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WEEKLY NOTES OF CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF PENNSYLVANIA, THE COUNTY COURTS OF PHILADELPHIA, AND THE UNITED STATES DISTRICT AND CIRCUIT COURTS FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BY

MEMBERS OF THE BAR.

VOLUME XXXV.

SEPTEMBER, 1894, TO FEBRUARY, 1895.

PHILADELPHIA:
KAY & BROTHER,
LAW BOOKSELLERS, PUBLISHERS AND IMPORTERS.
1895.

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Mr. Thomas W. Barlow.

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ERRATA.

CLIPPINGER'S ESTATE, p. 18, line 2, of syllabus, for "F." read "*J.*;" line 7, for "M." read "*J.*"

MCCORMICK *v.* ROYAL INS. CO., p. 25, col. 2, line 3, strike out "MCCOLLUM, J." and insert "MITCHELL and DEAN, JJ."

CHRISTY *v.* CHRISTY, p. 80, col. 2, line 3, for "individual" read "*undivided.*"

ENDERS *v.* ENDERS, p. 118, ¶ 1 of syllabus, line 2, for "and" read "*as*"; line 3, for "of" read "*or.*"

BANK OF OSWEGO'S APPEAL, p. 162, to second ¶ syllabus, add "*except for abuse of it.*"

KRECKER *v.* SHIREY, p. 165, ¶ 6, of syllabus, line 7, for "1889" read "*1887,*" p. 171, col. 1, line 13 from bottom, for "conference" read "*performance.*"

HECKMAN'S ESTATE, p. 199, ¶ 5 of syllabus, line 4, for "lessee" read "*lessor*".

In re ASSIGNED ESTATE OF WEINMANN & CO., p. 321, first ¶ of syllabus, line 2, for "assignee" read "*assignor.*"

COM'TH *v.* LEHIGH VALLEY R. R. CO., p. 505, ¶ 2 of syllabus, line 6, for "criminal cases" read "*criminal indictments for misdemeanors;*" p. 507, col. 2, line 1, read "*introduces no new practice.*"

DALE *v.* BLUE MOUNTAIN MFG. CO., p. 509, last ¶ of syllabus, line 1, for "Where no appearance be entered for defendant" read "*Where defendant has not been legally served.*"

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WEEKLY NOTES OF CASES.

VOL. XXXV.] *FRIDAY, SEPT. 14, 1894.* [No. 1.

Supreme Court.

Jan. '94, 377. April 5, 1894.

Middleton v. Thompson.

Broker—Commission when earned—Obtaining loan—Implied warrant as to marketable title.

A broker employed to obtain a loan has earned his commission when he has procured a person willing, ready and able to advance the money desired upon the terms communicated by the employer to the broker. A binding contract is not essential when the person produced by the broker stands ready to perform his part of the proposal and the failure occurs through the fault or inability of the principal.

One who proposes to borrow money on land impliedly warrants that he has a marketable title thereto, and in the absence of instructions to the contrary his employment of a broker to obtain a loan is a sufficient authority to the latter to make representations and negotiations on that basis, and such authority is not negatived by leaving unanswered, questions put by the broker upon a blank for the purpose of obtaining information.

A. employed by B. to obtain a loan, made application to C. upon a blank which stated that "full brief of title and searches with opinion of counsel will be required." C. accepted the application, the acceptance containing the words "opinion of J. C. S., Esq." The Court below held that this prevented the contract from being a binding and enforceable one between B. and C., and hence that A. was not entitled to commission.

Held, that this was error, that S. was not necessarily made the final arbiter of the matter of acceptance, and that even if he were, the question of whether A. went outside of his authority in submitting the matter to S. would depend on the nature of the objections raised by him; A. had authority to stipulate that the title should be marketable in the opinion of counsel. If S. required nothing more, A. was within his authority; if he raised objections not sufficient to destroy the marketability in the general opinion of the profession, and C. refused on these grounds to lend, then A. had not produced a willing lender within the terms of the contract and could not recover his commission; but these questions were for the jury.

Appeal of R. Taylor Middleton, plaintiff, from the judgment of the Common Pleas No. 1, of Philadelphia County, in an action of assumpsit in which George S. Thompson and Archibald Campbell, trading as Thompson & Campbell, were defendants.

This was an action brought to recover commission, alleged to be due for securing a loan for the defendant, and also amounts due for conveyancing services and disbursements in the course of the same operation.

On the trial, before BREGY, J., the plaintiff's evidence was as follows:—

The defendants engaged the plaintiff to obtain for them a loan of $14,000 upon certain real estate at the rate of six per cent. and signed an agreement promising to pay a commission for obtaining the loan of two per cent. The blank on which the agreement appeared contained, *inter alia*, the following question as to the title: "What encumbrances are now on the property to be paid off and by whom held?" which question was left unanswered. The plaintiff then made application for the money to the Fidelity Insurance, Trust and Safe Deposit Company. This application was made upon a blank of the Fidelity Company which contained the following:—

NOTE.—Full brief of title and searches, with opinion of counsel, will be required. Insurance assigned as collateral security, covenant entered into to pay State tax, and, if an old mortgage, a certificate of no set-off to be furnished. Papers to be complete within two weeks of date of acceptance; otherwise interest to be paid for period of delay.

The mortgage, if taken, must be a first lien upon the premises.

After having been considered, the paper was returned to the plaintiff with the following endorsement:—

Application to The Fidelity Ins. Trust and Safe Deposit Co. for $14,000. 1030 Germantown Ave. Exd. & Aprd. R. A. W. Oct. 10, '90. App. S. A. C. Pr. Accepted for The Fidelity Insurance Trust and Safe Deposit Company. Trustees for Helen M. Stillwell under the will of William Lang, deceased. Opinion of J. C. Stillwell, Esq. 302. Oct. 13, 1890.

The plaintiff then took out searches against the property upon which the money was to be loaned, which disclosed the fact that there were three mortgages existing against that property, one of $8,000, one of $6,000 and one of $3,000, and also that there was an irredeemable ground rent against a portion of the property. Middleton sent for Campbell to come to his office and explained the nature of these encumbrances. Campbell then went with Middleton to The Commonwealth Title Company to get that company to insure against this ground rent, and they together ordered the said company to issue a policy of insurance for which Middleton paid twenty-five dollars. Upon further investigation Middleton discovered that the property upon which the loan was to be made, had belonged to a firm in which one Kreider had held an interest, and also one Turnbull, that Kreider and Turnbull were both dead and that their interests had never been conveyed to the surviving mem-

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bers of the firm of Campbell and Thompson. Middleton then claimed that he was entitled to his commission, but proposed to do the necessary conveyancing to straighten out the matter, the only additional cost to defendant being his charges for the preparation of the additional papers. To this defendants agreed, and Middleton then proceeded to draw quit-claim deeds, one from the Kreider heirs, which after considerable trouble was duly executed and acknowledged, and one was also drawn from the Turnbull heirs. This latter was never executed, owing to the refusal of one of the heirs to sign the same, and the delay that followed upon this caused The Fidelity Company to withdraw their acceptance of the loan and the matter fell through.

The plaintiff offered in evidence the following letter, the counsel for defendants admitting that the writer, an officer of the Fidelity Company, would have testified to the statements contained therein, but objecting on the ground that it was incompetent to vary or alter the terms of the written contract between Middleton and the Fidelity Company.

PHILADELPHIA, Oct. 10, 1892.

DEAR SIR:

Referring to the application dated September 24th, 1890, made by you for Messrs. Thompson & Campbell for the loan on mortgage of $14,000 for five years, on premises No. 1030 Germantown Avenue, we beg to state that the application was accepted by us at the rate of six per cent. interest. It is true that the form on which the application was made provided that a covenant should be entered into to pay State tax. This form was the one in use with this Company before the passage of the Act providing against the covenant on the part of the borrower to pay State tax as well as interest. It was understood by us when the application was made that the rate being at six per cent. the mortgage would be drawn at that rate flat, without any provision for the payment of tax by the borrower. This mortgage was entered on our books as accepted at six per cent.

Yours very truly,
R. W. WILKINSON,
Real Estate Officer.

The Court sustained the objection.

The charge was as follows:—

"Gentlemen of the jury: [Under the law I instruct you that this plaintiff is not entitled to recover his commission for getting this loan.] He is entitled to recover $25 paid the Title Company, $8.50 for acknowledgments of the deeds, $6 that he paid for certified copies of the deeds, and he is entitled to be paid for the drawing of the two deeds. He claims for this $40—that that is the proper amount—$20 for each deed. The defendants deny that it is a proper amount. You will have to determine from the testimony what is a proper amount. If you come to the conclusion that his claim is right, then he is entitled to $79.50, with interest, which you can calculate. But if you think that $40 is too much for the drawing of the two deeds, then you will give him whatever you think he is entitled to for the drawing of the deeds, with interest, of course, from the time the claim became due.

"One other thing, gentlemen, I wish to say to you. The only evidence here as to the value of this service is that of the gentleman himself, and he says that it was worth $20 apiece. Unless you are satisfied from something else which has been stated here that he is not to be believed, then it would appear that $40 would be the right amount for the deeds."

Verdict for plaintiff $90.31 and judgment thereon. The plaintiff took this appeal and assigned as error the exclusion of the testimony of R. W. Wilkinson as contained in the letter above set out, and the portion of the charge in brackets.

William M. Stewart, Jr., (with him *John M. Gest* and *John Sparhawk, Jr.*), for appellant.

The testimony of Wilkinson should have been admitted.

Parol evidence is admissible to show that a particular clause was inserted in an agreement by mistake.

Hamilton *v.* Asslin, 14 S. & R. 448.
Mehaffy *v.* Share, 2 P. & W. 361.
Finney's Appeal, 59 Pa. 398.

Much more it is admissible to show that a printed clause in an agreement was not stricken out when the plain understanding of the parties at the time was that it was not to be included, and as a matter of law under the Act of June 1, 1889, § 1, could not lawfully be included.

Here is an attempt to enforce the rule against the admission of parol evidence at the instance of a person who is not a party to the instrument itself, where the parties themselves are agreed upon what was intended by them, and where the construction contended for by such third party would make the agreement unlawful.

It is submitted that this rule will not be so enforced at the instance of a third party.

Greenleaf's Evidence, 3,279.
Rice's Evidence, 58.
Brown on Parol Evidence, 326.
Krider *v.* Lafferty, 1 Wharton, 302.

Plaintiff was entitled to his commissions when he had procured a person able and willing to lend the money, although the matter subsequently fell through on account of a defect or a blot upon the title.

Sweeney *v.* Oil & Gas Co., 130 Pa. 193.
Patterson *v.* McCarty, 29 Pitts. L. J. 455.
Workman *v.* Cullberg, 12 WEEKLY NOTES, 189.
Jackson *v.* Market Co., Id. 190; 102 Pa. 269.
Middleton *v.* Yerkes, 2 Co. Ch., 610.
Vinton *v.* Baldwin, 88 Ind. 104.
Edwards on Factors and Brokers, sec. 113.
Doty *v.* Miller, 43 Barb. (N. Y.), 529.
Green *v.* Lucas, 33 Law Times R. 584.
Phister *v.* Gove, 48 Mo. App. 458.

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Peet *v.* Sherwood, 43 Minn. 447.
Holly *v.* Gosling, 3 E. D. Sm. 262.

The stipulation that the opinion of lender's counsel should be obtained, was nothing more than would have been implied had there been no such stipulation, viz., that the loan would not be accepted without investigation on the part of the lender or his counsel.

Gordon *v.* Mahoney, 13 Jr. Eq. 404.
Hussey *v.* Horne-Payne, L. R. 4 App. Cas. 311.

James Collins Jones, (*Lewin W. Barringer* with him), for appellee.

The right to recover commissions depends entirely on the contract. The plaintiff was "to obtain a loan," this expression means that he should actually get the money into the possession of the defendants; there is no pretence that the money ever came into the defendants' possession.

But if the expression be held to mean that plaintiff was simply to make a contract for the defendants by which some one should undertake to make the loan to them, then to earn commission he must obtain a valid, enforceable contract to loan on the terms on which he was authorized to act.

Keys *v.* Johnson, 68 Pa. 42.
Clendenon *v.* Pancoast, 75 Id. 213.
Michener *v.* Beirn, 27 WEEKLY NOTES, 341.
Peirce *v.* Truitt, 21 Id. 569.
Hartley *v.* Anderson, 150 Pa. 391.

The contract with the Fidelity Company was not one which the plaintiff was authorized to make. The provision that the title should be approved by Mr. Stillwell, was unauthorized, and as a result, rejection by him would end any dispute about the obligation of the Fidelity to make the loan, hence there was no enforceable contract on the terms authorized by the defendant.

Nelson *v.* Von Bonnhorst, 29 Pa. 352.
Singerly *v.* Thayer, 108 Id. 291.

And see

Crasto *v.* White, 52 Hun. 473.

July 12, 1894. MITCHELL, J. Brokers, says SHARSWOOD, J., in Keys *v.* Johnson, 68 Pa. 42, "are persons whose business it is to bring buyer and seller together. They need have nothing to do with the negotiation of the bargain." This is said generally of brokers, though the words used are "buyer and seller," and the case was one of the sale of real estate. There is no good reason why the same principle should not apply to a broker negotiating a loan as to one negotiating a sale. The basis of his right to compensation in either case is the same, his bringing to his principal a party able and willing to carry out the desired transaction. It is said in some of the cases that there must be shown a contract binding on the party produced. But this is not essential. Keys *v.* Johnson decides that the principal cannot take the matter out of the broker's hands and thus deprive him of his right to the commissions though he had as yet made no contract. In Clendenon *v.* Pancoast, 75 Pa. 213, no binding contract appears, and in Sweeney *v.* Oil & Gas Co. 130 Pa. 193, it affirmatively appears that no such contract was made. So in Reed's Exr. *v.* Reed, 82 Pa. 426, there was no contract, because while the expected purchaser was considering the matter under a time option allowed for that purpose, the principal sold to another party, and it was held that the broker had earned his commissions. These cases show clearly that a binding contract is not essential where the party produced by the broker stands ready to perform his part of the proposal, and the failure to do so occurs through the fault or inability of the principal.

We are therefore of opinion that there is no ground for a distinction in the extent of the duty of a broker to effect a loan and one to effect a sale. In the former case as in the latter, as said by Baron BRAMWELL in the closely analogous case of Green *v.* Lucas, 33 Law Times Reports, 584, "the word 'procure' means to procure the lender and not the money, and the contract was completed so far as the plaintiff was concerned, when he had procured a person who was ready and willing to advance the money."

Did the plaintiff complete his part of the contract in the sense so explained? He found a lender whose ability is not questioned, and whose willingness must be tested by the grounds of final refusal. If these were the fault of the defendants, then the failure to obtain the money was no defence to the plaintiff's claim.

A man who proposes to sell land, or to borrow money upon mortgage on it, impliedly warrants that he has a marketable title for the purpose desired, and in the absence of specific instructions to the contrary, his employment of a broker is sufficient authority to the latter to make representations and negotiations on that basis. And such authority is not negatived by merely leaving unanswered, questions which have been put by the broker on a blank furnished by him for the purpose of obtaining information.

It is objected on the part of defendants that plaintiff's contract with the Fidelity Company was not sufficient in that it was not binding in form, and it was not in accordance with the agreement between plaintiff and defendants as to the loan. The necessity for a binding contract has already been considered. The objections under the second head are: first, that plaintiff's contract with the Fidelity Company provided that defendants should pay the State

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tax in addition to the agreed interest; secondly, that the contract stipulated that the proposed mortgage should be a first lien, while defendants had made no representations as to encumbrances; and thirdly, that it subjected the title to the opinion of special counsel, whose rejection of it would terminate the agreement without remedy to the defendants.

The first objection was not well founded in fact. It is true that a provision for the payment of the tax appears in the memorandum of agreement; but plaintiff offered to prove by the other party to it, the Fidelity Company's officer, that it was in there by mistake, through the use of a printed form, and that it was no part of the actual contract. This proof should have been admitted. Of course the officer's mere letter was not of the requisite grade of evidence, except by the agreement of counsel that it should represent what the officer would testify to if examined in person. Under such agreement it should have been admitted.

The second objection would ordinarily raise a question of fact for the jury. As already said, an owner proposing to borrow on mortgage and employing a broker to find a lender of the money, impliedly warrants that his title is marketable for mortgage purposes, and that may require certain conditions as to liens, according to the custom of business. In the present case the point is conceded by appellee to be immaterial, as the stipulation for priority of the mortgage was modified by the Fidelity Company, and as so modified was complied with. It was not therefore a cause of the failure of the loan.

The third objection also raises a question of fact. The application by plaintiff to the Fidelity Company for the loan stated that "full brief of title and searches, with opinion of counsel will be required." This was within the implied authority of plaintiff. Any owner, as already said, was bound to know that a loan would not, in the ordinary course of business, be made on mortgage without an examination of title, and finding it marketable for mortgage purpose, and this was a matter for the opinion of counsel. The brief memorandum of acceptance by the Fidelity Company contained the words, "opinion of J. C. Stillwell, Esq." This does not necessarily mean anything more than the suggestion of Mr. Stillwell as the counsel whose opinion should be obtained in the first instance. There is no provision that he is to be the final arbiter in the matter, and such stipulation will not be understood as intended without express words to support it. But even if he were made the arbiter, the question whether the plaintiff went outside of his authority in submitting the matter to him would depend on the nature of the objections raised against the title. The plaintiff had authority to stipulate that the title should be marketable in the opinion of counsel. If Mr. Stillwell's opinion required nothing more, then plaintiff did not exceed his authority. If, on the other hand, Mr. Stillwell, through overcaution or excessive particularity, raised objections not sufficient to destroy the marketability of the title in the general opinion of the profession, and the refusal of the Fidelity Company to lend was based on those objections, then the plaintiff would be held to have failed to produce a willing customer within the requirements of his contract with defendants. But these questions would be for the jury.

From the foregoing it follows that the defendants failed to raise any defence which was sufficient to prevent the plaintiff's recovery as a conclusion of law, or to justify a binding direction that he could not recover his commissions. He was entitled to go to the jury on the question whether he had completed his agreement by procuring a party able and willing to make the loan, and if so, whether the loan finally failed through no fault of the plaintiff, but through defects in the title of defendants which were sufficient in the usual course of such business to justify the proposed lender in declining to go on with the transaction.

Judgment reversed and venire de novo awarded.

H. B.

Jan. '94, 94. March 19, 1894.

Gamble v. City of Philadelphia.

Road law—Damages affected by conveyances—Describing land taken as a boundary.

Where a street has been placed upon the city's plan and passes through property of a land owner who subsequently conveys the land on both sides, referring to it as a boundary, such conveyance constitutes a contract that the said street shall be kept open and subject to the right of way of the grantees, and hence when the land covered by the street is actually taken by the city for the purpose of the street, the owner can recover as damages only the value of the land as affected by the right of way of the grantees, and the question of such value is for the jury.

Brooklyn Street, 118 Pa. 640, and Whittaker *v.* Phœnixville Borough, 141 Pa. 327, followed.

Appeal of William S. Jones, executor under will of John K. Gamble, deceased, plaintiff, from the judgment of the Common Pleas No. 3, of Philadelphia County, in an action against the City of Philadelphia, for damages for land taken in the opening of Seymour street from Wayne avenue to Pulaski avenue in the Twenty-second ward.

On the trial, before REED, J., the following

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facts appeared: In 1851, John K. Gamble purchased a lot of ground comprising about one and three-quarters acres and ten perches which had a frontage upon a twelve feet wide road or lane. This road was subsequently vacated and, in 1856, an ordinance of Councils was approved authorizing the plotting of Seymour street. In 1858 a plan was approved by the Board of Surveyors on which Seymour street first appeared as a plotted street 50 feet in width. It projected directly across the centre of plaintiff's lot dividing it into two parts of almost equal dimensions.

In 1861 plaintiff sold all that portion of his lot lying south of the plotted street, and in making his deed of the land sold, he referred to Seymour street as a boundary, as follows: "Beginning at a point on the southeasterly side of Seymour street . . . . by a line running" to the southeast side of Seymour street the place of beginning. In 1866 the plaintiff sold all that portion of his lot lying north of the plotted street, referring in his deed to the line of Seymour street as a means of description.

The defendant offered in evidence a deed from plaintiff to Edward Royal which contained a reference to Seymour street, "as laid down and confirmed on the public plan." The land lying in the bed of Seymour street as laid out upon the city plan comprised a plot 50 feet by 132 feet, which plaintiff did not convey to anyone. All of this plot—50x132—was taken by the city when Seymour street was opened December 16, 1890. The question for the jury was to assess the value of this plot of ground lying in the bed of Seymour street, as plotted by the City of Philadelphia. In 1889 or early part of 1890, Tacoma street was laid out and opened by Gilbert Weir for the purpose of making building improvements, and extended south from Manheim street to the centre of plaintiff's lot and formed a means of access to the said lot.

It was agreed at the trial that the jury should assess the damages as of the date of the appeal from the report of the road jury, which was December 16, 1890.

In making their estimates of value, all of the plaintiff's witnesses dwelt upon the fact that the existence of Tacoma street was of great advantage to the plaintiff's land.

The Court charged the jury, *inter alia*, as follows:

"Now, the Supreme Court held that he could recover damages for the loss of the property in the bed of the street—lot 23 and 10 feet of lot 24—but they said that as a result of the conveyance, he had diminished the value of that property because he could not use it, and the jury must take into consideration how much less the property was worth, inasmuch as he had sold a portion outside of the street as abutting on the street, and, therefore, he could not use the property, which constituted the bed of the street, because he had by those conveyances granted certain rights to the grantee of the property. (First assignment or error.)

"The city having power, which it derives from the State, of not only taking a man's land, but of notifying him of its intention to do so a long time before it actually does take it, perhaps a lifetime, can therefore make it impossible for him to get any other enjoyment out of it than by having a frontage upon it. The city having that power of taking the land, may exercise it in such a way as to preclude the owner of the property from any other enjoyment than that of a frontage upon it from the time the notice is given, and that may be many years ahead, as it was in this case. (Second assignment of error.)

". . . . In the meantime this property was subject to the right of way on the part of those grantees. Now that right of way to the grantee forms a subject of consideration of the deed to Mintzer and Royal. The question is for you to say what use this man could make of the land; what value it was to its owner subject to the right of way on the part of those owners of adjoining premises, and subject also to the fact that the city might at some future time come in and take it. (Third assignment of error.)

". . . . Now, I think so far as this case is concerned, you can consider Tacoma street as out of it. Those damages, whatever they were, were settled before Tacoma street came into existence as an actuality, an actual street which could be used. (Fourth assignment of error.)

". . . . But taking those things into account you must not fix such a price upon this property that leaves out of it the inconveniences, situated as this property is, not through the act of the city, but through the act of the plaintiff himself in excluding himself from interfering with the use or enjoyment of this property by the owners of the adjoining property which he conveyed to them, a part of which enjoyment was the access to this street." (Fifth assignment of error.)

The defendant presented, *inter alia*, the following points, which were answered as follows:

Third. The plaintiff having sold to abutting owners bounded on the street, he is entitled to recover only the value of the lot subject to the rights of the abutting owners to have a clear front on said street, and he cannot build upon, nor improve the bed of Seymour street under the terms of his deed to Mintzer and Royal.

"I affirm that point with this qualification: that he cannot make any use of the bed of Seymour street in such a way as to interfere with the right of way or easement which he gave his grantees, and he cannot use it in such a way as

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to interfere with their right to have a front on the street, when that street has been regularly opened." (Sixth assignment of error.)

Fourth. That the jury, in considering the question of damages for the opening of Seymour street, can only consider the property as it was in 1890 and cannot take into consideration any value to the property of the plaintiffs by reason of the opening of Tacoma street.

"That point I affirm." (Seventh assignment of error.)

Verdict and judgment for defendant. The plaintiff took this appeal and assigned as error the instructions and ruling upon points indicated above.

Arthur W. Horton, for appellant.

1. As to Tacoma street:

The plaintiff's evidence, as well as that offered by the defendant, clearly established the fact that Tacoma street was opened before Seymour street. The deed made by Gilbert Weir to the City of Philadelphia, August 30, 1890, dedicated to public use as a street the land lying in the bed of Tacoma street, whereas Seymour street, by the admission of all parties, was not opened until December 16, 1890. That Tacoma street could not be used as a means of ingress and egress to and from plaintiff's land was certainly an important fact for the consideration of the jury. It is difficult to understand why the Court did not permit the jury to weigh that fact with all others established by the evidence in making their assessment of damages.

All of plaintiff's expert witnesses spoke definitely as to the benefit derived from the opening of Tacoma street to the land owned by the plaintiff and in making their estimates referred to a plan in which Tacoma street appeared as an open street; Tacoma street is referred to in the testimony sixty-nine times.

2. As to the effect of plaintiff's deeds made in 1861 and 1866: It was admitted that the land remaining in the bed of Seymour street belonged to the plaintiff at the time the street was opened in 1890, and that the plaintiff had not dedicated it to public use. In Union Burial Ground *v.* Robinson, 5 Wharton 18, it was held that a conveyance to the side of an unopened street plotted by the city, did not convey land in the bed of the street, and this was approved in—

Ball *v.* Ball, 4 Clark 505.
Ott *v.* Kreiter, 110 Pa. 378.

Did the plaintiff's grantees acquire a right of way over this land in the bed of the street prior to the time the street was opened. It was assumed by the Court that there was a covenant implied in the deeds that the plaintiff would keep his lot open to be used as a street, and that this covenant was operative from the time the deeds were made. The judge stated the correct rule, provided the land conveyed abutted on an open street, or on a street which the grantor himself had laid out. A conveyance on a street plotted by a municipality but not opened at the time of the conveyance, gives rise to no covenant which the grantee can enforce until after the street is in fact opened.

Bellinger *v.* The Union Burial Ground Society, 10 Pa. 135.

The grantee's right would depend upon his private contract, but the city, a mere volunteer, could claim no advantage therefrom; which principle is clearly announced in *In re* opening of Brooklyn street, 118 Pa. 640. It was an admitted fact in the case that the plaintiff had sold two lots each having a frontage line on Seymour street. It is clear that the words "right of frontage" were intended to convey a meaning different entirely from that attributed to them by the Judge. Plaintiff's interpretation of this language is that it was intended to call attention to the possibility of the vacation of the street and the enforcement at that time of the right of the grantee to enjoy a clear front on the street. This view reconciles the latter part of the opinion with that which precedes it and harmonizes the case with—

Brooklyn Street, 118 Pa. 640.
Borough of Easton *v.* Rinek, 116 Pa. 1.
Bellinger *v.* Union Burial Ground, 10 Id. 135.
In re Opening of Wayne Street, 124 Id. 135.
Union Burial Ground *v.* Robinson, 5 Wharton 18.

James Alcorn, assistant city solicitor, (with him *Charles F. Warwick*, city solicitor and *George E. Fili*, assistant city solicitor), for appellee.

The evidence clearly shows that there was no Tacoma street as an opened public highway accepted by the city until after the proceedings had been commenced in reference to the opening of Seymour street. The plan shows the absurdity of plaintiff's claim. He bases the value of his property by a frontage on Tacoma street to which he had no right until after the city had accepted the dedication of Tacoma street which was opened by Gilbert Weir, and if appellants were entitled to the frontage of that street it would thereby become a *cul-de-sac*, contrary to the Act of June 16, 1871. It appears from the testimony, however, that there is some question as to whether Tacoma street was actually opened by Gilbert Weir before the proceedings were determined as to the opening of Seymour street.

The effect to plaintiff's deeds made in 1861 and 1866 and the proper construction to be placed upon said deeds in a suit by the plaintiff against the City of Philadelphia was left to the jury in accordance with the decision:—

In re Whittaker *v.* TheBorough of Phœnixville, 141 Pa. 327.

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It is immaterial to enter into a discussion of the effect of the conveyances of the appellant of the property fronting on Seymour street. The deed, April 16, 1861, by John K. Gamble to Edward Royal, mentioned Seymour street as a boundary of the property; this was before the plotting of Seymour street. The executor of the said John K. Gamble is the appellant in this case. This conveyance, by reference to a street before it is plotted is a dedication of the street as a public highway. Even if the contention of the appellant is correct, that the plotting was prior to a conveyance, referring to the said Seymour street, there is no ground of complaint, as the Court in accordance with the case cited left to the jury the question of the value of the property in the bed of the street, subject as it was to the right of the grantee to use as a street. The appellant claimed to be the owner of a strip of ground which appears to be in the bed of Seymour street without any frontage on any street and without access to any street; it is the land, the title to which appears to be in appellants after the conveyances on both sides of the said Seymour street. John K. Gamble, of whose estate the appellant is executor, sold his land fronting on both sides of Seymour street and now claims to be the owner of the bed of the said street. The land had no frontage anywhere and could have no value except by interfering with the rights of the grantees of the said John K. Gamble.

July 11, 1894. GREEN, J. It seems to us this case was tried in accordance with our rulings in Brooklyn Street, 118 Pa. 640, and Whittaker *v.* Phœnixville Bor., 141 Pa. 327. The learned Court below very carefully instructed the jury as to the right of the plaintiff to have damages under those decisions. Undoubtedly the plaintiff's right as to the use of the ground lying in the bed of Seymour street, was affected by his conveyance to Mintzel and Royal. Certainly whenever Seymour street was opened the plaintiff could do nothing to obstruct the use of that street by his grantees. Beyond all question they had a right of free passage over the street, and it could not possibly be occupied by buildings, either as against the city or the plaintiff's grantees. It was of no use to theorize about the value of the ground as building lots, since it could not lawfully be used for any such purpose. The evidence on that subject was received, but it could not be permitted to constitute the basis of an inflated claim for damages upon a theory which had no lawful existence. The learned Court did leave to the jury the question, what was the value of the land taken subject to the right of way of the plaintiff's grantees, and also to the right of the city to open the street. On this subject there was considerable conflict of testimony, the defendant's witnesses testifying that in such a situation the land had no value whatever, some of the plaintiff's witnesses testifying that it was worth about two thousand dollars, notwithstanding these restraints upon the plaintiff's rights in the land, and others admitting that these restraints would impair its value materially. So far as Tacoma street is concerned the same considerations would be applicable, and therefore we do not think there was any error in the views expressed by the learned Court below on that subject. The opening of these two streets occurred so nearly together that there could be no appreciable effect upon the measure of damages whether Tacoma street was opened a little before, or a little after, Seymour street was opened, and in any event we do not see how this piece of ground, which would not admit of any buildings being erected upon it, could have any additional value imparted to it by the opening of a street which simply led up to it. Had the ground of the plaintiff been capable of use for building lots of course the case would have been different. But the Court did leave to the jury to say what the plaintiff's land was worth in view of all the circumstances and the jury said it was worth nothing. The assignments of error are dismissed. Judgment affirmed. W. C. S.

Jan. '94, 355. March 14, 1894.

Dwyer v. Wright.

Ejectment—Equitable ejectment — Vendor and vendee under articles of sale—Equity.

To entitle a plaintiff in ejectment, founded on an equity only, to recover, he must not only tender the price before suit brought, but must show his readiness to perform his part of the contract by having it in Court ready to be paid in the event of a verdict in his favor.

Where a vendee takes possession of land but fails for an indefinite time to pay the purchase money, the vendor may resume possession, if he can do so peaceably; and the vendee can not then recover in ejectment as against his vendor or any subsequent purchaser, except on tendering the purchase money in full.

L. sold to D. a lot of land by articles of agreement for a certain price to be paid in instalments. The agreement contained a warrant to confess judgment, in an action of ejectment, to be released upon the payment within three months, of the amount due on account of the purchase money. D. remained in possession until his death, some three years later, at which time there was still a considerable sum due upon the contract. Nothing further being paid, L. began an action of ejectment against the widow and heirs of D., a guardian *ad litem* being appointed for the minor heirs.

Subsequently L. entered judgment by confession in accordance with the articles of agreement. L. then sold the lot to W., having taken possession peaceably, without taking out any writ. W. at once recorded his deed. The

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articles of agreement between L. and D. were never recorded. Ten years afterwards the heirs of D. having ceased to be minors began an action of ejectment against W. The Court instructed the jury to find for the defendant:

Held, not to be error.

Appeal of Henry A. Dwyer, John P. Dwyer, William F. Dwyer, James P. Dwyer, and Joseph T. Dwyer, plaintiffs, from the judgment of the Common Pleas of Clinton County in an action of ejectment brought by the said plaintiffs against W. K. Wright, to recover a lot of ground situate in the borough of Renovo, Clinton County.

Upon the trial, before MAYER, P. J., the following facts appeared: On May 25, 1870, The Philadelphia and Erie Land Company, by a written contract, sold to Anthony Dwyer, the father of the plaintiffs, nine lots of ground, of which the lot in question was one, for $2024, payable in instalments, the deed to be delivered to Anthony Dwyer upon the payment of the last instalment of the purchase money. The agreement contained a warrant of attorney to confess judgment in an action of ejectment, in case of default in payment, to be released on payment of the amount in arrears within three months from entry of judgment. Anthony Dwyer went into possession and continued to occupy the land until his death about July 30, 1873, up to which time he had paid upon the contract the sum of $860.50. He left surviving him a widow and four children, all minors, who continued in possession of the premises until 1878. On May 11, 1878, The Philadelphia and Erie Land Company began an action of ejectment against the widow and children. A guardian *ad litem* was appointed for the minor children in said cause. On June 21, 1879, judgment was entered in said action by confession by virtue of the warrant contained in the contract with Anthony Dwyer for the land described in the writ, to be released upon the payment within three months from that date of the sum of $1932.12, being the balance of purchase money due with interest. No writ of habere facias possessionem was ever issued on said judgment, nor was the money ever paid, but soon after the judgment was confessed the premises became vacant, and in 1881 the Land Company resumed possession thereof. On April 23, 1881, it sold the lot in question for $225 to W. K. Wright, who immediately took possession, built a house at a cost of $1000, and occupied the lot continuously until the date at which the present action of ejectment was brought. A deed was executed and delivered to Wright, dated January 8, 1884, which was recorded January 22, 1884. The agreement of sale between The Philadelphia and Erie Land Company and Anthony Dwyer was never recorded. On January 15, 1891, the children of Anthony Dwyer having attained full age, brought ejectment against W. K. Wright to recover possession of the lot in question. The Court directed the jury to render a verdict for the defendant. Verdict and judgment accordingly. Whereupon the plaintiffs took this appeal, assigning for error the action of the Court.

C. S. McCormick, for appellants.

A judgment is void when confessed by virtue of a warrant of attorney, after the death of the person giving the warrant, unless there is an interest coupled with the power.

Lewis Assig. *v.* Ash, 2 Ashmead, 110.
Tobias *v.* Dorsey, 2 WEEKLY NOTES, 15.
Hunt *v.* Rousmanier's Adm., 8 Wheaton, 174.
Yerkes' Appeal, 99 Pa. 408.
Hartley and Minor's Appeal, 53 Id. 212.
Evans on Agency, 116.
Story on Agency, sec. 488.
Gleason *v.* Dood Adm., 45 Mass. 333.

A void judgment is in legal effect no judgment by which any rights are divested, and being worthless in itself all proceedings founded upon it are equally worthless.

Freeman on Judgments, sec. 117.

The defendant purchased with a full knowledge of all the facts, having lived in the borough of Renovo all the time, and he did not act with the due diligence required in such cases.

Sergeant *v.* Ingersoll, 7 Pa. 340.
Logan *v.* Neill, 24 WEEKLY NOTES, 541.

The defendant's right can rise no higher than that of his vendor the land company, and the Dwyer heirs were not required to tender the purchase money in order to maintain an action of ejectment against the land company.

Harris *v.* Bell, 10 S. & R. 39.
Basler *v.* Neasley, 2 S. R. Monroe, 354.
Chase *v.* Irvin, 6 Norris, 290.
Orne *v.* Kittanning Coal Co., 114 Pa. 180.
McGrew *v.* Foster, 18 WEEKLY NOTES, 487.

The taking the property in question by the land company without any authority of law, and the exercising by them of acts of ownership over it relieves the plaintiffs of any necessity to tender the purchase money before bringing suit.

T. C. Hipple, for appellee.

The power of attorney to confess judgment was not a mere agency, but a vital part of the agreement to sell, intended to give a sanction to the contract. The cases cited by the appellant are therefore not applicable.

Where an authority or power is coupled with an interest, or where it is given for a valuable consideration, or *where it is part of a security*, it is not revoked by the death of the party giving it.

Hunt *v.* Rousmanier's Adm., 8 Wheaton, 175, and note to same case, 5 Lawyer's Co-operative Edition of the United States Reports.

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The plaintiffs can not recover in this action without tendering the purchase money.

Bell *v.* Clark, 111 Pa. 94.

The agreement to sell to Anthony Dwyer was never recorded, and the defendant has a prior right under his deed by the recording Acts.

Act of March 18, 1775.
Hellman *v.* Hellman, 4 Rawle, 440.
Bellas *v.* McCarty, 10 Watts, 25.
2 Pomeroy's Equity Juris. 59.
Boggs *v.* Varner, 6 W. & S. 469.

July 11, 1894. STERRETT, C. J. In May, 1870, Anthony Dwyer by articles of agreement purchased from the Philadelphia and Erie Land Company nine lots in the borough of Renovo for which he agreed to pay $2024 in instalments. Prior to July 23, 1873, he paid on account, at different times, altogether $860.50; and a week thereafter he died, leaving to survive him a widow and several children, plaintiffs in this action. The agreement contained a warrant of attorney to confess judgment in an action of ejectment, in case default was made in payment of purchase money, to be released on payment of amount so in arrear within three months from entry of judgment. In May, 1878, an action of ejectment against the vendee's widow and children was instituted by the land company to enforce specific performance of the agreement. The writ was personally served on Catharine Dwyer, the widow, and Henry A. Dwyer, the oldest son, and service was accepted for the others, all of whom were then minors, by their guardian *ad litem*, James Chatham. Afterwards, by virtue of the power of attorney aforesaid, H. T. Beardsley, Esq., appeared for the defendants and confessed judgment against them and in favor of the land company for said nine lots of ground to be released upon payment, within three months, of $1932.12, residue of the purchase money, with interest from May 1, 1878, commissions, etc. No writ of habere facias possessionem was ever issued on said judgment, nor does it appear that any part of said money was ever paid; but it does appear from Mrs. Dwyer's testimony that sometime after the judgment in ejectment was confessed the premises became vacant, and in 1881 the land company resumed possession thereof. Afterwards, in April of that year, W. K. Wright, the defendant in this action, purchased one of the lots (lot No. 4, the property now in controversy) from the land company, went into possession, and at a cost of about $1000 erected a house thereon which he occupied nearly nine years prior to the bringing of this action of ejectment against him. On the trial in May, 1893, a verdict was rendered for defendant by direction of the learned trial Judge, who afterwards put on record his reasons at length for so doing. From the judgment entered on that verdict this appeal was taken and the only error assigned is, "in directing the jury to render a verdict for defendant, and in taking the case from the jury."

Without pausing to consider what effect, if any, should be given to the confessed judgment in ejectment, and, in same connection whether the power of attorney became inoperative by the death of Anthony Dwyer, or was in its nature irrevocable, we think there is at least one ground on which the action of the Court should be sustained. In any view that can be taken of the case, it must be conceded that the plaintiffs' action of ejectment is grounded on a mere equity. The legal title to the lot in controversy is not and never was in them or any of them. It remained in the Philadelphia and Erie Land Company until it conveyed the lot to defendant in 1884. Plaintiffs were in possession at the death of their father and for some time thereafter, and do not appear to have been tortiously or wrongfully dispossessed by any one. On the contrary, they voluntarily relinquished their possession, and, according to the undisputed testimony, the land company peaceably resumed possession of the premises before the defendant bought the lot in controversy. Although thus out of possession before they brought suit, the plaintiffs neither previously tendered any part of the overdue purchase money, nor afterwards brought the same into Court. In these circumstances they were not entitled to recover. It is well settled that to entitle a plaintiff in ejectment, founded on an equity only, to recover he must not only tender the money before suit brought, but he must show his readiness to perform by having it in Court ready to be paid in the event of a verdict in his favor: Minister *v.* Morrison, 2 Yeates, 346; Gore *v.* Kinney, 10 Watts, 139; Bell *v.* Clark, 111 Pa. 92; Orne *v.* Kittanning Coal Co., 114 Id. 172. "The rule," said Mr. Justice GORDON in Bell *v.* Clarke, *supra*, "may be stated thus: When the possession of the vendor is lawful, his vendee cannot maintain ejectment against him without proof of a previous tender of the purchase money, and he must also maintain that tender by producing the money in Court. Until he has thus put his vendor in fault he has no cause of action; nor can he demand a verdict conditioned upon his subsequent payment of the purchase money, for that would enable him, by a refusal to comply with such verdict, to harass the owner of the legal title to no purpose."

The rule is founded on the principle that he who claims under an equitable title only must do equity before he can recover. What is equity in a particular case must depend on the contract invoked and the equities arising under it. It does

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not apply when the vendor, for example, after putting the vendee in possession and inducing him to make valuable improvements, has by collusion or other unfair practice regained possession; but in the case before us there is nothing of that nature to take it out of the general rule. If there is, the testimony does not disclose it.

Judgment affirmed.

S. H. T.

Jan. '94, 107. March 6, 1894.

Sharpe v. Scheible.

Easement—Servitude created by common owner of servient and dominant tenements—Purchaser—Notice.

The owner of land may adapt the parts thereof so as to render one portion subject to a servitude in favor of the other, and if he afterwards sell the parts to different purchasers, who take with notice of the adaptation, they will take their lands respectively charged with and entitled to the easement.

Notice of the existence of an easement may be given by the appearance of the property in or over which it is claimed, e. g., a notice of water course by the existence of a drain entering the servient premises.

Appeal of John G. Scheible, defendant, from the judgment of the Common Pleas of Franklin County, in an action of trespass brought by Helena Allison, for which after verdict her administrator, Walter K. Sharpe, was substituted of record.

This was an action of trespass brought by Helena Allison to recover damages for unlawfully obstructing a drain at the point at which it entered the defendant's premises and thereby forcing water back upon the premises of the plaintiff.

On the trial, before STEWART, P. J., the facts appeared as follows:—

In 1867 William H. Wanamaker owned a tract of land containing five or six acres fronting upon Market street in the town of Chambersburg, and extending back to the Falling Spring northward. One Reside owned the adjoining tract to the west fronting also upon Market street and extending back in the same direction to the same northward boundary. At that time the lowest point along Market street, between a railroad on the west and what was known as the "Point" on the east, was towards the west boundary of the Wanamaker lot on Market street. At that point in 1867, and for many years previous thereto, the waters which accumulated on Market street from the territory which was drained by that street, found vent and there entered upon the Wanamaker lot, and flowed back upon and over it. Some of it was lost in the lot itself, and what was not lost found its way in a northeasterly direction, out towards the Falling Spring. About the same time that Wanamaker acquired his title to that property, Reside, the adjoining owner, had opened up an alley running from Market street northward along his western limit, that was between his lot and the Wanamaker lot. He and Wanamaker both conducting brick yards. Reside opened this alley to get in and out from his brick yard. In 1867 Wanamaker changed this vent for the water, moved it some few feet to the west and dug a ditch or channel or drain extending from Market street on the western limit of his lot, a few feet east of the old water way, along the western limit of his lot, northward until it entered his pond which he used in connection with the manufacture of brick. This drain was constructed for the convenience of the brick yard, conducting the water into that pond. Subsequently the property of Wanamaker was divided. The plaintiff acquired title to a part of the Wanamaker lot. The alley which Reside opened was intersected after it left Market street at a distance of about 130 feet by an alley running east and west. The lot of the plaintiff was at that intersection on the south side, and fronted on the alley opened by Reside, and on the alley running east and west. This piece of ground was disconnected from the Wanamaker lot, as we have it, in 1867. Subsequently the defendant purchased the northern part of the Wanamaker lot, that part lying north of the alley which ran east and west.

The defendant on his own land filled up with earth and stone to a sufficient height to keep the water off his own premises, the result of which was that the water was thrown through the alley back upon plaintiff's land.

There was no mention in the deed to the defendant of the right to discharge water upon or through his premises, and no evidence that the plaintiff gave him notice of any claim to such right. There was, however, evidence that the physical appearance of the property bought by the defendant was such as to give him notice of the existence of the easement.

There was also evidence that by the grading of the streets of the city a greater volume of water than Wanamaker originally guarded against was thrown into the channel.

The Court charged, *inter alia*, as follows:—

"The grantor had a right to subject his premises to a burden which resulted from a condition of things which he himself had created. Now when the property came to be subdivided, the party buying that section of the property, which is benefited by the servitude which the original owner impressed upon that property, would have a right to have it continued if, when he bought,

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the same was clearly defined upon the premises. But where it does not lie in grant and is not apparent, he can only enforce it against a subsequent purchaser of the property sought to be charged, by actual notice to the party that the property he is about to buy is subject to such an easement. But where it is apparent on the face of things themselves that that servitude has been impressed upon the premises, then such subsequent purchaser is bound to take notice of it. If by the appearance of the property itself a party ought to see that the property has been so subjected, the law charges him with notice. He takes the property charged with that servitude just as though written in his deed." And left to the jury to find whether "there was an open, apparent, continuous drain down from Market street through and across the plaintiff's land over upon the defendant's land in 1872 when he purchased." Adding: "If there was, then it follows that such servitude remains charged upon the premises of Scheible. If it was visible and apparent when the defendant bought, so much so that an ordinary and usual examination of the premises must have disclosed it, then I say the property of Scheible would continue subject to that servitude. If you find for the defendant upon this particular issue, that ends this case, and there can be no verdict for the plaintiff. You are to inquire into the condition of things when the defendant purchased. The plaintiff's rights must be determined by the condition of things as they then were. If the condition of things then was such as to make it apparent to any one that there was a drain there then the defendant is bound by it."

The Court also charged as follows:—

"If by recent grading of the public streets a greater volume of water than Wanamaker originally provided for has been thrown into this channel, more than it can carry off, the defendant would have the right to protect his premises against the increased flow, but he would not be warranted in shutting up his drain to protect himself against this increased flow if by so doing he flooded the plaintiff's premises, or increased the flooding of the same to any extent."

The defendant submitted, *inter alia*, the following point:—

"The water complained of in this case being wholly surface water, if the jury believe from the evidence that the flow of said surface water was greatly increased after the defendant purchased his lot in 1872, by reason of a much larger area being drained thereupon, he, the defendant, was not bound to submit to such increased flow but could lawfully fill up his property to protect it against such increased flow and thus throw the water upon the alley between his lot and that of the plaintiff."

To which the Court answered: "I answer that in this way: The defendant's right to dam the water back upon the alley is not relevant to this issue. It is not the flooding of the alley that is complained of, but the flooding of the plaintiff's lot. The proposition therefore is irrelevant and requires no answer at our hands."

Verdict for plaintiff for $200, and judgment thereon. After verdict and before judgment the plaintiff died and her administrator was substituted.

The defendant took this appeal, assigning for error, *inter alia*, the portion of the charge of the Court first above quoted and the answer to his first point.

J. D. Ludwig and *O. C. Bowers*, for appellant.

In cities and boroughs the owner of a lower lot is not bound to submit to the flow of *surface water* upon his lot from a higher one, but may, by filling up or otherwise, protect his lot from such flow.

Bentz *v.* Armstrong, 8 W. & S. 40.
Kauffman *v.* Griesemer, 26 Pa. 414.
Comm'rs of Kensington *v.* Wood, 10 Id. 93.

By the common law of England surface water is regarded as a common enemy, which every proprietor may get rid of as best he may.

Dillon, Mun. Corp., sec. 1039.
Abbott *v.* Kansas City R. R. Co., 20 A. & E. R. R. Cases. 103.
Kansas City R. R. Co. *v.* Riley, Id. 116.
R. R. *v.* Benson, Id 96.

By the common law there is no natural servitude in favor of the owner of the higher ground as to surface water, and the inferior owner may lawfully obstruct the natural flow of such water to his own land. It is admitted, however, that the rule of the civil law that the lower proprietor cannot throw back upon the upper proprietor the water which comes by a natural flow or channel upon the lower land, has been adopted in Pennsylvania, but in nearly every case in which the rule has been applied, has been the case of water flowing in a *natural channel:* see Kauffman *v.* Griesemer, 26 Pa. 407, and Martin *v.* Riddle, reported as a note thereto.

But whatever the rule may be with respect to farm lands and lands outside of cities and incorporated towns, we contend with great confidence, that the rule of the civil law does not apply to lot owners in cities and boroughs.

Bentz *v.* Armstrong, 8 W. & S. 40.

The burden placed by Wanamaker upon the defendant's premises could not be increased, and, therefore, it was, the defendant had a right to protect himself by obstructing the excessive flow.

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Darlington *v.* Painter, 7 Pa. 475.
Limerick *v.* Colebrookedale Turnpike Co.'s App., 80 Id. 425.

Joshua W. Sharpe (with him *William Alexander* and *Sharpe*), for appellee.

When rains and melting snows, by the natural formation of the ground, are collected together in such quantities as to wear a deep and well defined channel through which the waters are accustomed to flow, and through which outlet said territory is drained, no one has the right to obstruct such a water course and throw the water back upon adjoining property owners to their injury. A water course of this character has all the incidents of a running stream, and the law applies to incorporated towns as well as to rural districts.

Martin *v.* Riddle, 26 Pa. 415.
Kauffman *v.* Griesemer, 26 Id. 407.
Miller *v.* Laubach, 47 Id. 154.
Rhoads *v* Davidheiser, 133 Id. 226.
Trickett on Boroughs, p 409.
Earl *v.* De Hart, 1 Beasl. (N. J. Ch.) 280.

Plaintiff purchased his lot with the benefit and the defendant purchased his with the burden and the law will not relieve the one at the expense of the other.

Seibert *v.* Levan, 8 Pa. 383.
Kieffer *v.* Imhoff, 26 Id 442.
Phillips *v.* Phillips, 48 Id. 184.
Cannon *v.* Boyd, 73 Id. 179.
Zell's Ex'rs *v.* Universalist Society, 119 Id. 390.

July 11, 1894. FELL, J. This action was to recover damages caused by the obstruction of a surface drain by reason of which rain water backed upon and overflowed the plaintiff's premises. W. H. Wanamaker owned a tract of some five acres of ground in what is now the borough of Chambersburg. The rain water which fell on the higher ground in the vicinity and accumulated in the street upon which the lot fronted flowed thence through an opening which was a well defined surface water course, and spread over the land. In 1867 W. H. Wanamaker changed the opening from the street to a point a few feet distant and constructed a ditch by which the water, which before had run upon and over his land, was conducted to a pond in the back part of his lot. His purpose in making the change was two-fold; to relieve the front of his lot from the flow of water so that he could improve it, and to collect the water in a pond at the rear where he could utilize it in manufacturing bricks. He erected a number of small dwelling houses on the front, one of which he sold to the plaintiff in 1867; and in 1872 he sold the whole of the back part to the defendant.

When these sales were made the ditch was a well defined surface water course two or three feet deep and as many wide, which conducted the rain water, which otherwise would have run over the surface to the pond mentioned. By a recent grading of the street the flow of water in the ditch has been somewhat increased, and the defendant to avoid injury therefrom placed obstructions in the ditch at the point where it enters his land, causing the overflow which injured the property of the plaintiff. The case has been argued here upon the right of the owner of a lower lot of land to shut off the surface water flowing from a higher one. It was submitted to the jury upon the trial as involving only the question of servitude imposed upon the defendant's land by the former owner of both properties.

We are of opinion that this submission included the only question in the case, and that the instruction to the jury on the subject was accurate and full. The grantor of both plaintiff and defendant while he was the owner of the whole property changed the natural channel to adapt the parts to the uses to which he intended to put them. This created an easement in favor of the land which he conveyed to the plaintiff, and imposed a servitude upon that which he afterward conveyed to the defendant. Both parties bought with notice of this, and both are bound by it. The charge of the learned Judge carefully guarded the defendant from a recovery for injuries caused by an increased flow of water resulting from a change of grade of the streets by the borough authorities, and left him liable only for his own act in diverting the water which would have run upon his property before the change of grade.

The judgment is affirmed. H. B.

May, '94. 17. March 31, 1894.

Citizens' Passenger Railway Company v. East Harrisburg Passenger Railway Company.

Equity—Practice—Appeal—Supersedeas—Railroad crossing—Act of June 19, 1871, P. L. 1361.

An appeal, with due security to prosecute with effect, etc., taken in due time, acts as a supersedeas to a decree made under the Act of June 19, 1871, P. L. 1361, approving a plan by which one railroad may cross the tracks of another; and pending such appeal the Supreme Court may enforce the effect of the supersedeas by an order restraining the appellee whose plan has been approved from proceeding with the construction of the crossing.

Rule to show cause why appeal should not be declared a supersedeas and a restraining order issued.

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On August 28, 1893, the Citizens' Passenger Railway Company filed a bill in equity in the Court of Common Pleas of Dauphin County against the East Harrisburg Passenger Railway Company, stating in it that the Citizens' Passenger Railway Company, a corporation under the Act of Assembly of 14th May, 1889, was authorized to build and operate by electricity a street railway on and over certain streets in the City of Harrisburg and the borough of Steelton; that the borough of Steelton had, on the 17th day of March, 1892, given it permission to construct and operate its railway on certain of its streets, including Front street, from Adams to Trevick; that it had already built its line of road to Adams street on the one side of Front street and to Trevick street on the other side of said street; that the East Harrisburg Passenger Railway Company had a double track of railway running along and over said Front street, between Adams street and Trevick street; that the Citizens' Passenger Railway Company desired to make a diagonal crossing of the double line of tracks of that Company for the distance of 240 feet on Front street between Adams and Trevick streets, and that it believed this to be the best, safest, most convenient and only practicable way of crossing that street. The prayer of the bill was for a decree to permit this diagonal crossing to be made and for an injunction to prevent the East Harrisburg Passenger Railway Company from interfering with the construction of that crossing.

The East Harrisburg Passenger Railway Company filed an answer, setting up, *inter alia*, that the proposed crossing was not necessary, safe or practicable, and that it was possible and practicable for the Citizens' Passenger Railway Company to complete its line of road by other methods and routes.

The Court heard argument upon the bill and answer, and verbally declined to order a diagonal crossing. It changed the prayer of the bill and directed the Citizens' Passenger Railway Company to submit a plan of crossing the appellant's tracks at Adams street, and proceeding along Front street to Trevick street, a distance of about 260 feet. The East Harrisburg Passenger Railway Company filed objections, and the Court referred the said plan and the objections to a master. The report of the Master, filed on the 26th day of December, 1893, stated "that testimony as to any other mode of crossing than in the manner proposed in the plan filed, or at any other point on Front street, was excluded by the master as not pertinent to the issue before him." "That when the rails" upon Adams and Trevick streets, approaching Front street, "are slippery from any cause they (the cars) cannot always be so stopped with the appliances now in use by the plaintiff company." The report concluded with the belief of the master that the crossing could be used and operated with reasonable safety if certain regulations were observed.

The exceptions filed to the master's report were overruled by the Court, and from its decree, filed February 17, permitting the crossing to be made as shown in the plan submitted by the Citizens' Passenger Railway Company, the East Harrisburg Passenger Railway Company took its appeal on 24th February, 1894, to this Court, entered into recognizance in the sum of $8,000, which was the amount fixed by the Court, "conditioned to prosecute its appeal with effect, and if the decree be affirmed or the appeal be discontinued or non-prossed to pay all debts, damages and costs accruing upon such appeal, and all other damages and costs that may be awarded upon such appeal." A certiorari was duly issued on March 2, 1894. On March 5th the Citizens' Passenger Railway Company gave notice that on the 15th it would proceed to construct its crossing.

Application was then made by the appellant to the Supreme Court for a declaration that the appeal constituted a supersedeas and for an order restraining the construction of the crossing pending the appeal. A temporary stay was granted on its *ex parte* application, and the matter now came on for argument.

Lyman D. Gilbert and *Louis M. Hall* (with them *Wolfe & Bailey*, *John H. Weiss*, and *Francis Jordan*), for the rule.

An appeal lies in the present case.

Act of June 16, 1836, sec. 13, P. L. 789.
Act of Feb. 14, 1857, Id. 39.
Act of April 21, 1846, Id. 432.
Pitts. & Connellsv. R. R. Co. *v.* S. W. P. Rw. Co., 77 Pa. 173.
Appeal of Cornwall & Lebanon R. R., 125 Id. 232, 243.
Perry County R. R. Co. *v.* Newport & Sherman R. R. Co., 150 Id. 193.
P. R. R. Co. *v.* Braddock Electric Ry. Co, 152 Id. 116.

The appeal is a supersedeas. It is not taken under the Act of Mar. 17, 1845, P. L. 158; that Act relates only to appeals from the Common Pleas of Philadelphia; but under the Act of April 21, 1846, § 3; March 29, 1832, § 59, P. L. 213; May 19, 1874, P. L. 206.

Appeal of New Brighton R. R. Co., 105 Pa. 13, 22.

The effect of the certiorari is also to stay all proceedings; it is not itself a supersedeas but operates as one by implication.

Ewing *v.* Thompson, 43 Pa. 376.
Road in Roaring Brook Twp., 140 Pa. 632.
Hagerty's Case, 4 Watts, 305.
Sage *v.* McGuire, 4 W. & S. 228, 231.

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Even if the appeal is not a supersedeas the special circumstances of this case justify the granting of the order prayed for by the appellant.

The Act of 16th June, 1836, sec. 7, P. L. 787, declares:—

"The Judges of the Supreme Court shall have full power and authority, when and as often as there may be occasion, to issue writs of habeas corpus, writs of certiorari and writs of error and all remedial and other writs and processes returnable to said Court."

The action of the Citizens' Passenger Railway Company violates the Act of 14th May, 1889, P. L. 211, sec. 4, which declares: "That no extension or branch shall be constructed on any street or highway upon which a track is laid or authorized under any existing charter, except as hereinafter provided." It violates sec. 17 of that Act, in that it is an attempt to occupy with a third track Front street, which is the turnpike road of the Middletown and Harrisburg Turnpike Road Company, upon which two tracks of street passenger railway line had heretofore been laid and were and are being operated by the East Harrisburg Passenger Railway Company.

Such an effort is forbidden by the decision of this Court in Perry County R. R. Co. *v.* Newport R. R. Co., 150 Pa. 193.

C. H. Bergner (with him *J. C. Durbin*), contra.

The appeal is not a supersedeas. There is no statute making it such, and in the absence of a statute no appeal is a supersedeas. The Act of Mar. 17, 1845, P. L. 158, extended to the whole State by Act of February 14, 1857, P. L. 39, provides that an appeal may be a supersedeas:—

1. Where the decree directs the payment of money.

2. Where it directs the assignment or delivery of any securities, evidences of debt, documents, etc.

3. Where it directs the execution of any conveyance or other instrument.

4. Where it directs the sale or delivery of any real property.

The present suit certainly cannot be included within any one of the foregoing classes. It was instituted under the provisions of the Act of June 19, 1871, P. L. 1361, which conferred the right upon Courts of equity to ascertain and define the mode of the crossing of one railroad by another; and the sole purpose of the decree in the Court below was to regulate the manner of the crossing. Clearly, therefore, this case does not fall within any one of the four classes enumerated in the Act of March 17, 1845, as extended to the whole State by the Act of February 14, 1857.

Barker et al. *v.* Hartman Steel Co., 23 WEEKLY NOTES, 109.

The Act of April 21, 1846, P. L. 433, does not make this appeal a supersedeas; it refers to decrees in equity made both by the district Courts and the Courts of Common Pleas, and provides that appeals from such decrees shall be made in the same manner and upon the same terms as in the case of appeals from the Orphans' Court. But the Act of February 14, 1857, confers upon the Courts of Common Pleas throughout the State the same chancery powers possessed by the Court of Common Pleas of Philadelphia under the Act of March 17, 1845; and provides that all appeals from decrees in equity shall be taken in the same manner and under the same terms and conditions as provided by said Act of March 17, 1845. The Act of February 14, 1857, being later in date than the Act of April 21, 1846, and providing a different system of appeals from Courts of Common Pleas, the latter Act in so far as it relates to appeals from Courts of Common Pleas is repealed by the Act of February 14, 1857. See note (a) Purdon's Dig. 701.

No appeal lies in the present case. It is a proceeding under the provisions of the Act of June 19, 1871, P. L. 1361, Purdon's Dig. 357, authorizing Courts of equity to ascertain and define by their decree the mode of crossing of one railroad by another, etc., etc. This is a special grant of power conferred on a particular Court.

The Legislature, in enacting the statute, undoubtedly intended to confer something in addition to the general equity jurisdiction to prevent irreparable injury, and protect the rights of property where there is no adequate remedy at law for their infringement.

The right of a railroad to corporate rights being established or admitted, the right to cross, if necessary, or convenient in reaching its terminus, is absolute, and the Court under the Act of June 19, 1871, can only ascertain the mode.

Pittsburg Junction Railroad Company's Appeal, 122 Pa. 529.

The only jurisdiction of the Court below was acquired under the Act of June 19, 1871. The Act contents itself with conferring jurisdiction upon the Court below. It provides for no appellate proceedings. The grant of chancery powers to a subordinate Court does not necessarily give the right of appeal to the Supreme Court.

Patterson *v.* Schoyer, 10 Watts, 333.
Penna. R. R. *v.* Lutheran Congregation, 53 Pa. 449.

The sole office of a certiorari in this case is to bring up the appeal. If there is no appeal the certiorari goes for nothing.

Roddy's Appeal, 99 Pa. 11.

With respect to the second ground of the peti-

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tioner, viz: that if the appeal is not a supersedeas of right, then the Supreme Court should by grace issue a restraining order to stay further proceedings. Such order should not be granted because it would entail great and lasting injury upon the respondent and would conserve the rights of no one, and its only effect would be to prevent competition and prolong a monopoly long enjoyed by the petitioner corporation.

April 9, 1894. PER CURIAM. This appeal having been taken by defendant company from the decree of the Court below, without any special order of said Court, and recognizance in the sum of $8000 conditioned to prosecute said appeal with effect, etc., having been given by appellant and approved by said Court, we are of opinion that said appeal operates as a supersedeas of all proceedings by plaintiff company under and by virtue of said decree.

It is therefore ordered and decreed that the stay of proceedings heretofore ordered by this Court, be and the same is hereby continued until the final determination of said appeal.

H. B.

Orphans' Court.

April, '94, 262.

Baird's Estate.

Wills—Signing of—Additions not signed.

Where a will is executed with all the forms of law, it will not be invalidated by subsequent additions thereto by the testator which are not signed by him. The rule is the reverse where the whole instrument is prepared at one and the same time, and was intended to be so executed.

Wineland's Ap., 118 Pa. 37, followed.

Appeal from the register of wills.

The decedent left a will which she had executed on a sheet of note paper duly signed and witnessed. On the next page she added a clause nominating her executor. On the ground that the will was not signed at the end thereof, the register refused to admit it to probate.

John H. Sloan, for appellant.

Charles L. Brown and *Thomas B. Price*, contra.

June 30, 1894. FERGUSON, J. This case presents the same question we have had before, whether a will is executed in accordance with our Act of Assembly which is not signed by the person making the same at the end thereof, or, rather, where, under the Act, is the end of the will? The will in question was executed on an ordinary sheet of note paper, and duly signed and witnessed, and on the next page there followed the words: "Lastly, I do nominate and desire that Robert John Ralston be my executor, and see that all my claims and expenses are paid."

It has been held that a will executed with all the forms of law will not be invalidated by some subsequent additions thereto by the testator which have not been signed by him; but that the said additions will be considered as an unexecuted codicil, and the will as originally written, allowed to stand: Heise *v.* Heise, 31 Pa. 246; Smith's Est., 20 Phila. 94. Yet these cases do not apply where the whole instrument was prepared at one and the same time, and was intended to be so executed. Here a mistake in not signing at the end is fatal; Wineland's Ap., 118 Pa. 37; Frazier's Will, 20 Phila. 40. In Wineland's Appeal the words not signed were the same as in this case, viz., the appointment of executors, and the Supreme Court said that, while the appointment of executors was not essential, it was an important part of the will, and as, therefore, that will was not signed at the end thereof, it was invalid. This decision was severely criticised in 6th American Probate Reports, 349, where it is said that "the rule laid down in this case was not to be regarded as law. It is contrary to both reason and authority." Be this as it may, it must be regarded by us as the law so long as it stands unreversed by our Supreme Court.

In the present case, then, the only question to be considered is, whether the clause appointing the executor was written into the will when it was signed or afterwards. We have no evidence upon this point excepting what the record discloses, and this indicates that this clause was written with the rest of the will and was there when the will was executed. The testatrix, having disposed of all her estate, says, "lastly," a word which can only indicate the conclusion of what had preceded it. She had disposed of all her estate, and there only remained to do that which is usual and customary by the last item of most wills, name the person whom she wished to execute the same. If this clause was there when she signed the will, and, from all the evidence in the case, it was, then she did not sign the will at the end thereof, and, as was said in Wineland's Appeal, that is the end of it.

It seems hard, however, that in a case like this, where all the desires and intentions of the testatrix with reference to her estate are clearly expressed, they should fail because she happened to sign her will in the wrong place.

The appeal in this case is dismissed.

F. B. N.

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O. C. October, 1892, 5.

Howe's Estate.

Caveat Emptor—Orphans' Court sale—Auctioneer—Voluntary statement of—Specific performance—Doubtful title.

The maxim of *caveat emptor* applies to all judicial sales as a rule; but such sales, and especially those made under the direction of the Orphans' Court, must be conducted in good faith, all misdescription and misrepresentation being avoided.

A purchaser at these sales is not bound to take a doubtful title, and every title is doubtful which exposes the party to litigation.

A voluntary statement was made by an auctioneer that a ground rent upon a property he was selling under the directions of the Orphans' Court, was redeemable:

Held, the purchaser might regard it as a condition of sale.

Sur petition for specific performance.

A property was sold under proceedings in partition by order of the Orphans' Court. The sale was subject to a ground rent, which the auctioneer asserted was redeemable. It afterwards appeared, that there was a peculiar covenant in the deed which made it very doubtful whether or not the ground rent *was* redeemable. Whereupon the purchaser refused to take title. A petition for specific performance was made to this Court.

Charles Davis, for the petition.

C. Oscar Beasley, contra, cited

Speakman *v.* Forepaugh, 44 Pa. 373.
Heimer *v.* Sommers, 158 Id. 424.
Swayne *v.* Lyon, 67 Id. 439.

The petition was dismissed for the reasons given in this opinion.

March 3, 1894. FERGUSON, J. While as a rule the maxim of *caveat emptor* applies to all judicial sales, yet it has been held that such sales, especially those made under the direction of the Orphans' Court, shall be so conducted as not to mislead or entrap bidders. Those who conduct such sales must act in good faith, and, so far as possible, avoid any misdescription or misrepresentation as to quality or quantity of the property offered for sale: Schug's Ap., 14 WEEKLY NOTES, 49; Johnson's Ap., 114 Pa. 132; De Haven's Ap., 106 Pa. 612; Wiltberger's Est., 18 Phila. 232.

In this case the property was sold by order of this Court under proceedings in partition, which stated that the sale was made subject to a yearly ground rent of $36. At the sale the auctioneer announced that this ground rent was redeemable. If he had said nothing about it, and the purchaser had bought in the absence of any interference, inducement or statement upon his part, the maxim of *caveat emptor* would certainly have applied; but he stated that the ground rent was redeemable, and the purchaser had a right to expect that this was one of the conditions of the sale. He bought upon the faith of this representation. He now refuses to take the title, because he is advised that the ground rent is irredeemable. This objection is a valid one, because there is a great difference between buying a property which can be made clear, and one which is fettered with a perpetual encumbrance. But it is contended that this particular ground rent is redeemable, and therefore the purchaser is without excuse in refusing to accept this title. This is a question which, under the peculiar covenant in this deed, and the decisions of the Supreme Court in Palairet *v.* Snyder, 106 Pa. 227, and Springer *v.* Phillips, 71 Pa. 60, is involved in considerable doubt. We do not feel called upon to decide it, because the purchaser in this case is not bound to take a doubtful title, and every title is doubtful which exposes the party to litigation. "If there be color of outstanding title which may prove substantial, though there is not enough in evidence to enable the chancellor to say so, a purchaser will not be held to take it and encounter the hazard of litigation:" Speakman *v.* Forepaugh, 44 Pa. 373; Heimer *v.* Sommers, 158 Pa. 424. We do not think that this case is one in which specific performance should be decreed.

The petition is therefore dismissed.

F. B. N.

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WEEKLY NOTES OF CASES.

VOL. XXXV.] *FRIDAY, SEPT. 21, 1894.* [No. 2.

Supreme Court.

Jan. '93, 426. February 5, 1894.

Wilkinson v. Patton, et al.

Wages—Acts of May 12, 1891; June 13, 1883, and April 9, 1872—When not applicable.

The Act of May 12, 1891, provides that money due for wages of certain enumerated persons, within limits as to time and amount, shall be liens on real or personal property sold "by execution or otherwise on account of the death or insolvency" of the employer:

Held, 1. That this Act does not give a specific lien on the property in the hands of the owner or his vendee;

2. The Act evidently refers to a sale effected by legal process, where a fund is raised for distribution, and not to a sale made by the owner;

3. That it is lawful for the employer to transfer all his property by a bill of sale to one of his creditors, although the effect of such transfer be to cut out the wage claims.

Appeal of Charles Benjamin Wilkinson, assignee for the benefit of creditors of William Clegg, Jr., from the judgment of the Common Pleas of Delaware County, in favor of Frank Patton, *et al.*

The facts as they appeared on the trial were as follows: William Clegg, Jr. rented a mill and its machinery to McNaulty, Evans & Co. They became indebted to him for rent, and in settlement thereof transferred to him all their personal property on the premises. At the same time they surrendered their lease and delivered exclusive possession of the property transferred and of the demised premises. A month later they confessed judgment to some of their workmen, and the sheriff levied upon the personal property which had been transferred to Clegg. A feigned issue was awarded, in which C. B. Wilkinson, who had become assignee for the benefit of Clegg, was plaintiff, and the execution creditors for wages of McNaulty, Evans & Co., were defendants.

At the trial, defendants called John Evans and questioned him as to the amount of capital of the firm of McNaulty, Evans & Co., with a view to test the good faith of the transfer to Clegg. Objected to. Objection overruled. (First assignment of error.)

The defendants offered in evidence the wage claims served upon the sheriff, other than those included in the confessed judgment. Objected to. Objection overruled. (Second assignment of error.)

The plaintiff requested the Court to charge the jury as follows: —

1. If the defendants have any lien upon the goods and chattels levied upon for wages due them, such lien can only be asserted or determined upon the distribution of the assigned estate of William Clegg, Jr., and cannot be asserted in this case. *Answer.* I decline to so charge you. (Fourth assignment of error.)

2. The defendants cannot have a verdict merely upon the ground that their claim is for wages. They stand upon the ground of ordinary judgment creditors. *Answer.* I decline to affirm this point. (Fifth assignment of error.)

The Court, being of opinion that the making of the bill of sale to the landlord for rent for all the property was an act of insolvency under the Act of May 12, 1891, accordingly directed the jury to find a verdict for the defendants. (Third assignment of error.)

Verdict and judgment for defendants. Thereupon plaintiff appealed, assigning for error the points above noted.

A. Lewis Smith, (*Alfred J. Wilkinson* with him), for appellee, cited—

Taylor *v.* Guarantee Trust Co., 30 WEEKLY NOTES, 445.

V. Gilpin Robinson, (*Horace P. Green* with him), for appellees, cited—

Act of May 12, 1891, P. L. 54.
Act of April 9, 1872.
Act of June 13, 1883, P. L. 117.

May 23, 1894. FELL, J. The question in this case is whether under the Act of May 12th, 1891, P. L. 54, a creditor for wages has a lien on personal property transferred in good faith by an insolvent debtor in payment of his debts.

Wm. Clegg, Jr., rented a mill and its machinery to McNaulty, Evans & Co. They became indebted to him for rent, and in settlement thereof transferred to him all their personal property on the premises. At the same time they surrendered their lease and delivered exclusive possession of the property transferred and of the demised premises. A month later they confessed judgment to some of their workmen for wages, and the sheriff levied on the personal property which had been transferred to Clegg. A feigned issue was awarded, in which Charles Benjamin Wilkinson, who had become assignee for the benefit of creditors of Clegg, was plaintiff, and the execution creditors for wages of McNaulty, Evans & Co., were defendants.

While there were other questions involved, the case was taken from the jury by a peremptory instruction to find for the defendants on the ground that McNaulty, Evans & Co., being in-

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solvent, the transfer of their property in payment of the claim for rent was subject to the lien of debts for wages. Whether if subject to such liens they could be enforced in the manner indicated in the charge, it is unnecessary now to consider, as we are of opinion that no liens existed.

The Act of May 12, 1891, is amendatory of the Act of June 13, 1883, P. L. 117, which Act is an amendment of the Act of April 9, 1872, P. L. 47. Each successive Act enlarges the class of persons intended to be benefited, but in other respects no material change has been made in the legislation upon the subject.

The Act of 1891 provides that moneys due for wages of certain enumerated persons, within limits as to time and amount, shall be liens upon real or personal property sold by execution or otherwise on account of the death or insolvency of the employer, and shall be first paid out of the proceeds of the sale of such property. Omitting the parts that are descriptive of the classes of persons and kinds of property included, the effective portion of the Act is: ". . . all moneys due for labor . . . for any period not exceeding six months preceding the sale of the real or personal property . . . by execution or otherwise on account of the death or insolvency of such employer, shall be a lien on such real or personal property . . . and shall be preferred and first paid out of the proceeds of such sale."

The jury were in effect instructed that the sale by the tenant to the landlord, while not fraudulent in fact or in law, was an act of insolvency, and that the creditors for wages had liens upon the goods sold which could be enforced by a levy under judgment subsequently obtained.

This places a construction upon the Act which we think was not contemplated by the Legislature, and which cannot be sustained. It was not intended that there should be a specific lien on the property in the hands of the owner or of the vendee. By a sale or transfer by execution or otherwise on account of the death or insolvency of the employer is meant a sale caused by operation of law by reason of death or insolvency —as a sale by an administrator or executor, by an assignee for the benefit of creditors, or by a receiver, and not a sale by the employer. This construction is indicated by the language of the Act, and is in harmony with the settled legal policy of the State. The method provided for the enforcement of the claim for wages is that "it shall be preferred and first paid out of the proceeds of such sale." This evidently refers to a sale effected by legal process, where a fund is raised for distribution, and not to a sale made by the owner. Money in the possession of a vendor of property is not the proceeds of a sale on which a claim can be preferred and first paid.

The construction placed upon the Act by the learned Judge would create a class of liens of the most dangerous and obnoxious character. No one could purchase property without assuming the risk of the insolvency of the vendor. The principle is the same whether the sale is of a part or of the whole of the debtor's property, and whether the sale is in payment of a particular debt, or to realize funds for general use either in the payment of debts or the conduct of business. It is the established rule in this State that a debtor may prefer a creditor, and it was as lawful for McNaulty, Evans & Co., to transfer their property to one creditor as it would have been to sell it to a stranger.

The first assignment of error is to the admission of testimony which went to the good faith of the transfer, and which was properly received. This assignment is overruled, and the remaining assignments are sustained.

The judgment is reversed, and a venire de novo awarded. W. M. S. Jr.

May, '94, 9. May 29, 1894.

Clippinger's Estate.

Judgments—Ownership of—Claim against legal holder arising from alleged debt due by him to another.

M., the owner of certain real estate, charged with the payment of an annuity to one C., sold the land to F., and subsequently agreed with him to protect it from the charge of the annuity. M. after the conveyance continued for some time to pay the annuity to C., but at her death it was in arrears, and C.'s administrator brought suit against F., who owned the land, by purchase from M., at the time the arrearages accrued. The administrator obtained judgment for $766.34 which was paid by F.'s vendee A. to prevent the sale of the land. In this action against F. for the arrears of annuity M. was requested to allow the use of a claim which he had against C. for goods sold and money advanced, as a set-off, but he refused, and subsequently he obtained judgment on this claim against the same administrator for $330, the Court, however, restricting the judgment by an order that it should not be used or assigned until the auditor's report upon the distribution of C.'s estate should be confirmed. "This to afford an opportunity in that time for any parties to raise the question of the ownership of this judgment." In making distribution the auditor awarded the amount of M.'s judgment to A., and the Court confirmed the auditor's report;

Held, that as the arrearages of the annuity were for a period during which M. was not the owner of the land, he owed C. nothing, and her administrator could not set off her claim for annuity in an action by M. for goods sold;

Held, also, that M. was under no obligation to either F. or A. to pay the annuity; his covenant with J., their predecessor in title, being a personal one only.

Held, therefore, that there was no legal justification of the method by which the auditor gave effect to his views of the abstract justice of the case by delivering the property of one person bodily over to another.

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Appeal of William L. Mosebey from the decree of the Orphans' Court of Fulton County, dismissing exceptions to the report of an auditor appointed to make distribution of the estate of Elizabeth Clippinger, deceased.

The facts of this case are sufficiently stated in the opinion of the Supreme Court. The Court below confirmed the report of the auditor awarding distribution of the amount of the judgment in question to the claimant, James McClain. Whereupon the legal owner of the said judgment, William L. Moseby, took this appeal, assigning for error this action of the Court.

F. E. Colvin (with him *John M. Reynolds* and *W. Scott Alexander*), for appellant, cited

Yundt's Estate, 6 Pa. 35.
Gaston's Appeal, 1 Pitts. Rep. 48.
Second National Bank of Titusville Appeal, 85 Pa. 530.
Sergeant's Heirs *v.* Ewing, 36 Id. 156.
Meckley's Appeal, 102 Id. 542.

George A. Smith and *John P. Sipes*, for appellees, cited

Dundas's Estate, 73 Pa. 480.
Drysdale's Appeal, 14 Id. 531.

July 11, 1894. FELL, J. The facts out of which this controversy has arisen are somewhat complicated, but to the extent to which they are important in considering the question raised they may be briefly stated.

William L. Mosebey owned a tract of land charged with the payment of an annuity to Elizabeth Clippinger. He conveyed this land to John McClain, and subsequently agreed with him to protect it from the charge of the annuity. John McClain conveyed the land to Frank McClain, who conveyed it to James McClain. William L. Mosebey after the conveyance continued for some time to pay the annuity to Mrs. Clippinger, but at her death it was in arrears, and suit was brought by her administrator against Frank McClain, and a judgment obtained for $766.34, which was paid by James McClain to prevent the sale of the land.

William L. Mosebey obtained a judgment against the same administrator for $300 in an action for goods sold and money advanced to Mrs. Clippinger.

Upon the trial of the action against Frank McClain for arrears of annuity, William L. Mosebey was requested by him to allow the use of his claim against Mrs. Clippinger as a set-off, but declined to do so. Upon the trial of the issue in which William L. Mosebey was plaintiff, the Court was requested to direct that the recovery should be to the use of Frank McClain. This was refused, but after verdict the following order was made: "The judgment upon the verdict not to be used or assigned by the plaintiff until the report of the auditor to be appointed at this time by the Orphans' Court to report distribution of the estate of Elizabeth Clippinger, deceased, be confirmed, and execution upon the judgment is hereby restrained in the meantime. This to afford an opportunity in that time for any parties to raise the question of the ownership of this judgment."

There was no allegation of collusion between William L. Mosebey and the administrator to enable the former to avoid payment of a debt for which he was liable. He denied any obligation in that regard and claimed to have been released by John McClain from his personal agreement with him.

In making distribution the auditor awarded the amount of Mosebey's judgment to McClain, stating in his report: "The auditor is of the view that it would be most inequitable and unjust to allow William L. Mosebey to take the amount of the judgment of $330, or any part of it, from the estate, as the evidence is convincing that not one dollar of it belongs to him, and he is further of opinion that the right to the ownership of said judgment should be held to be in James F. McClain and that the amount of it should be paid to him, and distribution of the funds of the estate to that amount, $330, is accordingly made to said James F. McClain."

This finding was based upon the supposition that William L. Mosebey should have paid the annuity, and that the goods furnished and money advanced for which he recovered a judgment were in fact payments on account of the same, because he had previously in settling the annuity taken credit for goods furnished and money advanced.

It is probable that this disposition of the matter works out a result that is equitable, but it is in total disregard of all orderly procedure. Mosebey's judgment was for a debt due by Mrs. Clippinger, to whom he owed nothing. He was under no duty to her to pay the annuity, as he had never covenanted with her to do so, and was not the holder of the title when it became due. The payments which he had previously made to her were in discharge of his obligation to another, John McClain. Her administrator could not set off her claim for annuity in an action by him for goods sold.

On the other hand, he was under no legal duty to Frank McClain or James McClain to pay the annuity. His obligation to pay it, if any existed, was a personal obligation to another who was their predecessor in title. There was no privity of estate or contract between the parties, and there is no legal justification of the method by which the learned auditor gave effect to his views of the abstract justice of the case by de-

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livering the property of one person bodily over to another.

The exceptions touching the distribution of the amount due upon the judgment of William L. Mosebey *v.* John P. Sipes, administrator, are sustained and the decree is reversed at the cost of the appellee, and it is now ordered that the amount of the said judgment be awarded to William L. Mosebey. S. H. T.

July, '94, 72. May 30, 1894.

Commonwealth v. Reinoehl.

Insurance brokers—Penalty under Act of May 1, 1876, sec. 47, P. L. 53—"Company" and "corporation" defined.

Although the word "company" is used in the 47th section of the Act of May 1, 1876, P. L. 53, imposing a penalty on persons acting as agents for foreign insurance companies without a certificate of authority, it must be held to mean "corporation" only, the plain reading of the entire Act showing that its intention throughout is confined to incorporated companies.

A person doing business as agent for an association of individual underwriters, each of whom binds himself severally, and not jointly, is not liable to the penalty of the Act of May 1, 1876, sec. 47, P. L. 53.

Appeal of Augustus F. Reinoehl, defendant, from the verdict, sentence and judgment of the Quarter Sessions of Lancaster County on an indictment for issuing insurance policies without license.

The facts of the case are stated in the charge of the Court, BRUBAKER, J., which was as follows:—

"The defendant in this case, Augustus F. Reinoehl, is charged in the indictment with having unlawfully transacted business within the Commonwealth of Pennsylvania as the agent of the Guarantee and Accident Lloyds, New York, an insurance company of the State of New York, without a certificate of authority, as required by the laws of the State of Pennsylvania, and without such authority of law did negotiate contracts of insurance, as agent of the said Guarantee and Accident Lloyds, New York, an insurance company of the State of New York, with Benjamin E. Radcliff and others, and did issue or cause to be issued to said Benjamin E. Radcliff, within the County of Lancaster and State of Pennsylvania, a policy of insurance for five thousand dollars, dated June 5, 1893, in said Guarantee and Accident Lloyds, New York, and to others within the County of Lancaster and State of Pennsylvania.

"The defendant is indicted under the 47th section of an Act of Assembly passed the 1st day of May, 1876, which reads as follows:—Any person transacting business within this Commonwealth as the agent of an insurance company of any other State or Government, without a certificate of authority, as required by the Act to which this is a supplement, shall be guilty of a misdemeanor, and upon conviction thereof shall be sentenced to pay a fine of five hundred dollars.

"[The evidence offered before you on the part of the Commonwealth is uncontradicted. The defence made here by the defendant is that this insurance company is not an incorporated company, and, therefore, does not come within the purview of the Act of Assembly which I have just read. I charge you that it is not necessary. The Act of Assembly does not say that it should be an incorporated company, and therefore, if you believe this testimony, which is uncontradicted, your verdict should be in favor of the Commonwealth, or guilty in manner and form as he stands indicted]. If we are wrong in our judgment in this matter, the counsel for the defendant may make a motion in arrest of judgment, which can be heard by the Court in full bench. It is a new question, and the counsel are desirous of having the queston passed upon by the Supreme Court. The question of fact is for you."

The form of policy was as follows:—

CLASSIFICATION "A."

No. 86,257. $5,000.

GUARANTEE AND ACCIDENT LLOYDS, NEW YORK.

AGE 43. WEEKLY INDEMNITY, $25.00.

IN CONSIDERATION of.....Dollars paid, and of the warranties and agreements contained in the application for insurance, which application is made a part of this contract, each of the subscribers hereto, as a separate underwriter, does for himself and not one for the other, hereby

INSURE (Subject to the conditions hereon) B. E. RADCLIFF, of Lancaster, Pa. . . . . against loss of life, etc.

. . . . . .

Each of the present subscribers as separate underwriter binds himself severally and not jointly with any other for the true performance of the premises for the amount expressed to be insured by him.

In witness whereof, the subscribers as separate underwriters do severally subscribe their name at the City of New York, this 5th day of June, 1893.

C. F. Ackerman, of Meissner, Ackerman & Co.
Wm. P. Aldrich, of Worthen & Aldrich.
William Allan, Vice-Prest. The A. H. Hart Co.

. . . . . .

A. F. KNABB,
CORTLAND W. FISHER,
Attorneys.

The Commonwealth asked the Court to charge the jury that "the uncontradicted evidence shows that the defendant A. G. Reinoehl, did, on or about June 1, 1893, within the jurisdiction of this Court, unlawfully transact business within

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the Commonwealth of Pennsylvania as the agent of the Guarantee and Accident Lloyds, New York, an insurance company in the State of New York, without a certificate of authority, as required by the laws of the State of Pennsylvania, and then and there, without such authority of law, did negotiate contracts of insurance, as agent of the said Guarantee and Accident Lloyds, New York, an insurance company of the State of New York, with Benjamin E. Radcliff, and did issue to him a policy of insurance in said company, and the verdict of the jury must be, guilty in manner and form as he stands indicted." *Affirmed.*

The defendant asked the Court to charge the jury as follows:—

"That the testimony of the Commonwealth has failed to show that the defendant was acting as the agent of an insurance company of any other State or government without a certificate of authority, as required by the Act, to which the Act of May 1, 1876, is a supplement, and that the Commonwealth has utterly failed to show that the policy upon which this complaint is based was issued by a company or corporation either of this or any other State, and that the verdict of the jury should be a verdict of not guilty." *Refused.*

2. "The 47th section of the Act of May 1, 1876, entitled a supplement to 'An Act to establish an Insurance Department, approved April 4, 1873, providing for the incorporation and regulation of insurance companies, and relating to insurance agents and brokers, and to foreign insurance companies,' which section reads as follows: 'Any person transacting business within this Commonwealth as the agent of an insurance company of any other State or government without a certificate of authority, as required by the Act to which this is a supplement, shall be guilty of a misdemeanor, and on conviction thereof shall be sentenced to pay a fine of $500,' is unconstitutional and contrary to section 1, Article 1, of the Bill of Rights of the Constitution of Pennsylvania," which declares that "all men are born equally free and independent, and have certain inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring possession and protecting property and reputation, and pursuing their own happiness." *Refused.*

3. That section 47, of the Act of May 1, 1876, as fully recited in the foregoing point is unconstitutional, and in violation of the 14th Amendment of the Constitution of the United States, which provides that no State "shall make or enforce any law which shall abridge the privileges or immunities of citizens in the United States, nor deny to any person within its jurisdiction the equal protection of the laws," and also in violation of Article 4, section 2, of the Constitution of the United States, which ordains "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." *Refused.*

Verdict, guilty, and sentence thereon.

The defendant appealed, and assigned as error the portion of charge included in brackets, in refusing to affirm the defendant's points, and in admitting in evidence policy 86,257 of the Guarantee and Accident Lloyds, New York, issued to Benjamin E. Radcliff.

A. C. Reinoehl and *F. Carroll Brewster*, for appellant.

The title of the Act of May 1, 1876, P. L. 53, sets forth very clearly that the nature of the company contemplated by this section, and the Act to which it is a supplement is an incorporated company, the title being as follows: "A supplement to an Act entitled, 'An Act to establish an Insurance Department, approved April 4, 1873, providing for the incorporation and regulation of insurance companies and relating to insurance agents and brokers, and to foreign insurance companies.'" To enable the Commonwealth to secure a conviction under this indictment it was necessary to prove that the policy issued was the policy of a foreign insurance company. An examination shows that the policy admitted in evidence under objections from the defendant was not the policy of a company in the above sense.

The Commonwealth produced no evidence by records or other testimony to show that the Guarantee Lloyds is an incorporated company, or company in any sense of the term. On the contrary, the defendants produced the form of insurance, which clearly shows that the policy is issued by individuals to the number of about one hundred, each exclusively for himself, independent of others, by no contract or articles of agreement with others, executing his own separate power of attorney to three attorneys in fact, authorizing said attorneys to make insurance and fixing clearly his liability. There is no reason why the attorneys of one hundred individuals should not be allowed to do business in our State as well as the agents, or attorneys or employés of individuals engaged in any lawful business.

Commonwealth *v.* Vrooman, 3 Dist. Rep. 340.

The conviction under this indictment is in violation of the Constitution of the United States. Appellant was acting as agent of individuals, and no law can be enacted to punish him for exercising that right.

Paul *v.* Virginia, 8 Wal. 180.
Ward *v.* Maryland, 12 Id. 418.

W. U. Hensel, attorney-general (with him

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W. M. Franklin, district attorney, and *James A. Stranahan*, deputy attorney-general), for appellee.

It is within the power of the State, and the lawful exercise of its sovereignty to restrict insurance to any particular class or to bodies corporate.

Attorney-General of New York *v.* The Utica Insurance Co., 2 Johnson's Chancery R. 371.

It is purely within the discretion of the Legislature to determine when a franchise shall be created; and when its enjoyment is free to all the citizens of the State upon equal terms, it is not obnoxious to the constitutional inhibition.

Doing business in this State, under its laws, renders a corporation liable and subject to the revenue laws of the State.

Erie Railway Co. *v.* Pennsylvania, 21 Wallace, 492.
Paul *v.* Virginia, 8 Id. 168.
Fire Association *v.* New York, 119 U. S. 110.

If then a foreign insurance company, and its agents in Pennsylvania are subject to the Insurance Department of this Commonwealth, it only remains to consider and determine whether, as a matter of fact, this concern is a "company." Our deponents contend that the "company" referred to in the Act under which this indictment was found must be an incorporated company. There is nothing in definitions or in the reason of things to sustain this assumption. "Company" does not necessarily mean corporation. It is a much broader term both in its popular and legal sense.

Recently in proceedings of quo warranto by the attorney-general of Ohio against the "Guarantee and Accident Lloyds" to oust them from the franchise of doing insurance in Ohio without having complied with the laws of Ohio regulating insurance, and without license or authority from the superintendent of insurance, the Supreme Court entered judgment for the Commonwealth, deciding that the "company" cannot do business in that State without license or authority. The Michigan statutes regulating insurance are similar to ours in that they apply to all "foreign insurance companies, partnerships, associations and individuals whether corporated or not."

F. and M. Ins. Co. *v.* Salt Co., 31 Mich. 346–354.
American Ins. Co. *v.* Stoy, 41 Id. 385.
People *v.* Howard, 50 Id. 248.

Also in the Supreme Court of Illinois the case of Green *v.* People, 21 N. E. Rep, 605.

The Act under which this indictment is framed is constitutional.

Powell *v.* Commonwealth, 114 Pa. 265.
Davidson *v.* New Orleans, 96 U. S. 97.
Munn *v.* People, 69 Ill. 80.
Burdick *v.* People, 36 N. E. Rep. 948.
Commonwealth *v.* Wilson, 14 Phila. 384.
Slaughter House Cases, 16 Wallace, 36.

July 12, 1894. GREEN, J. There is no question involved in the present contention except the question whether the defendant is liable to indictment and conviction under the 47th section of the Act of May 1, 1876, P. L. 53. That section reads as follows:—

"Section 47. Any person transacting business within this Commonwealth as the agent of an insurance company of any other State or government, without a certificate of authority as required by the Act to which this is a supplement, shall be guilty of a misdemeanor, and upon conviction thereof shall be sentenced to pay a fine of five hundred dollars, but this section shall not be held to prevent the insurance commissioner from pursuing the remedies provided in the Act aforesaid." The remainder of the section is unimportant.

The defendant's contention on the trial was that he is not "the agent of an insurance company of any other State or government" within the meaning of the section, and that the Commonwealth had entirely failed to prove that the policy upon which the complaint was based was issued by a company or corporation of this or any other State. The policy in question was undoubtedly a policy executed by one hundred individual persons and contracting for individual liability of all. The point is made in argument that, although the word "company" is used in the Act it must be held to mean "corporation" only, upon the plain reading of the Act, and we think this proposition is entirely correct. The Act of 1876 is a supplement to the Act of April 4, 1873, P. L. 20, entitled "An Act to Establish an Insurance Department," and is itself entitled as follows: "A Supplement to an Act entitled 'An Act to Establish an Insurance Department,' approved the fourth day of April, one thousand eight hundred and seventy-three, providing for the *incorporation* and regulation of insurance companies, and relating to insurance agents and brokers and to foreign insurance companies." The first section of the Act provides "That any ten or more persons, citizens of this Commonwealth, may associate in accordance with the provisions of this Act and form an *incorporated company* for any of the following purposes," enumerating four different purposes. The second section provides that the persons associating themselves together shall do so, "by articles of agreement in writing for the purpose of forming an insurance company, which agreement shall specify the name by which *the corporation* shall be known," etc., etc. Then follow numerous provisions regulating the details of the organization and government of companies formed under the Act, including joint stock companies, and in which the companies formed are constantly described or referred to as "incorporated under

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this Act." Thus section 34 provides that "Companies *incorporated* under this Act must be organized upon the joint stock or the mutual plan, and the power to insure upon both plans shall not exist in the *corporation* except temporarily," etc. Section 35, "If any *corporation* created under this Act does not commence to issue policies within one year from the date of its letters patent, its *corporate* powers and existence shall cease." Section 39, "The charters for *incorporations* named in this Act may be perpetual or limited in time," etc. Section 40, "That no fire, marine, or fire and marine, insurance company, *incorporated* by any other State or government shall be authorized to transact business in this State unless," etc. Section 42, "That every insurance company in this State *incorporated* or organized after" April 4, 1873, "which has failed to file with the insurance commissioner a certified copy of its *charter*, shall file such copy within ninety days," etc., etc., "and every *company* hereafter organized shall file a copy of its *charter* with the commissioner within ninety days from the date of said *charter*," etc., etc. The 43d and 44th sections describe the organizations as *companies*, evidently meaning *corporations*, as for instance in the 44th the words occur, "with the agents of any insurance *company* not *incorporated* in this Commonwealth." The 46th section imposes a penalty upon persons transacting business as insurance brokers without a certificate of authority *as aforesaid*. Then comes the 47th section, which imposes penalties upon persons acting as agents for insurance companies of any other State or government. It is perfectly clear that the word "companies" is here used, as it is throughout the Act, as the equivalent of the word "corporations." They are indiscriminately and constantly employed as synonyms in all the sections of the Act in which they appear, and as this view is consistent with the subject of the legislation as described in the title, and in the chief enacting section, the first, which authorizes only the formation of *incorporated* companies, we do not feel at liberty to diverge from that construction in considering the 47th section.

Moreover, the offence with which the defendant is charged is the transaction of business within this Commonwealth as the agent of a foreign insurance company, without having obtained a certificate of authority as required by the Act of 1873. The eleventh section of that Act is the one which prohibits the transaction of business by agents until they have procured from the insurance commissioner a certificate that the company they represent has complied with the requirements of the Act of 1873. A reading of that section convinces us that the companies referred to in the 11th as also in the 10th section are incorporated companies. The eleventh section refers to the 10th in designating the kind of companies which shall obtain certificates and those companies as described in the 10th section, "any insurance company of another State or foreign government." It can scarcely be considered that this description was intended to include any other than regularly incorporated companies.

Whatever may be the other responsibilities of the defendant for acting without a certificate we are of opinion that he is not amenable to the penal consequences of the 47th section of the Act of 1876, and therefore the judgment of the Court below must be reversed.

The judgment of the Court below is reversed, and it is ordered that the defendant go without day. W. C. S.

July, '91, 19. April 17, 1893; April 20, 1894.

McCormick v. The Royal Insurance Co.

Special verdict—Sufficiency of—Fire Insurance—Waiver—Estoppel.

A special verdict must contain all the facts upon which the judgment of the Court is to rest, and the Court in entering judgment is necessarily confined to the facts found and embodied in the verdict and is not at liberty to aid the same by intendment or extrinsic facts which may appear in the evidence.

In an action on a policy of fire insurance, a special verdict found that plaintiffs owned certain lumber which value on the day of the fire was greater than "the insurance sought to be recovered in this case;" that it was piled in a certain way not 300 feet from a mill, etc., and that a fire was caused on May 19, 1891, by a general forest conflagration unconnected with the operation of the mill. The verdict did not find the terms and condition of the policy, or specifically that any lumber was destroyed: *Held*, that the verdict was essentially defective and should be set aside, and that the Court erred in referring to the policy in evidence, and being of opinion that the piling of the lumber within 300 feet of the mill was a breach of a warranty contained in the policy, entering judgment for defendant.

Refusal of an insurance company to pay a loss on a specified ground estops it from asserting on the trial another ground of defence of which it had full knowledge, where the assured has incurred expense and brought action in the belief that the only objection was that communicated to him.

Where a policy contains what is known as a space clause, and after the subject of the policy has been destroyed by fire, the insurer's adjuster visits the premises, and after examination tells the assured that there will be no objection to payment on the score of the "space clause," and afterwards a correspondence takes place between insured and insurer, in which the latter, with full knowledge of the facts, bases its refusal to pay, solely on a denial that the assured owned the property destroyed, such conduct constitutes a waiver of the right to take advantage of the space clause, and the insurer will be estopped from setting it up after action brought, as the

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conduct of the insurer is virtually an invitation to the assured to bring action to determine the question of property in the subject destroyed and that only.

Appeal of R. W. McCormick and John McCormick, trading as R. W. McCormick & Son, plaintiffs, from the judgment of the Common Pleas of Clearfield County, in an action of assumpsit in which The Royal Insurance Company of Liverpool was defendant.

This was an action upon a policy of fire insurance.

On the trial, before KREBS, P. J., the plaintiff gave in evidence a policy of the defendant insuring lumber of the plaintiffs, including lath and pickets, their own, or held by them in trust, or sold but not delivered, piled on the piling ground adjacent to W. H. Stevenson's mill located at Westover, Clearfield County, Penna., for one year from the 20th of July, 1891. This policy contained the following clause:—

Space Clause: "Warranted by the assured that a continuous clear space of 300 feet shall hereafter be maintained between the property hereby insured and any wood-working or manufacturing establishment, and that said space shall not be used for the handling or piling of lumber thereon for temporary purposes, tramways upon which lumber is not piled alone being excepted; but this shall not be construed to prohibit loading or unloading within, or the transportation of lumber and timber products across such clear space; it being specially understood and agreed by the assured that any violation of this warranty shall render this policy null and void."

The plaintiffs then gave in evidence a correspondence between the general agent of the defendant at Philadelphia and the plaintiffs' attorneys after the fire, in which the only subject of dispute was as to whether any of the lumber burned belonged to the plaintiffs, the concluding letter of the correspondence being as follows:—

PHILADELPHIA, July 9, 1891.

C. S. McCormick, Esq.,
Lock Haven, Pa.

Dear Sir: I am in receipt of your favor of the 6th inst., inclosing also one from Messrs. R. W. McCormick & Son, dated July 3, and beg to say that having given a full examination into the subject of this fire loss claim and being satisfied that there was no property on the premises insured under policy No. 3,923,669 belonging to your clients, I see no occasion for arbitration and decline to enter into one in behalf of the Royal Insurance Co. You are therefore at liberty to bring suit at once, any right of exemption from suit under the 14th clause of the Royal policy being waived. It seems unnecessary to refer your expression of the intention to appoint an arbitrator for Royal Insurance Co. which is utterly without warrant and will not receive any attention from the company. I remain

Yours truly,
GEO. WOOD, Agent,
306 Walnut street, Royal, Pa.

The plaintiffs called A. T. Grow and offered to prove by him and other witnesses that at the time the policy of insurance in evidence was written, Mr. Grow, who was soliciting agent for the defendant, procured the distance of 300 feet placed in the space clause, from a draft given him by W. H. Stevenson a considerable time before, showing the distance from the mill to the lumber piles to be over 300 feet, said draft having been prepared and furnished witness with a view of placing insurance for Stevenson on the mill, and that R. W. McCormick & Son, nor either of them, knew anything as to said distance, nor did they nor either of them in any way furnish to witness any evidence as to what said distance really was, but witness put the same there of his own motion. And further that when the adjuster, Mr. Taylor, came to Lock Haven to adjust said loss and after he had looked the matter of the loss over, said to plaintiffs that there was no objection so far as the space clause was concerned, which conversation occurred in the latter part of May or beginning of June, 1891, and before the correspondence in evidence took place.

The offer was objected to (1) as incompetent and irrelevant; (2), because the space clause was a warranty and could not be contradicted or varied or destroyed by such testimony as was purposed. The Court sustained the objection. (Second assignment of error.) The defendant gave evidence tending to show a violation of the space clause above quoted.

The plaintiffs in rebuttal made the following offer: "To show that when Mr. Taylor, the adjuster of said defendant company, came to Lock Haven in the latter part of May, or beginning of June, 1891, after looking into the matter of the loss in this case, he then said to plaintiffs that there was no objection to plaintiffs' claim so far as the space clause was concerned, and that afterwards the said company knowing the facts in regard to the said space clause and the objections that might be made on account of same, as to the policy being thereby made void, afterwards by their correspondence already in evidence, failed to set up any defence on account of the space clause, but put their defence on the alleged ground that the plaintiffs had no lumber on the ground at the time of the fire. This for the purpose of showing that the defendant company by its conduct after full knowledge of facts waived their defence on the ground of the space clause, or at least is estopped from setting up such defence, and as rebuttal to the defence set up on account of the space clause."

Objected to by defendant:

First. Because the testimony is irrelevant and incompetent. *Second.* Because the declaration alleged as made by the adjuster would be insuffi-

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cient to contradict the terms of, or waive the binding effect of the express warranty to which it relates. *Third.* Because the offer is not proper rebuttal. *Fourth.* Because the alleged statement by the adjuster was after the fire and after the rights of the parties were fixed, and wholly insufficient to relieve plaintiffs from the effect of the express warranty.

Objection sustained. (Third assignment of error.)

The jury returned the following special verdict:—

"We find the following facts, viz:

"That R. W. McCormick & Son did purchase from W. H. Stevenson lumber as set out in the written contract, dated the 8th day of September, 1890, and in written contract dated the 3rd day of May, 1891, and that the same was marked on the edge of the boards as the same was piled in the yard at the mill of said Stevenson with pencil marks, and that Clayton Pepperman, as agent of said McCormick & Son, went to the yard where same was piled, and shipped two car loads from said marked piles about the 23d of April, 1891.

"That there was in the yard at saw mill on the day of the fire the value of the lumber bought by the plaintiff, as aforesaid was $1,165, and $135 in excess of insurance sought to be recovered in the case.

"That the lumber in the yard was not piled 300 feet from the mill, and that in the space between the mill and the lumber piles and along the tramway there were pieces of rotten and broken boards, slabs, edging and plastering lath, in some places were about nine feet high, but that there were no lumber piled within said space as in the yard beyond.

"That the fire occurred on the 19th day of May, 1891, caused by a general forest conflagration unconnected with the operations of the mill, and that the mill had been shut down for about seven days before the 19th day of May, 1891.

"If under these facts the Court be of the opinion that the plaintiff is entitled to recover, then we find in favor of the plaintiff in the sum of one thousand and thirty dollars ($1,030) and judgment be entered for that amount. But if under these facts the Court be of the opinion that the plaintiff is not entitled to recover, then judgment to be entered for the defendant notwithstanding the verdict."

The Court subsequently entered judgment for defendant *non obstante veredicto.*

The plaintiffs took this appeal and assigned as error the exclusion of evidence above noted, and that the Court erred in entering judgment for the defendants upon the special verdict.

The case was argued April 17, 1893, WILLIAMS and MCCOLLUM, JJ., being absent, and on November 13, 1893, a reargument was ordered, which was now had before STERRETT, C. J., GREEN, WILLIAMS, MCCOLLUM, and FELL, JJ., by the same counsel who took part in the former argument.

C. S. McCormick (*J. B. McEnally* with him), for appellant.

A special verdict must itself contain all the facts necessary to sustain the judgment entered thereon or the judgment cannot stand.

Wallingford *v.* Dunlap, 14 Pa. 31.
Loew *v.* Stocker, 61 Id. 347.
Crousillat *v.* Ball, 3 Yeates, 386.
Tuigg *v.* Treacy, 104 Pa. 498.
R. R. Co. *v.* Evans, 53 Id. 253.
Whitesides *v.* Russell, 8 W. & S. 47.

The evidence excluded should have been admitted.

Parol evidence is competent to show a waiver of a breach of a condition or warranty in a policy of insurance, either on the ground of knowledge of the fact in the agent at the time of issuing the policy, or of such subsequent conduct on the part of the insurer or its agents as subject the insured to expense, inconvenience, annoyance or trouble, and lead him to believe that the breach is waived.

Brown on Parol Evid. 106.
Wood, Fire Insurance, par. 88.
Ins. Co. *v.* Wilkinson, 13 Wall. 222.
Plumb *v.* Cattaraugus Co. M. Ins. Co. 18 N. Y. 392.
Aetna Ins. Co. *v.* Olmstead, 21 Mich. 246.

That an insurance company is estopped from avoiding the policy for deficiency of clear space, where its agent when he wrote the policy knew the condition of the insured property, and that a clear space of the distance named did not exist, and that plaintiff could not control a clear space for that distance.

Michigan Shingle Co. *v.* State Investment & Ins. Co., 53 N. W. Rep. 945.

When the agent of a company from his own knowledge and without asking any information from the assured, writes a policy and it proves that when the policy is written one or more of the conditions or stipulations, which renders the policy void when broken, is broken and he takes the premium for the insurance and delivers the policy, inducing the assured to believe that he holds a good and valid policy, when in fact it is void, the company is estopped from setting up that cause as a forfeiture of the policy.

Mutual Protection Company *v.* Schell, 29 Pa. 31.
Insurance Company *v.* Cooper, 50 Id. 331.
Insurance Company *v.* Spencer, 53 Id. 353.
Kister *v.* Ins. Co., 128 Pa. 553.
Howard Ins. Co. *v.* Bruner, 23 Id. 50.

Refusal of an insurance company to pay loss on a specified ground estops it from asserting other ground relieving it from liability of which

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it had full knowledge, where the assured has incurred expense and brought suit in the belief that the only objection was that stated.

Towle v. Ionia Mutual Fire Insur. Co., 51 N. W. Rep. 987.
Roe v. Dwelling House Ins. Co., 23 Atlan. Rep. 718.
Weiss v. Am. Ins. Co., Id. 991.
Courson v. Penna. Ins. Co., 46 Pa. 323.
Crawford Ins. Co. v. Cochran, 88 Id. 233.
Snowden v. Kittanning Ins. Co., 122 Id. 502.
Pa. Fire Ins. Co. v. Dougherty, 102 Id. 571.
Welch v. London Ins. Co., 25 Atlan. Rep. 115.
W. & A. Pipe Line v. Ins. Co., 145 Pa. 361.

Thomas H. Murray (*Cyrus Gordon* with him), for appellee.

The special verdict if deficient may be amended by notes of counsel or affidavit.

Morse v. Chase, 4 Watts, 456.
Ivens' Appeal, 33 Pa. 237.
Keen v. Hopkins, 48 Id. 445.

The verdict may be even amended in the appellate Court.

Thompson v. Mattern, 115 Pa. 501.
Act of Mar. 14, 1872, § 1, P. L. 25.
Parks v. Boynton, 98 Pa. 375.
Dexter v. Billings, 110 Id. 135.

It is too late to raise an objection to the sufficiency of the special verdict to sustain a judgment, as that point was not raised in the Court below.

Rank v. Rank, 5 Pa. 211.
Wright v. Wood, 23 Id. 120.
Blake v. Metzger, 131 Id. 299.

As to the rejection of evidence, the authorities cited for plaintiffs as to the waiver at the time of execution of the policy, do not apply; they are cases in which the assured made one answer and the agent by mistake or fraud wrote down another. As to the waiver after the fire, the action of the adjuster could not bind the company, an adjuster's business and duty is to ascertain the amount of a loss. The correspondence simply waived proofs of loss and dispensed with the arbitration clause in the policy. The cases cited by the plaintiff in support of this part of his argument are all of one of three classes:—

1. Where the evidence of waiver relates to proofs of loss or limitation of the time within which action should be brought, or other "condition precedent to the right of action of the assured," and not to "a condition precedent to the undertaking of the insurers." 2. Where the evidence related to some fraud or imposition practiced by the company or its authorized agent. 3. Where the condition to which the evidence of waiver related was not a warranty on the part of the assured.

The present case does not fall within any of these classes, and the space clause is a warranty.

A defendant is not bound to name all his reasons of defence at once, hence the denial of plaintiffs' ownership of the lumber by the defendant did not estop him from setting up any other defence.

National Insurance Co. v. Brown, 128 Pa. 386.
Welsh v. London Assurance Corp., 151 Id. 618.

July 12, 1894. STERRETT, C. J. The first specification in substance challenged the sufficiency of the special verdict and alleges error in entering judgment thereon.

In Wallingford v. Dunlap, 14 Pa. 31, it is said: "A special verdict is when the jury find the facts, leaving the ultimate decision of the cause, upon those facts, to the Court, concluding conditionally, that if, upon the whole matter thus found, the Court should be of opinion that the plaintiff has a good cause of action, they then find for the plaintiff and assess his damages; if otherwise, they then find for the defendant." Nothing is better settled on principle as well as authority, than that all the facts upon which the Court is to pronounce judgment should be incorporated in the special verdict. It is the exclusive province of the jury, in the first place, to determine all disputed questions of fact from the evidence before them; and then their special verdict is made up of those findings of fact, together with such undisputed facts as may be necessary to a just decision of the cause. If important undisputed facts are omitted by mistake from the special verdict, or are incorrectly recited therein, the Court may, upon full proof thereof, so amend or mould the verdict as to make it conform to the undisputed facts. This should be done when the verdict is rendered, or as soon as practicable thereafter. The Court, in considering a special verdict and entering judgment thereon, is necessarily confined to the facts found and embodied in the verdict; the latter cannot be aided by intendment or extrinsic facts that may appear in the evidence. It is an inflexible rule that in a special verdict no inferences whatsoever, as to matters of fact, but only inferences of law, and of legal construction are allowable: 4 Minor's Inst., 752; Wallingford v. Dunlap, *supra*, and cases there cited; Loew v. Stocker, 61 Pa. 347; Van Syckel v. Stewart, 77 Pa. 125; Tuigg v. Traecy, 104 Pa. 493; Railway v. Evans, 53 Pa. 250. According to all the authorities it is essential to a special verdict that it contain all the facts upon which the judgment of the Court is to rest. Nothing is to be taken by implication or intendment. Like a case stated, whatever is not found in it is presumed not to exist.

Tested by these requirements, we think the special verdict in this case is defective.

The first clause substantially finds that plaintiffs purchased and owned the lumber in ques-

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tion, and that it was properly marked, etc., as claimed by them.

The second finds that of the lumber so owned by plaintiffs, there was in the yard on the day of the fire a quantity greater in value than the "insurance sought to be recovered in this case."

The third finds: "That the lumber in the yard was not piled 300 feet from the mill, and that in the space between the mill and the lumber piles and along the tramway, there were pieces of rotten and broken boards, slabs, edging and plastering lath, in some places were about nine feet high, but that there were no lumber piled within said space as in the yard beyond."

The fourth and last clause finds that the fire of May 19, 1891, was caused by a general forest conflagration, unconnected with the operation of the mill, and that the mill had been shut down about seven days before.

While these findings of fact, except those contained in the third clause, may be regarded as distinct and sufficiently specific, it will be observed that the special verdict is silent as to terms and conditions of the policy given in evidence. There is no finding that any lumber was destroyed by fire on May 19, 1891, or at any other time. These and other facts, obviously necessary to a just decision of the case, are left to conjecture, or must be sought for in the evidence. That, of course, is contrary to every correct precedent and cannot be sanctioned. Again, assuming for the sake of argument, that the findings in the third clause are sufficiently distinct and certain, and that they relate to a condition of things existing at a time and place material to the matter in controversy, there is nothing in the special verdict to which they are applicable. It is claimed that these findings establish a breach of the "space clause" in the policy; but how can we know that without going outside of the special verdict and resorting to the evidence to ascertain what the alleged "space clause" is. Without further comment on this branch of the case, we are of opinion that, according to the authorities above cited, the special verdict is essentially defective and should be set aside.

The subjects of complaint in the two remaining specifications are the offers of testimony recited therein respectively.

It is claimed that this testimony, in connection with other evidence in the case, would have shown that defendant company relinquished any right it may have had under the "space clause" in its policy, and by its conduct estopped itself from interposing said clause as a defence to plaintiffs' claim, and hence it should have been received for that purpose and submitted to the jury for their consideration. For present purposes it must be assumed that plaintiffs could and would have proved all the facts and circumstances suggested in these offers; and, therefore, in considering their relevancy and effect, said facts, etc., may be regarded as proved.

It was conclusively shown that on May 19, 1891, during the life of the policy, an unprecedented forest fire swept over the premises where the lumber insured was piled, and destroyed mill, lumber and everything of a combustible nature in its path. Defendant having been duly notified of the total loss, immediately sent its adjuster, Mr. Taylor, to the premises for the purpose of inquiring into the circumstances of the fire and adjusting the loss. After making such examination as was deemed proper, and with a full knowledge of all the circumstances attending the loss, etc., he informed plaintiffs that there would be no objection to payment so far as the "space clause" was concerned. The only objection he suggested was that plaintiffs had little if any lumber in the yard at time the fire occurred. As clearly shown by subsequent correspondence, the company with full knowledge of all the facts took the same position, and finally refused to pay on the sole ground that the lumber covered by the policy did not belong to plaintiffs. Under date of July 3, 1891, its general agent at Philadelphia wrote plaintiffs' attorney thus: "I note what you say as to the general agreement as to the law of the case, between yourself and . . . our counsel, but with respect to the fact it does not appear at all probable that we can come to a better understanding, as I have made a thorough investigation into the matter, and believe that I can prove beyond all question that there was not a foot of lumber at the time of the sale in the yard of Stevenson's marked as the property of McCormick & Son."

A few days thereafter plaintiffs' attorney again wrote, enclosing notice of appointment of referee, etc., and said: "I learn that no formal proof of loss, as required by the policy, was made. The reason it was not done was, that your adjuster, Mr. Taylor, said to Mr. R. W. McCormick, that no formal or other proof than he had was necessary. I don't want any technical question about this formality to arise to trouble us hereafter, and if you are not satisfied with what your adjuster has done in this regard, I desire that you say so now, so that we may put ourselves in proper shape."

To this, the general agent replied, under date of July 9, 1891, and said: "Having given a full examination into the subject of this fire-loss claim, and being satisfied that there was no property on the premises insured under policy No. 3,923,669 belonging to your clients, I see no occasion for arbitration, and decline to enter into one in behalf of the Royal Insurance Company. You are therefore at liberty to bring suit at once,

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any right of exemption from suit under the 14th clause of the Royal policy being waived."

It is impossible to consider what was said and done by the parties, the company's adjuster, its general agent, and its counsel, from the beginning until suit was brought, without being forced to the conclusion that the adjuster, acting for the company, relinquished any right it may have had under the "space clause," that, with full knowledge of all the facts, the adjuster's action in that regard was fully approved and ratified by the company, and that, by mutual understanding of both parties, the only matter in controversy between them was the ownership of the lumber in question. With that mutual understanding, plaintiffs were virtually invited to bring suit for the purpose of determining that fact and nothing else. In view of the testimony it would be idle to suggest that the effect of the "space clause" was overlooked by the company until after suit was brought. Such a thing is simply impossible, or at least extremely improbable; but, if it were otherwise, every principle of good faith and fair dealing required the company to notify plaintiffs, when they were invited to bring suit to settle the question of ownership, that the space clause would be made a ground of defence. If such notice had been given, *non constat* that they would have risked the outlay of employing counsel, and the expenses of conducting a useless law suit. If, by its wilful conduct the company led the plaintiffs on and induced them to incur expenses for the purpose of establishing their ownership of the lumber, in the belief that there was no other question in the case, justice and equity both forbid that in such circumstances the company should be permitted to impale them on the "space clause." If such a thing can be done it would be difficult to conceive of a plainer case of bad faith, by which a party is induced to change his position for the worse and involve himself in useless trouble and expense. In view of its legitimate bearing, and tendency to prove such facts as ought to constitute a waiver of the space clause and estoppel, we think the proposed testimony was relevant. In connection with other evidence in the cause, it presents questions of fact which are proper for the consideration of the jury.

In Brink *et al. v.* Ins. Co., 80 N. Y. 108, 113, the defendant company after considering the claim of the insured, decided not to pay the loss upon the ground of fraud, and so informed them. Thereupon suit was brought, and at the trial the company sought to interpose the additional defence that the proofs of loss were not filed in time. Mr. Chief Judge CHURCH, speaking for the Court of Appeals, said: "I think it was estopped from so doing. The plaintiffs' claim was challenged for fraud and that only. They acted upon it and brought an action, incurring large expense in its prosecution. *Non constat*, if the failure to file the proofs in time had been insisted on, but that the plaintiffs would have acquiesced in it and refrained from prosecuting, and thus they might be injured by the change of ground on the part of the defendant. Every consideration of public policy demands that insurance companies should be required to deal with their customers with entire fairness and frankness. They may refuse to pay, without specifying any ground, and insist upon any available ground, but when they plant themselves upon a specific defence and so notify the assured, they should not be permitted to retract after the latter has acted upon their position as announced, and incurred expenses in consequence of it."

"Refusal of an insurance company to pay a loss on a specified ground estops it from asserting other ground relieving it from liability of which it had full knowledge, where the assured has incurred expense and brought suit in the belief that the only objection was that stated:" Towle *v.* Ionia Fire Insurance Co., 51 N. W. Rep. 987.

A similar principle was recognized and applied in Bonnert *v.* Ins. Co., 129 Pa. 558, to prevent the defendant from successfully asserting a breach of condition requiring suit to be brought within six months after loss. Mr. Chief Justice PAXSON in that case said: "When an insurance company attempts to defeat a recovery upon a condition that was intended solely for its own benefit, and which deprives the assured, however honest his claim may be, of the indemnity which he paid for, it is not too much to hold the company to entire good faith. The breach of the condition must be promptly taken advantage of. Nothing else must be alleged as a reason for non-payment, and especially must not the assured be led astray by proposing settlement on grounds other than the alleged breach of the condition."

The principles which we think are applicable to that branch of the defence grounded on the "space clause" in the policy are also recognized in the following cases: Stayton *v.* Graham, 139 Pa. 1; Pipe Lines *v.* Ins. Co., 145 Pa. 346; Castner *v.* Ins. Co., 50 Mich. 273; Vos *v.* Robinson, 9 Johns. 192; Ins. Co. *v.* Miller, 120 Pa. 517; McFarland *v.* Ins. Co., 134 Pa. 590; Michigan Shingle Co. *v.* Ins. Co., 53 N. W. R. 945; Same *v.* Same, 94 Mich. 389.

For reasons above suggested the assignments of error are sustained, judgment reversed and a venire facias de novo awarded.

MITCHELL, J., dissented from so much of this opinion as implies that there was any sufficient evidence of waiver. H. B.

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Common Pleas.

C. P. No. 2. March, '92, 765.

Shepp v. Jones.

Equity—Imitation of goods of another trader—Fraud—Injunction.

One who attempts to impose his goods upon purchasers as those of a rival trader, by means which have a tendency to mislead the public, may be restrained by an injunction.

When evidence shows that a collection of pictures has been published in book form and has acquired a reputation, valuable for the purposes of sale, an imitation of the said collection, in style, form and size which so closely resembles the first collection as to naturally deceive the ordinary picture book buyer, is, although called by a different title, such a fraud upon the rights of the publisher of the first collection as to entitle him to relief by in junction and account.

Putnam Nail Co. *v.* Dulaney, 140 Pa. 205; Hoyt *v.* Hoyt, 143 Id. 623; Brown *v.* Seidel, 153 Id. 60, distinguished.

Exceptions to report of master.

The plaintiffs filed a bill, setting out that they were the authors, compilers and publishers of a collection of pictures in book form called "Shepp's Photographs of the World," that defendants had brought out a similar work called "Superb Photographs of Famous Scenes," which was, and was intended to be, an imitation of the plaintiffs' book; that the copies of the imitation issued by the defendant were well calculated to deceive the public; and praying (1) an injunction against the publication and sale of the imitation; (2) an account.

A preliminary injunction was granted. The defendant pleaded to the jurisdiction, which plea was overruled. They then answered denying fraud, "servile imitation," intention to create the impression that their book was that of the plaintiffs, and that it was of such a character as to induce the public to believe that it was the said book. The case was referred to S. S. Hollingsworth, Esq., as master, who made a report recommending that the prayers of the bill be granted. The essential facts found appear in the opinion of the Court, *infra*. The defendants filed exceptions.

H. E. Garsed and *George Tucker Bispham*, for exceptants.

Hector T. Fenton and *Richard P. White*, contra.

July 20, 1894. PENNYPACKER, J. It was said by JESSEL, Master of the Rolls, in the case of Singer Manufacturing Co. *v.* Wilson, L. R. C. Div. vol. 2, p. 440: "The view I take of the law is, that nothing can be better established, and nothing ought to be otherwise than fully established in a civilized country than this, that a manufacturer is not entitled to sell his goods under the false representation that they are made by a rival manufacturer."

The same rule is stated by Judge HARE, in Day *v.* Walls, 34 Legal Intell. 418, in the following words: "It is an obvious principle, which the authorities abundantly confirm, that no man has a right to expose his goods for sale as those of a rival trader, and one who attempts to carry such a purpose into effect by means that have a tendency to mislead the public and impose on purchasers, is liable to an action on the case, or may be restrained by an injunction."

The master in the present case has found in effect that the book published and sold by the defendants in many particulars so closely resembles the book of the plaintiffs, that the ordinary purchaser is likely to be misled into mistaking one for the other, and that, whatever may have been the motive of the defendants in so manufacturing their book, they have committed a fraudulent act, and ought to be restrained. Thus the master says: "It is difficult to understand how the cover and back of the defendant's cloth bound book should so much resemble the plaintiffs' unless there was an actual intention that such resemblance should exist." And again: "The defendant, therefore, by allowing his book to go to the public in such shape as to convey to the ordinary purchaser the idea that it is the plaintiffs' book, makes to the public a representation which he knows to be untrue." Some criticism has been suggested upon the report of the master because he has also said: "I have no doubt that the defendants did not intend to imitate the plaintiffs' book in the sense of violating anything that was protected by the copyright law." We do not see, however, any necessary inconsistency between these findings of the master. It might well be that the purpose of the defendants was to avoid the consequences of a violation of the copyright law, and at the same time to make their book so like that of the plaintiffs as to deceive the public and get the benefit of the advertising and business efforts made by the latter. In fact, assuming the purpose to exist, the problem which would doubtless present itself to the defendants would be how to make their book resemble that of their predecessors enough that it should be mistaken for it, and at the same time to escape the consequences of the imitation. At all events, the master has definitely found that the act of the defendants was in

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effect fraudulent. There is ample evidence to support the finding. The plaintiffs are publishers of a book, which was copyrighted in July, 1891, entitled "Shepp's Photographs of the World." In November, 1891, the defendants wrote to the plaintiffs, asking for quotations of prices and for circulars, and about the same time began the preparation of their book, which they called "Superb Photographs of Famous Scenes." The book of the plaintiffs contained 256 photographic scenes, and that of the defendants 263. Sixteen of these views in each book are identical, nineteen of them are of the same subjects, but reproduced from different photographs, and as to the rest, there is the same general treatment of different subjects. Each scene has a letter press description underneath and a blank page opposite. Both books have the same arrangement of contents, are of the same shape, width, length and thickness, and the edges are gilded or marbled in the same manner. The paper is the same kind in each, and was made to order. Both books were issued in two styles of binding, in leather and in cloth. With respect to the leather binding there is little or nothing distinctive, but it is different when we come to look at those in cloth. In each book in cloth there is a centre piece with six vignettes arranged around it, the word "Photographs" in bold gilt letters of the same character, and other points of resemblance which have been detailed by the master.

The books differ as to title page and preface, but it ought not to be overlooked that these features are less likely to catch the eye and make an impression in a picture book than in one intended to be read. The pictures themselves, and their arrangement, are comparatively much more prominent. Bertron, an employé of the defendant, whose duty it was to select the photographs, testifies that he had seen the canvassing book of the plaintiffs before making his selection of views. At the time the defendants' book went to press the prospectus of the plaintiffs was in the press-room of the defendants. Jefferson, who designed the cover for the book of defendants, testified that Beyer, under whose direction he acted, had a copy of the plaintiffs book, or something with which to make comparison. Beyer testifies that the title of the book of defendants, as first designed, was "Superb Photographs of the *World*," but that, at the suggestion of the defendants it was subsequently changed. Northrop, who wrote the foot notes for the defendants, testified that while he was engaged in his work he saw the prospectus of the plaintiffs. Bryan, the foreman of the printing office of the defendants, testified that a copy of the book of the complainants was given to him at the main office to be used as a guide in the preparation of the book of the defendants. Although the testimony of the last witness was contradicted, the evidence of Jefferson was: "A. He (Beyer) must have had, I think, well, I don't know whether it was a copy of Shepp's book, or what it was, but it was something that he had to compare it with.

"Q. And he thought it was too much like that and made some suggestion to you about changing it, so that it should not be so much like it?

"A. Yes, sir; those are the very words that he said.

"Q. Then he seemed to desire to avoid too great similarity?

"A. Yes, sir; that was the idea; his words were to get away from it."

According to this testimony, Beyer, after examining the books, saw that they were alike, and gave directions, not that they should be made in such a way that one could not be mistaken for the other, but that the design should be so changed that there would not be "so much" likeness. He desired to avoid a similarity which should be "too great." If the instructions were to "get away from it," the only conclusion is that he recognized the nearness. Two witnesses testified that they actually were deceived by the similarity in the appearance of the two books; one of them, Oldach, a bookbinder, saying: "When I first saw a copy of it I mistook it for 'Shepp's Photographs of the World.'" A number of expert witnesses testified that it would have been impossible to have produced the book of the defendants without having made free use of that of plaintiffs. With all of these and other facts before him, the master has found that the defendants, by allowing their book to go to the public in such a shape as to convey to the ordinary purchaser the idea that it was the work of the plaintiffs, make to the public a representation which they know to be untrue, and consequently ought to be enjoined and to be required to account. This finding, based as it is upon sufficient evidence, must be sustained, unless the law of Pennsylvania is, as is contended, different from the rule as it has been above expressed.

In the Putnam Nail Co. *v.* Dulaney, 140 Pa. 205, the plaintiff filed a bill, setting forth that it had adopted a method of bronzing a certain kind of horse shoe nails to distinguish such nails as its own manufacture, and that the defendant, for the purpose of deceiving purchasers and defrauding the public, had been for some time engaged in the manufacture of bronzed horse shoe nails, and, claiming the use of the device of bronzing as a trade-mark, asked for an injunction and account. The bill was dismissed, and, upon appeal, the decree of the

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Court below was affirmed. What is decided in that case is that the complainant had filed a trade-mark bill, and that the bronzing of a nail did not constitute a trade-mark. In rendering the decision, Judge PAXSON said: "But he may not sell his own article as and for that of another by means of a trade-mark in imitation of the trade-mark of such other person;" which language certainly does not indicate any purpose to change the rule with respect to fraudulent imitation. In Hoyt *v.* Hoyt, 143 Pa. 623, it was held that a stock bottle, to which neither party had an exclusive right, and which was freely sold to all who applied for it, could not, by use, become a trade-mark. Justice WILLIAMS said: "But the trade-mark must relate to and distinguish the goods to which it is applied. For this reason, among others, the size or shape or mode of construction of a box, barrel, bottle or package, in which goods may be put, is not a trade mark." That case is no authority for the present one, where the similarity is in the pictures, paper, descriptions, bindings, designs, and other matters constituting essential features of the books and distinguishing them. Justice WILLIAMS also proceeds to say: "As a general proposition, it may be said that one may imitate what is excellent in the processes and business methods of his neighbor as freely and as safely as he may imitate what is good in his moral character as long as he infringes no right secured to him by statute, and does not fraudulently personate him or simulate his products." The only conclusion to be fairly drawn is, that had the defendant fraudulently simulated the products of the complainant, the decision would have been otherwise.

In Brown *et al. v.* Seidel *et al.*, 153 Pa. 60, the decision was based upon the ground that while the packages of stove polish as put up by the defendant, might, perhaps, induce an ignorant or careless person to mistake the one for the other, provided he made no examination whatever, the mere possibility of mistake was not sufficient, and that following Heinz *v.* Lutz, 146 Pa. 592, the resemblance must be such that it is likely to deceive persons of ordinary intelligence. The Court hold that where the fact of imitation is in doubt the adoption of a like style of package may be evidence upon the question of intention, and that where there is a manifest intent on the part of one manufacturer to sell his goods as and for the goods of another manufacturer, the aid of equity has been successfully invoked. It cannot, therefore, be inferred from the decisions in these cases that there was any purpose to change the rule with respect to fraudulent imitation, which has heretofore been generally accepted. The rule itself seems to be based upon the principles of common honesty, and ought to be upheld.

For these reasons the exceptions to the report of the master are dismissed, and the report is confirmed. H. B.

Orphans' Court.

October, '93, 386.

Dimond's Estate.

Wills—Testamentary capacity — Drunkenness.

To defeat a will upon the ground of the testamentary incapacity of the testator, it must be shown that the incapacity existed at the time of the execution of the will.

The capacity of the testator before or after the execution of the will is merely ground for inference by the Court as to his capacity at the time of the execution.

There is no standard of drunkenness, save downright imbecility, and positive statements are required to overcome the presumption of testamentary ability.

Sur appeal from register's decision in admitting the will of testator to probate.

The facts of this case are stated in the opinion of the Court.

White, White & McCullen, for appellants.

D. J. Callaghan and *Anthony A. Hirst*, for proponents.

June 30, 1894. ASHMAN, J. If the testimony of some of the contestants' witnesses is to be received without qualification, the mental condition of the testator was as hopeless in April and May, 1890, when he executed the wills under which they claim, as they assert it was in May, 1892, when he executed the will which they dispute. There were as many and varied descriptions of his inebriety as there were conceptions in the minds of the witnesses of what constitutes drunkenness. Some of them were picturesque in the extreme. It was said by one witness that the testator "always had a kettle in his hand or a bottle in his pocket;" and, by another, that "he could not hold a match to his pipe or put a glass to his mouth;" a melancholy infirmity, which would seem to indicate that neither the kettle nor the bottle could have afforded him much solace. Of course, the most voluminous evidence under this head would be offered in vain, if it failed to show that, at the time of executing the will, the testator did not possess testamentary capacity. What his condition was before that time, or what it became afterwards, would only enable us to infer, with a greater or less degree

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of uncertainty, what it actually was then. The contestants attempted to come down to that day. They produced three witnesses, who were their near relatives, and who asserted that the testator was more or less under the influence of liquor at an early hour in the morning; and one or two other witnesses, who testified that he was thoroughly intoxicated the day before. Short of downright imbecility, there is no standard of drunkenness, and something more than vague statements, like the foregoing, is needed to destroy the presumption of testamentary ability. At the best they are mere expressions of opinion, which require to be buttressed by facts before they can be accepted as proofs; and this is especially true when they are uttered in a contest over a will, by those who have a personal interest in defeating the instrument. Some of the circumstances of the case tended to disprove their accuracy in this instance. On March 15, nearly two months before the execution of the will, the testator brought a will of earlier date to his conveyancer, and directed the preparation of a substitute, whose provisions were to follow pretty closely those of a still older will. He called again on March 30 and on April 22 to learn whether it was ready, and on May 6 he produced one of the subscribing witnesses and signed the writing. Two witnesses testified that at all of these interviews he was apparently sober and clear-headed. He explained to these persons, as he had to others, why he desired to revoke his gifts to individuals and to give instead the bulk of his estate to charities. He also arranged to pay his indebtedness to the contestants, and fixed its amount at a figure which they themselves admitted was exact. Immediately after signing the will he went to the hospital, in which his conveyancer, whom he had made an executor of his will, had previously engaged a room for him as a boarder, and where he remained until his death. The then resident physician of the hospital was not called as to the testator's condition on entering the institution, but two of the attendants swore that he was sober, and the physician who came on duty a month later said that the testator was not treated for alcoholism, and that the hospital books described his disease as fatty degeneracy of the heart.

The decedent was under no restraint while at the hospital, and occasionally left the building upon short errands, but he seems never to have abused his freedom by any intemperate indulgence in stimulants. So far as the evidence goes, we may conclude that the date at which he executed his will was a sort of dividing line in his life; because, while the proofs are many of his lapses from sobriety before that time, there are none which cast any reproach upon his conduct afterwards. His mental state on that particular day is therefore the real point of inquiry, and it was the subject of notice by four witnesses—the conveyancer who drafted the will, his clerk, who was the subscribing witness, the wife of the conveyancer, and a person who happened to be casually present. These persons, with more or less positiveness, swore that the testator was of full testamentary capacity. The only drawback to the conclusiveness of this testimony was the admission of two of the parties that they had practically certified to his testamentary capacity by drawing and witnessing a will two years before, although they knew at the time that he was mentally incompetent to perform any deliberate act whatever. The majority of the Court do not regard this circumstance as impeaching the credibility of those witnesses, nor the soundness of their judgment, when they gave their impressions of his condition at the later period. Their testimony was certainly corroborated by that of others who were present, and by proof of the long meditated intention of the testator to alter the testamentary dispositions he had previously made; a change of purpose which was explained by his strained relations with one or more of the contestants. The evidence negatives even the supposition that any physical or moral coercion was exerted upon the testator at any stage in the preparation or execution of his will; and that part of it which goes to his mental state at the very times the will went through these stages, must be accepted as conclusive, because it was uncontradicted. Against this affirmative proof of his competency at those periods, all evidence as to his capacity or non-capacity on other and earlier occasions is clearly irrelevant.

The evidence, in our judgment, would not avail to sustain a verdict against the will, and we therefore affirm the decree dismissing the appeal.

F. B. N.

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WEEKLY NOTES OF CASES.

VOL. XXXV.] *FRIDAY, SEPT. 28, 1894.* [No. 3.

Supreme Court.

Jan. '94, 327. February 14, 1894.

Westhaeffer v. Lebanon and Annville Street Railway Co.

Injunction, when to be invoked—Estoppel—Laches—Relief in equity.

In an application to enjoin respondent railway company from operating its road in front of complainant's premises, to require it to remove its embankment, ties, rails and fittings, and restore its surface to its former condition; and for general relief, such relief as his case may fairly require; respondent demurred, thereby admitting the facts and denying that they gave the complainant any cause of complaint in a Court of Equity; the Court below sustained the demurrer, and dismissed the bill on account of delay in presenting the application:

Held, to be error.

If it be conceded, that upon final hearing the complainant might be denied the injunction because of laches, he might yet be entitled to relief against the mode of construction adopted by the respondent, and to such restoration of the former grade as might be necessary to restore to him safe and convenient access to his own home.

Appeal of Jacob Westhaeffer, plaintiff, from the decree of the Common Pleas of Lebanon County, dismissing his bill for an injunction against the Lebanon and Annville Street Railway Company.

In the Court below this was a hearing on bill and demurrer.

The facts in this case are fully stated in the opinion of the Supreme Court, *infra*.

After argument the Court, McPHERSON, J., filed the following opinion:—

"The plaintiff's bill (as amended at the argument) is intended to raise the following important questions:

"1. Has a street railway company the right to use a township road even with the consent of the supervisors?

"2. Are the supervisors the proper local authorities to consent to such use? If they are, must their consent be given before the road is constructed, or may they ratify a construction to which they did not originally consent?

"3. Are turnpikes so far township roads as to be included within the first two questions? Or does the consent of a turnpike company relieve a railway company from the need of obtaining the consent of the local authorities?

"4. Is the street railway Act of 1889 unconstitutional as to townships because it makes no provision for paying or securing compensation to injured owners of abutting property? Must a street railroad company offer or secure compensation to abutting owners before it can use a township road?

"5. Must such company follow precisely the grade of the road? Is it forbidden in any case to erect an embankment, say two feet high, in front of the building of an abutting owner?

"6. If a railway company with the precedent consent of the township authorities, and without offering or securing compensation to an abutting owner, builds an embankment two feet high upon a turnpike in front of the owner's dwelling, and lays its rails thereon, does it maintain a nuisance? May it be restrained at the suit of the owner from operating its road upon these rails, and may it also be compelled by mandatory injunction to remove its embankment, rails, ties, poles and wires from the turnpike in front of the owner's property?

"These questions are interesting as well as important, and they would receive attention at the proper stage of this proceeding if the plaintiff had not lost whatever right to raise them he may have originally had. Unfortunately for him his own laches is a bar to the relief sought by the bill, and the case must be decided against him upon this preliminary question. It appears from the bill itself that the location of the defendant's railway in front of the plaintiff's property was made in March, 1891; that the work of construction was begun at this point in the following July, and that cars began to run in December, and have been running continuously since that date. Nevertheless the bill before us was not filed until November, 1892, more than a year after the plaintiff must have known just what the defendant was about to do, and after every injury now complained of was either plainly visible or certain to be done. With the knowledge he must have possessed, the facts being constantly before his eyes and at his door—it was his duty to move promptly. To do nothing under such circumstances was equivalent to express encouragement; silence was sure to mislead the defendant into the belief that no opposition was intended, and therefore that its outlay and labor might safely continue. Being responsible in this degree for this condition of things, the plaintiff cannot now successfully ask a chancellor to destroy what his own wrongful inaction has helped to create; he must accept the result of his own neglect of duty as if it had been caused by his active labor.

"This proposition is familiar and does not need

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to be elaborated. It is supported by many authorities, of which a selection will be found in 10 Am. & Eng. Ency. of Law, 802, in a note to the following statement in the text: 'A Court of equity requires reasonable diligence on the part of those seeking its aid, and discourages laches by making it a bar to relief. Therefore a plaintiff, on filing his bill for an injunction, must make it appear that he has used reasonable diligence in invoking the aid of the Court, otherwise the relief will be denied.' See also 12 Id. 533 et. seq; High Inj. Sect. 397; 2 Story Eq. Jur. (12th ed.) Sect. 1520, *ad finem*; Smith *v.* Thompson, 54 Amer. Dec. 130, note; Bigelow Estoppel, (2d ed.) 508; Galliher *v.* Cadwell, 145 U. S. 368.

"Our own cases abundantly sustain the rule, that one who misleads another to his injury may lose, not only a particular form of remedy against the latter, but may even lose all forms of remedy and thus may be effectually deprived of a legal right. Parker *v.* Spillin, 10 Phila. 8; Seal *v.* Ry., 1 Pears. 547; Carr *v.* Wallace, 7 Watts, 394; Arnold *v.* Cornman, 50 Pa. 361; R. R. *v.* McLanahan, 59 Id. 23; Chapman *v.* Chapman, Id. 214; Putnam *v.* Tyler, 117 Id. 570; Thompson's Ap. 126 Id. 373; Schuey *v.* Schaeffer, 130 Id. 22; Logan *v.* Gardner, 136 Id. 600 and 142 Id. 442.

"It may be observed, in conclusion, that we do not affirm or deny the plaintiff's legal rights in the premises. We simply decide that by his own conduct, he has lost his right to the equitable remedy by injunction, and, since his bill asks for no other relief it would be a waste of time to go further into the matter.

"Because, therefore, of the plaintiff's laches, which appears upon the face of his bill, we sustain the demurrer, and dismiss the bill at the plaintiff's costs, but without prejudice to his right to recover at law any damages to which he may be legally entitled."

The plaintiff then filed his appeal, assigning as error the sustaining of the demurrer and the dismissing of the bill by the Court.

Bassler Boyer, for appellant.

The matters averred in this bill, viz: The acts of construction, maintenance and operation, the subject of the present complaint, if without authority of law, were and are the usurpation of a right not conferred upon the company by its charter at the *locus in quo*; and therefore invalid from the beginning; a continuing trespass, rendering it a nuisance and incapable of being validated by any lapse of time, however long; and no delay of the plaintiff, in complaining against a constant defiance of the law by the company; and in seeking relief from the effect of its acts, would constitute laches on his part.

Lord CAIRNS in Evans *v.* Smallcombe, L. R. 3 H. L. 253; n. says of the curative effect of time on an act like this prohibited by law, that "lapse of time clearly would not make valid that which at the beginning was invalid."

In Marin *v.* Zellerbach, 38 Cal. 300, reported in 99 American Decisions 375, the Court says: "If an act done by a corporation were contrary to law it is incapable to ratification. No amount of ratification can give validity to an act prohibited by law."

The cases in our own State are to the same effect.

Phila. *v.* Phila. & Reading R. R. Co., 58 Pa. 253.
Groff's Appeal, 128 Id. 621.
Edgewood R. R. Co. Appeal, 79 Id. 257.
McCandless' Appeal, 70 Id. 210.

The Act of June 19, 1871, sec. 1, speaks not of future injuries which may be impending but of past and present acts resulting therein. The railway at this point, if constructed without authority of law and continued, maintained and operated there, is by such continuance, maintenance and operation the act from which the injury contemplated by this Act results. It cannot be successfully contended that a nuisance will acquire a right to be continued, and escape abatement by a failure to proceed against it before or during the process of its erection, for the reason that because of the neglect to interfere with its construction an expenditure of a large amount of money may seemingly have been encouraged. Sufficient having been admitted by the demurrer to show a want of authority to do the act complained of as a conclusion of law, it was the duty of the Court to examine and ascertain as required by the Act of June 19, 1871, and its neglect to do this was error.

A street railway company is forbidden to erect an embankment, say two feet high, in front of the building of an abutting owner, rendering his access both difficult and dangerous, where before it was safe. As said by Chancellor GREEN in Hinchman *v.* Railway Co., 17 New Jersey Eq. 80, "the road is required to be laid level with the street, there shall be no embankment or excavation and the use of the road must be nearly identical with that of the ordinary highway."

Nothing is better settled than that the law conferring this right upon a corporation to injure directly or consequentially as here, must provide an adequate remedy to secure compensation; if it fails to do this, the law, as to the parties injured and the place where the injury is sustained, is unconstitutional; and the corporation committing the injury had not and has not now any right to do the act from which the injury results. There is not a single word in the entire street railway Act of 1889 which even hints at damages to abutting owners;

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neither is there, it may be admitted, a right given to injure abutting property.

Art. 17, § 9 of the Constitution requires that "no street passenger railway shall be constructed within the limits of any city, borough or township without the consent of its local authorities."

Sec. 15 of the street railway Act of 1889 contains the same provision, and section 16 of that Act requires that actual construction shall commence within one year after consent is obtained.

Weinman *v.* Passenger Railway Co., 118 Pa. 203.
Morrison *v.* Bachert, 112 Id. 323.
Larimer Railway Co. *v.* Larimer Street Railway Co. 137 Id. 533.

The supervisors of township roads have no rights or powers except such as may be specially conferred on them by statute.

Union Township *v.* Gibboney, 94 Pa. 534.

The question: Are turnpikes so far townships roads as to require the consent of the local authorities before construction of street railways can be commenced thereon:

Steelton Borough *v.* East Harrisburg Pass. Railway Co., 1 Dist. Rep. 667.

Where the language of a statute is so devoid of certainty as to render it impossible to ascertain the result intended by them, it cannot be assumed that it was intended to give a Court, as the interpreter of the statute in the last resort, the power to control the event.

Endlich on the Interpretation of Statutes, sec. 34.
Commonwealth *v.* Bank, 3 W. & S. 173.

"The rule as to enjoining irreparable injuries only, has no application to acts, especially corporate acts, entirely without authority, for which there is no adequate measure of damages at law. Such acts equity always enjoins."

Per MITCHELL, J., Groff's Appeal, 128 Pa. 628.

C. H. Killinger (*S. P. Light* with him), for appellee.

The plaintiff's laches is apparent upon the face of his pleading.

If a complainant have knowledge of the construction of *quasi* public works, injuriously affecting his private rights and stand by in silence during the construction of such works while the other party is incurring large expenditures, such silence and delay are equivalent to acquiescence in the work and bars the complainant from any remedy, resulting in the destruction of such works.

All the more is this so where the work has been completed, and duties to the public, as here, those of a public carrier, have been entered upon.

Silence, with knowledge of expenditures being made by a party in possession, may be sufficient to create an estoppel in law.

Carr *v.* Wallace, 7 Watts, 394.
Arnold *v.* Cornman, 50 Pa. 361.
C. V. Railway *v.* McLanahan, 59 Id. 23.
Chapman *v.* Chapman, 59 Id. 214.
Logan *v.* Gardner, 136 Id. 600.
Logan *v.* Gardner, 142 Id. 442.

Laches in equity is not like limitation, a mere matter of time, but principally a question of the inequality of permitting a claim to be enforced, founded on some change in the condition or relation of the parties.

Galliher *v.* Cadwell, 145 U. S. 368.

If a party having a right stands by and sees another dealing with the property in a manner inconsistent with that right and makes no objection while the act is in progress, he cannot afterwards complain.

Duke of Leeds *v.* Amherst, 2 Phill. Ch. 117.

If a party proposes to insist on his rights in equity it is his duty to speak promptly, before the other party has changed his position, and incurred large expenditures and obligations.

Easton & McMahon *v.* N. Y. & L. B. R. R., 24 N. J. Eq. 57.
Grey *v.* O. and Pa. R. R. Co., 1 Grant, 412.
Seal *v.* N. C. R. R. 1 Pearson, 547.
West Pa. R. R. *v.* Johnston, 59 Pa. 290.
West Pa. R. R. Co.'s Ap., 104 Id. 407.
Commonwealth ex rel. Atty. Gen. *v.* Bala & Bryn Mawr Turnpike Co., 153 Id. 47.

Under such circumstances the Courts refuse their aid, in either legal or equitable proceedings, to the destruction of a franchise or public work, but permit a recovery of damages for any injury sustained.

The plaintiff's delay until the defendant has entered upon its duties as a common carrier is a bar to plaintiff's remedy by injunction or ejectment.

McAulay *v.* W. V. R. R., 33 Vt. 311.

Although he may still maintain an action for damages.

Porter *v.* Midland R. R. Co., 125 Ind. 476.
Ind., B. & W. Ry. *v.* Allen, 113 Id. 581.

The Act of 1871 authorizes the Court at the instance of a private person or corporation to ascertain the existence of a corporate franchise or right to commit an act injurious to the plaintiff, and to restrain the act if unauthorized. If the appellant's position be correct an abutting owner along the line of the Reading or Pennsylvania terminals in Philadelphia may to-day ask the Court to examine their franchises and decree the removal of the railway opposite the abutting property.

July 12, 1894. WILLIAMS, J. Several im

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portant questions have been discussed in this case that are not necessary to its decision. Some of them involve consequences too far reaching to justify us in entering upon them until their decision becomes a duty. We turn at once therefore to the question on which this appeal really depends.

The plaintiff is a lot owner on the line of the Berks and Dauphin Turnpike, in the township of South Annville, Lebanon County. The defendant is an Electric Street Railway Company incorporated under the Act of 1889. It located its line of railway along the line of the turnpike from Avon to Annville, passing through the township of South Annville, and in front of the premises of the plaintiff.

The bill charges that the rails of this road were laid by the defendant on the south side of the turnpike at a distance of seven feet from the fences of the land owners along that side of the turnpike; that in front of the premises of the plaintiff the grade of the surface was raised and a perpendicular embankment or wall, made of slag and stone, built near the south side of the track, on which the rails were laid; that this embankment, so near his yard, fence and gates, practically and seriously obstructs access to his gates and his house, and renders approach thereto both difficult and dangerous. Upon these facts he asks that the defendant may be enjoined from operating its road in front of his premises; that it be required to remove its embankment, ties, rails and fittings, and restore the surface to its former condition; and for general relief, which means such relief as his case may fairly require.

The defendant demurred, thus admitting the facts, and denying that they gave the plaintiff any cause of complaint in a Court of Equity. The learned Judge of the Court below sustained the demurrer on the ground that as it appeared from the plaintiff's bill that the defendant's railroad was completed and in operation before the bill was filed, the plaintiff was estopped by his delay from alleging that he was unlawfully injured by the change of grade. The injunction was refused and the bill dismissed for this reason. The learned Judge said that the delay by the plaintiff was fatal to him and that he had "lost his right to the equitable remedy by injunction, and since his bill asks for no other relief it would be a waste of time to go further into the matter."

But the plaintiff did ask for other relief than by injunction against the operation of defendant's road. He asked for the removal of the embankment, and the restoration of the surface to its original condition. He also asked in his prayer for general relief, for whatever form of relief a chancellor might think his case required.

If it be conceded that upon final hearing he might be denied the injunction because of laches, he might yet be entitled to relief against the mode of construction adopted by the defendant, and to such restoration of the former grade as might be necessary to restore to him safe and convenient access to his own home.

The cases cited by the learned Judge upon the subject of estoppel are not applicable upon the facts of this case, unless it be to the prayer for an injunction against the operation of the defendant's road. But the specific injury complained of is the embankment and its effect in obstructing access to the plaintiff's house and grounds. This is alleged to be an unauthorized and illegal obstruction maintained by the defendant. The demurrer admits this. If the defendant was encouraged to expend money in the erection of the embankment by the words or acts of the plaintiff a question of estoppel might be raised: Logan *v.* Gardner, 136 Pa. 588. But if the defendant erected it in accordance with its general plan of construction without regard to the wishes or conduct of the plaintiff then no element of estoppel exists in the case so far as this subject is concerned. If the fact is that the defendant was invited or encouraged to erect this embankment by the plaintiff, that fact must be alleged in an answer and sustained by proof. If this is not successfully done the defendants must justify their conduct in the change of the grade of the street, and thereby obstructing access to the premises of the plaintiff in some other manner, or remove the obstruction in such manner as the Court may direct.

The decree appealed from is reversed, the record remitted and the defendant is ordered to answer. The costs of this appeal to be paid by the appellee. W. C. S.

Jan. '94, 389. March 14, 1894.

Sweet v. Williams.

Execution—Priority of lien—Fi. fa.

A pluries fi. fa. issued and duly prosecuted does not lose its priority because the party who issued it had previously issued a fi. fa. and an alias which he had stayed.

An execution will not be postponed for the fault of the officer who should have carried it into effect; his procrastination can affect the creditor only when the latter directs the officer not to proceed—mere sufferance will not bring about a postponement.

Appeal of J. T. Sweet, plaintiff, from the decree of the Common Pleas of Bradford County, distributing a fund arising from the sale upon execution of property of Charles Williams, defendant.

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The facts of the case were as follows: On the 3d of September, 1891, the Towanda Foundry Company held two judgments in the Common Pleas, Bradford County, Nos. 775 and 776 September term, 1891, against Charles Williams, and on that day issued respectively writs of fi. fa. thereon to Nos. 13 and 14 December term, 1891. The sheriff on these writs made no sale, but did levy on a portion of the same property, by a sale of which the fund in dispute was made as hereinafter stated, and then returned the writs by order of the plaintiff.

On the 3d of March, 1893, the Towanda Foundry Company issued on its said judgments respectively writs of vend. ex. with clause of fi. fa., Nos. 58 and 59 May term, 1893, on which the sheriff made no levy, but sold the property mentioned in the writs and also other property levied on, on other writs as hereinafter stated.

On the 6th of February, 1893, J. T. Sweet held a judgment in said Court No. 309, December term, 1892, against the said Charles Williams for the sum of $300, and on that day issued a plus. fi. fa. on it to No. 25 May term, 1893, by virtue whereof the sheriff on the 6th of March, 1893, levied upon the same property levied upon in September, 1891, on the said fi. fas. of the Towanda Foundry Company and other property of the defendant never levied on, on any Towanda Foundry Company writ, and advertised the same for sale, and sold the same March 14, 1893, for the sum of $331, $200 of it being made by the sale of property levied upon in September, 1891, on the foundry company writs, and the balance, $131, by the sale of other property never levied upon on any writ of the foundry company. The entire fund, after payment of costs of sale and audit was claimed by J. T. Sweet on his pluries fi. fa., and also by the foundry company on its writs of vend. ex.

The foundry company admitted that it made no claim to the fund for distribution on account of a lien thereon by virtue of the levy on said fi. fas. No. 13 and 14 Dec. term, 1891, but claimed that Sweet by his action postponed his execution to that of its writs. The only evidence given to sustain this claim of the foundry company was the writs issued by Sweet on his judgment.

The matter was referred to James H. Webb, Esq., as auditor. The auditor found and held that the Sweet writ was the first lien, and that it was not postponed in favor of the foundry company writs, and decreed the fund after payment of costs to Sweet.

Exceptions were filed by the Towanda Foundry Company, which were sustained by the Court, PECK, P. J., and the fund was awarded to the exceptant. J. T. Sweet took this appeal.

I. McPherson (*E. J. Angle* with him), for appellant.

Appellant is entitled to the fund, because his writ was first issued, and the defendant's personal property levied upon and sold by the sheriff upon it, and there is no evidence to postpone it to the subsequent writs of the appellee.

If a plaintiff gives the sheriff orders inconsistent with the command of his writ, or does anything evincing his intention not to have a sale of the defendant's property upon it, the legal effect will be to postpone his writ in favor of a subsequent one. But there is no evidence whatever in the case that the appellant, by word or deed in any way whatever, interfered with the sheriff in his execution of the command of the writ on which the property was levied and sold. The mere fact that the appellant issued two prior writs at most would only justify an inference that he issued to get priority of lien as against other creditors. But a person who issues a writ for the purpose of obtaining priority, if he do not interfere with the sheriff in the execution of it, will not be postponed.

Stroudsburg Bank's Appeal, 126 Pa. 523.
Landis *v.* Evans, 113 Pa. 332.

If, however, the appellant's writ be regarded as subsequent to the appellee's, still the appellant is entitled to the proceeds of the sale, because the sheriff made no levy on the appellee's writs.

McClelland *v.* Slingluff, 7 W. & S. 134.
Stroudsburg Bank's Appeal, 126 Pa. 523.
Schuylkill Co.'s Appeal, 30 Id. 358.

James H. Codding (*John W. Codding* with him), for appellee.

Instructions to the sheriff to stay proceedings, or not to proceed upon an execution, or which indicate that it was issued not for the purpose of levy and sale, but for the purpose of lien, and to acquire security for the debt, destroy the lien as to purchasers and subsequent execution creditors.

Kent, Santee & Co.'s Appeal, 87 Pa. 167, quoting Commonwealth *v.* Stremback, 3 Rawle, 341.
Freeburger's Appeal, 4 Wright, 244.
Pary's Appeal, 5 Id. 273.
Stern's Appeal, 64 Pa. 447.

Our contention is, that while the clearly dilatory purpose of the first two writs is not to be construed as affecting the validity of the third writ had it been duly prosecuted, yet the fact that no levy was made under the third writ until the appellee's executions were in the sheriff's hands, is to be construed with the history of the original and alias writs, as indicating an attempt to hold security and not to collect the debt.

May 31, 1894. MCCOLLUM, J. The fund

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for distribution was raised by a sheriff's sale of the personal property of Charles Williams against whom the Towanda Foundry Company, appellee, held two judgments, and J. T. Sweet, appellant, held one judgment. A portion of the property was levied upon September 11, 1891, on writs of fieri facias on the appellee's judgments, and on the 3d of March, 1893, writs of venditioni exponas were issued thereon. On the 6th of February, 1893, a pluries fi. fa. was issued on the appellant's judgment and by virtue of it all the property was levied on and sold. The appellee expressly disclaims any priority of lien by reason of the levies on the 11th of September, but insists that the whole fund is applicable to its writs issued on the 3d of March because the appellant stayed the fi. fa. and alias fi. fa on his judgment and the sheriff did not make a levy by virtue of the pluries fi. fa. before the appellee's writs came to his hands.

The learned auditor concluded that the evidence before him was insufficient to warrant a finding that the pluries fi. fa. was issued for the purpose of lien only, and he accordingly awarded the fund to the appellant; but the learned Judge of the Court below being of opinion that such a finding was demanded by the evidence, awarded the fund to the appellee.

The sheriff's returns to the preceding writs on the appellant's judgment constituted the only evidence on this point. From these returns it appears that the appellant consented that the first writ, and directed that the second, should be returned unexecuted. But how did this consent and direction affect the lien of the pluries fi. fa.? At most they operated as a stay of proceedings on the writs to which they related. They did not authorize an inference that the last writ was for the purpose of lien only. The learned counsel for the appellee concede this in their brief when they say: "Our contention is therefore that while the clearly dilatory purpose of the first two writs is not to be construed as affecting the validity of the third writ had it been duly prosecuted, yet the fact that no levy was made under the third writ until the appellee's executions were in the sheriff's hands, is to be construed with the history of the original and alias writs, as indicating an attempt to hold security and not to collect a debt." But there was no evidence that the appellant interfered by word or act with the due execution of the pluries fi. fa. It was a valid writ in the hands of the sheriff, and his rights and duties under it together with the lien of it upon the property of the defendant were unaffected by the returns on the prior writs, or the directions of the appellant in respect to them. It was received by the sheriff on the 6th of February and it was returnable on the first of May. By virtue of it the sheriff on the 6th of March levied on all the property on which it became a lien when he received it, and on the 14th of March he sold the same. In this execution of the writ considered by itself there was nothing to charge the appellant with a misuse of it. Manifestly when the pluries fi. fa. was received by the sheriff it became a lien upon the property sold by virtue of it. This much, as we have seen, was conceded by the appellee.

It follows that the lien so obtained was not postponed to subsequently acquired liens unless, as the appellee alleges, the appellant interfered in some manner with the execution of the writ. The burden was on the appellee to show such interference. It was not presumed from the alleged delay in making the levy. Affirmative proof of it was required. "An execution will not be postponed for the officer's default. His procrastination even by the sufferance of the creditor is not fraudulent *per se*, and postpones only when the creditor directs him not to proceed": McGinnis *v.* Prieson, 85 Pa. 111, and cases cited therein. We summarize our conclusions on this branch of the case as follows: The action of the appellant in staying the previous writs did not postpone the lien of the pluries fi. fa., or cast on him the burden of showing that it was issued for the purpose of collecting his judgment. Presumptively it was so issued. *Prima facie* it was a lien from the time it was received by the sheriff, and in order to postpone it to the subsequent writ it was incumbent on the contesting creditor to show that it was issued or used for a purpose condemned by the law. No act or declaration of the appellant was shown which would justify an inference of such a purpose.

While the conclusions above stated and the concession of the appellee in reference to the September levies render it unnecessary to consider the other questions in the case which were discussed by the counsel, it is proper to note that in the distribution among execution creditors of a sum of money realized by a sale of personal property the money must be appropriated to the writs which were levied on it or the property to the exclusion of the writs which were not so levied: McClelland *v.* Slingluff, 7 W. & S. 134; Schuylkill Co's. Appeal, 30 Pa. 358, and Stroudsburg Bank's Appeal, 126 Pa. 523. Applying this principle to the case before us and relying on the disclaimer of priority founded upon the September levies, we are unable to discover upon what ground the appellee can claim all or any portion of the fund, in view of the fact that its writs issued March 3, 1893, were not levied upon the property or upon the money realized by the sale of it. It may be that the levies made on the appellee's writs on the 11th of September, 1891, were suf-

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ficient as against the defendant to support the writs of venditioni exponas, issued on the 3d of March, 1893, but they were not sufficient to continue the lien on the property against his subsequent execution creditors. As to such creditors it was clearly postponed by the arrangement under which the writs were returned levied and the defendant in them was allowed eighteen months in which to make payments from time to time on account of them. We are satisfied therefore that the appellee lost nothing by its disclaimer of priority by virtue of these levies.

In accordance with the views we have expressed we sustain all the specifications of error.

Decree reversed at the cost of the appellee, and record remitted to the Court below with directions to enter a decree in conformity with this opinion. H. B.

Jan. '94, 373. March 14, 1894.

Melick v. City of Williamsport.

Constitutional law—Remedial legislation—To be so interpreted as to be made effective—Classification of cities—Unconstitutional Act of May 24, 1887, P. L. 204—Remedial Acts of May 13 and May 23, 1889, P. L. 196 and 277.

Intolerable confusion having been the effect of the unconstitutionality of the Act of May 24, 1887, P. L. 204, the Legislature sought to supply a remedy by the Acts of May 13 and May 23, 1889, P. L. 196 and 277—the former being intended more particularly to apply to the past, while the later provided for the future.

As the true intent of the Act of May 13, 1889, is not in the least doubt, it will not do to stick in the letter of its terms. It specifies ordinances and resolutions, but it also declares the city councils under the Act of 1887 to be and to have been legally constituted, and its clear purpose was to validate municipal action based on the Act of 1887.

Therefore an office supposed to have a legal existence under the Act of 1887 was legalized by the Acts of 1889. The duties which the incumbent discharged were validated, and so was his claim for the salary appointed for the office by councils.

Appeal of H. B. Melick, plaintiff, from the judgment of the Common Pleas of Lycoming County in favor of the City of Williamsport, defendant, on case stated.

Assumpsit to recover on a compromise, agreed upon, of a claim for services rendered by plaintiff as city assessor.

The facts are stated in the opinion of SAVIDGE, P. J., specially presiding, which was as follows:—

"At the February election, 1888, plaintiff was elected city assessor of the City of Williamsport. He took upon himself and performed the duties of the supposed office. His compensation was fixed by ordinance of councils at $250 per annum.

"January 27, 1889, the Act of May 24, 1887, creating the office of city assessor, was declared by the Supreme Court unconstitutional. Ayar's Appeal, 122 Pa. 266.

"The city controller refusing to sign a warrant for his salary, plaintiff threatened suit, whereupon a compromise ordinance was passed March 17, 1890, providing for the payment of $125, one-half of the amount originally fixed. The controller declined to recognize this ordinance, and plaintiff brought his action to recover the $125 with interest.

"'An unconstitutional act is not a law; it confers no right; it imposes no duties; it affords no protection; it creates no office; it is in legal contemplation as inoperative as though it had never been passed:' Norton *v.* Shelby County, 118 U. S. 425.

"There being in contemplation of the law no such office as that of city assessor, plaintiff was not a *de facto* officer. A *de facto* officer is one who improperly or illegally holds an office having a legal existence. Here there was no office, hence there could be no officer, and the ordinance providing for the salary was illegal. Municipal corporations are not liable for services performed by an officer under an unconstitutional statute: Dillon on Municipal Corporations, Sec. 230, note 1.

"Plaintiff, however, claims by virtue of the compromise ordinance of March 17, 1890, and insists that the action taken by councils is binding upon the corporation.

"Agreements of compromise are highly favored in law and, when within the scope of powers of the parties to them, will be rigidly enforced. But, unfortunately for plaintiff, the compromise ordinance was in contravention of the Act of Assembly. Not only was it illegal, but had the city controller countersigned plaintiff's warrant, he would have been guilty of a misdemeanor.

"The Act of May 23, 1889, P. L. 277, governing cities of the third class, of which Williamsport is one, provides Article 4, sec. 5: 'The councils shall prescribe by ordinance the number, duties and compensation of the officers and employés of the city, and no payment shall be made from the city treasury, or be in any way authorized to any person except an officer or employé elected or appointed in pursuance of law; and no ordinance shall be passed giving any extra compensation to any office, servant, employé, agent or contractor, nor providing for the payment of any claim against the city without previous authority of law; and any officer drawing or countersigning any warrant or passing any voucher for the same, or paying the same, shall be guilty of a misdemeanor.'

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"Plaintiff was not 'An officer or employé elected or appointed in pursuance of law.' As we have seen an unconstitutional act 'creates no office,' and where there is no office there can be no officer. Nor had plaintiff's claim 'previous authority of law.'

"The compromise ordinance being thus forbidden, we are compelled to conclude, with great reluctance, the plaintiff has no standing in law to assert his claim, and judgment is entered for the defendant for costs."

The Court after a re-argument being of the same opinion, and judgment having been entered accordingly, plaintiff appealed, assigning as error the entry of judgment for defendant and the failure to enter judgment for plaintiff.

H. C. McCormick (with him *S. T. McCormick* and *A. W. King*), for appellant.

If the contention of the defendant that although the city ordinance of March, 1888, is validated by the Acts of 1889 (as they are obliged to concede under Devers *v.* York City, 150 Pa. 208), it can only operate upon the office of city assessor where it is subsequently created by a valid Act of Assembly, then curative legislation like that of 1889 could never be effective.

Donley *v.* City of Pittsburgh, 29 WEEKLY NOTES, 362.

The city's action in compromising a claim to avoid litigation is a valid and enforceable contract, and the plaintiff may recover on that ground.

N. M. Edwards, city solicitor, for appellee.

July 11, 1894. MITCHELL, J. The effect of the unconstitutionality of so important a statute, under which so much had been done, as the Act of May 24, 1887, P. L. 204, dividing cities into classes, was as said in Devers *v.* York, 150 Pa. 208, intolerable confusion, and the Legislature when it addressed itself to the task of providing a remedy, intended to make it complete as far as lay in its power. The Act of 13th May, 1889, P. L. 196, therefore declared all the existing councils "to be and *to have been* legally constituted councils," and all their ordinances and resolutions were validated and declared to be in full force. The operation of the Act was intended to be upon the past even more than upon the future, for the future would be taken care of by the Act of 23 May, 1889, P. L. 277, for the incorporation of cities of the third class, which was proceeding on its legislative passage *pari passu* with the other Act. But the past required a special and additional remedy, and that was given by declaring the councils to have been legal and their ordinances to be valid. But how can an ordinance fixing the salary of an officer be valid or have any effect as to the past unless there was an office to which it could apply? To make valid the ordinance was therefore necessarily to declare that for the purposes and to the extent of what had been done under it, the office must be treated as having a legal existence.

The learned Judge below thought that though the ordinance was made valid, the office was not created until the passage of the later Act, and therefore not being in existence when the plaintiff was elected the ordinance could not apply. The strict letter of the Act of May 13 might countenance this view, but such a construction would deprive the Act of the greater part of its intended benefit. It is not merely a question of this office, or this officer's salary, but of the whole municipal action. If there was legally no assessor, then the assessments and valuations of property, and perhaps the taxes paid thereon, would go for naught, and we get back again at once to the confusion meant to be prevented. As the true intent of the statute is not in the least doubt, it will not do to stick in the letter of its terms. It specifies ordinances and resolutions, but it also declares the councils to be and to have been legally constituted, and its whole tenor makes clear its purpose to validate all municipal action based on the Act of 1887, and to declare that if it would have been valid under that Act, it shall be treated as if valid now. The plaintiff was elected in February, 1888, to an office supposed to have a legal existence, and to which a salary attached by virtue of an ordinance having all the forms in law. He performed the duties of the office and would have been entitled to the salary, but that both office and ordinance failed together by the failure of the statute on which they rested. The Legislature immediately validated the ordinance and restored the office by the Acts of May 13 and May 23, 1889. The result was to make legal what before had only the appearance of legality. As said in Devers *v.* York, *supra*, "the order of dates of the two statutes is entirely immaterial. They are parts of the same legislative effort to repair the mischief which the invalidity of the previous Act had brought about, and to ratify everything that had been done under it, as broadly and as conclusively as if it had been legally authorized in the first instance."

The principles on which that case, and Donley *v.* Pittsburgh, 147 Pa. 348, were decided, are applicable to the present case and control its decision.

Judgment reversed, and judgment is now entered for plaintiff. J. D. B., Jr.

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Jan. '94, 104. May 16, 1894.

In re Borough of Columbia.

Appeal of County of Lancaster et al.

Judicial proceedings—Measures of a public character—Notice—Division of borough into wards—Irregularity—Acts of May 14, 1874, and May 10, 1878.

It is elementary law that those interested in, or affected by a judicial proceeding should have proper and timely notice thereof; and if the kind of notice to be given, etc., is not prescribed by statute it is the duty of the Court in which the proceeding is inaugurated to direct either by standing rule or special order the kind of notice, etc., that should be given.

Commissioners were appointed under the Act of May 14, 1874, and its supplement of May 10, 1878, P. L. 51, to inquire into the propriety of granting the prayer of a petition of citizens of the borough of Columbia to divide the borough into wards. No provision was made in the order as to the notice to be given. The commissioners caused small hand bills to be posted in ten or twelve of the hotels, saloons, etc., of the borough, which contained about twelve thousand inhabitants, and in which daily and weekly newspapers were published. The report of the commissioners recommending a division of the borough into nine wards having been confirmed by the Court:

Held, that the proceedings were void for lack of notice and should be set aside.

The petition was for a division into "wards." The order to the commissioners was to the effect that if they deemed such division necessary for the convenience of the inhabitants they should make a plot or draft of the proposed new "election districts:"

Held, careless and erroneous practice.

Appeal of the County of Lancaster and Robert S. Conklin, an inhabitant of the Borough of Columbia, from the decree of the Quarter Sessions of Lancaster County, dividing the Borough of Columbia into nine wards and nine election districts.

At a Court of Quarter Sessions held January 21, 1893, a petition of freeholders, residents of the Borough of Columbia, in said county, was presented, asking the Court to appoint three impartial men to inquire into the propriety of dividing the Borough of Columbia into wards to suit the convenience of the inhabitants thereof, according to the provisions of the Act of Assembly. On January 23, 1893, the Court appointed commissioners to inquire into the propriety of granting the prayer of the petitioners. Subsequently an order was issued to the commissioners which directed them to inquire into the propriety of granting the prayer of the petitioners, "and if they, or any two of them, shall be of opinion that such division is necessary for the convenience of the inhabitants thereof, shall make a plot or draft of the proposed new election district or districts, if the same cannot be fully designated by natural lines or boundaries; all of which they, or any two of them, shall report to the next Court of Quarter Sessions, together with their opinion of the same."

At the April Sessions, 1893, the commissioners made their report, but failed to state their "opinion of the expediency and propriety of a division," though they reported in favor of dividing the borough into nine wards. The order to the commissioners contained no direction to them as to the character of the notice to be given by them of the time, place and purpose of their meeting. Their report showed that they gave notice by hand-bills posted in ten or twelve hotels and saloons in the borough. This report of the commissioners was subsequently confirmed absolutely by the Court on August 24, 1893, and, on October 25, 1893, the Court in a decree by BRUBAKER, J., fixed the polling places in the nine wards into which the borough was divided by report of the commissioners. Subsequently an appeal was taken by the County of Lancaster and Robert S. Conklin, an inhabitant of the Borough of Columbia, from the decree of the Court confirming the report of the commissioners dividing the borough into nine wards and nine election districts. The errors assigned were confirming the report of the commissioners and dividing the borough into nine wards and nine election districts.

J. Hay Brown and *W. F. Beyer* (with them *George A. Lane*, county solicitor, and *W. U. Hensel*, for appellants.

The petition was for a division into "wards," the order referred to "election districts." This is the first fatal defect in the proceedings.

In re Bethel Township, 1 Pa. 97.
In re Shamokin Borough, 6 P. C. C. R. 573.
Brown *v.* Fowzer, 114 Pa. 446.

The second is the failure to prescribe proper notice in the order of the Court and the adequacy of the notice given.

In re Gettysburg, 90 Pa. 355.
Brown *v.* Fowzer, *supra*.
In re Dickson City Borough, 3 Lanc. L. R. 179.

The third is the failure of the commissioners to report their opinion of the expediency of the division.

In re Harrison Township, 5 Pa. 447.

Charles I. Landis (with him *C. C. Kauffman*, *W. T. Brown* and *William B. Given*, for appellees.

No exceptions were filed to the report of the commissioners in the Court below. They can not for the first time be exhibited in the Supreme Court.

In re Road in Collins Township, 36 Pa. 85.
In re Road in Verona Borough, 21 WEEKLY NOTES, 534.

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In re Walnut Street, Lancaster City, 31 Leg. Int. 332.

The order to the commissioners conformed to the law in all respects except in the accidental verbal substitution of "election districts" for "wards." The two are in fact synonymous.

Act May 10, 1878, P. L. 51.

The notice given was signed by the clerk of the Quarter Sessions and set forth the time, place and purpose of the meeting. It was served on the chief burgess twenty days before the meeting; was posted in ten of the most public places of the borough; and service of it was accepted by the county commissioners, who are now here as appellants. There could have been no fuller notice by direction of the Court.

The points raised by appellants are purely technical.

July 12, 1894. STERRETT, C. J. It is of the first importance in proceedings such as this, that proper public notice of the time, place and purpose of the commissioners' meeting, etc., be so given that it will be likely to reach every person who is or may be interested therein. Anything short of this, is sure to be unjust to individuals and detrimental to the public interest. True, the Act is silent on the subject of notice, but as was well said in Brown *v.* Fowzer, 114 Pa. 446, 451, "proper notice of the proceedings should be directed by the Court on the filing of the petition, and the character of the notice to be given should be embodied in the order. The report should certify specially what notice was given, so that it may appear on the face of the proceedings that the order of Court has been complied with. The powers conferred by the Act are of a public and important character, and all parties interested ought to have an opportunity to be heard, and such opportunity can best be obtained by an adequate notice so given as to reach most effectively the various parties." It is elementary law that those interested in or affected by a judicial proceeding should have proper and timely notice thereof; and if the kind of notice to be given, etc., is not prescribed by statute it is clearly the duty of the Court in which the proceeding is inaugurated to direct either by standing rule or special order the kind of notice, etc., that shall be given.

In this case, on presentation of the petition, commissioners were appointed without any order or provision whatever as to notice. The order issued to them is not only silent as to the character of the notice to be given by them of the time, place and purpose of their meeting, but it directs that "if they or any two of them shall be of opinion that such division is necessary for the convenience of the inhabitants thereof, they shall make a plot or draft of the proposed new election district or districts, if the same cannot be fully designated by natural lines or boundaries," etc. This substitution of "election districts" for "new wards" doubtless occurred, as has been suggested, by using the wrong blank form; but, that is a very unsatisfactory excuse for the careless and erroneous practice which has characterized this proceeding.

As appears by their report, the commissioners, prompted perhaps by their own conviction of the necessity for notice of some sort, caused small hand-bills to be posted in ten or twelve of the hotels, saloons, etc., of the borough. So far as appears, no other attempt was made to notify the people of the proceeding in which they were all more or less interested. It is needless to say, that for a borough of about twelve thousand inhabitants, with daily and weekly newspapers circulating in their midst, such notice as was given was wholly insufficient. Such irregular and erroneous proceedings cannot be sustained.

Petition dismissed and all proceedings thereunder reversed and set aside. J. D. B., Jr.

Jan. '94, 308. February 22, 1894.

Larkin v. The City of Scranton.

Road law—Eminent domain—Measure of damages — Jurisdiction — When objection to waived.

Where land is taken for a public road by a city, which has notice of the appointment of the viewers, of their report, and of the plaintiff's appeal, and pleads, without objection, to the issue framed on the appeal, it is too late for the city to raise the question of jurisdiction by a point presented upon the trial.

Where land is taken for public use, the measure of damages is the difference between the market value before and after the improvement; and it is error to allow the jury to consider the cost of replacing buildings injured by the taking, as an independent item of damage.

Dawson *v.* The City of Pittsburg, 34 WEEKLY NOTES, 69, followed.

In an action for damages for taking land for public use, the Court charged the jury that the land was taken absolutely from the owner and vested in the municipality taking it for all time; and further told them to consider as a separate item of damage the cost of replacing buildings injured by the taking, entirely independently of the question of the value of the property taken:

Held, to be error.

Appeal of the City of Scranton, defendant, from the judgment of the Common Pleas of Lackawanna County, upon an issue of trespass, framed by the Court, upon an appeal by Michael Larkin from an award of damages by viewers

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for land taken in widening West Lackawanna avenue, in the City of Scranton.

Upon the trial before SMITH, J., the following facts appeared: Michael Larkin, the plaintiff, was the owner of a lot of land on the south side of West Lackawanna avenue, in the City of Scranton, seventy-five feet wide in front and eighty-seven feet deep. Until 1890 West Lackawanna avenue was only thirty feet wide in front of plaintiff's property and for two or three blocks adjoining it. There was a six foot sidewalk on the north side and a twenty-four foot roadway.

By ordinance approved August 26, 1890, the city widened the street to the width of forty-two feet by taking twelve feet off the front of the lots on the south side of the avenue; locating a six foot sidewalk on that side and increasing the width of the roadway to thirty feet. All but three of the owners of property taken released any claims for damages. Bonds were tendered and filed in Court to secure the damages of these three, of whom the plaintiff was one; and the city went on and appropriated the land. Upon petition of the plaintiff viewers were appointed to assess his damages; from their award he appealed, of all of which the city had notice, and at his request the Court framed an issue in trespass upon which the trial was had without objection by the city.

The defendant submitted, *inter alia*, the following point:—

2. The damages and benefits from the widening of West Lackawanna avenue, not having been first ascertained by viewers appointed in accordance with the provisions of the Act of May 23, 1889, Article XIV., the Court had no jurisdiction of this appeal, and the verdict must be for the defendant.

Answer. I refuse this point, and submit the case to you to determine from all the evidence whether the plaintiff has suffered damages by reason of this taking, and if so, to what extent, and you will so find by your verdict.

The Court charged the jury, *inter alia*, as follows:—

"The fact that Mr. Larkin owned a lot of land fronting on West Lackawanna avenue, in this city, having seventy-five feet frontage on that avenue, and that a strip of twelve feet along that avenue was taken by the city, for public purposes, is admitted. It is taken by virtue of the power of eminent domain, vested in this city, and to be exercised by the city when the public needs require it. [That strip of land, containing 900 feet, is taken absolutely from Mr. Larkin; the title to it is taken from him, and vested in the city of Scranton by virtue of this proceeding for all time.] . . . .

"[There is testimony uncontradicted that there was a stone structure there, used by Mr. Larkin and his sons in their trade, that a part of it was cut away. The city engineer testifies himself that he fixed the line which severed a part of that building, and took the ground upon which it was into the city limits. You have also the right to consider the condition of the property in the rear of that building, in determining what it would require to place it in such a convenient position as it was before, and that consideration may be entirely independent of the question of the value of the property, which the city admits it has taken for public purposes.]"

Verdict for the plaintiff for $1400, and judgment thereon. Whereupon the defendant took this appeal, assigning for error the refusal of its point as above, and the portions of the charge given above in brackets.

James H. Torrey, city solicitor, for appellant.

The language of the Court was calculated to mislead the jury as implying a complete and absolute divesture of the plaintiff's title and interest in the land.

Wilson *v.* City of Scranton, 141 Pa. 621.
Elliott on Roads, 172.
Lance's Appeal, 55 Pa. 16.
Lewis *v.* Jones, 1 Id. 337.
Lyon *v.* Gormley, 53 Id. 261.

It was error to allow the jury to consider the cost of restoration as a separate item of damages.

Chambers *v.* South Chester, 28 WEEKLY NOTES, 249.
R. R. Co. *v.* McCloskey, 110 Pa. 436.

The plaintiff had viewers appointed to assess his individual damages caused by the widening of a street, and there is no statute which warrants the appointment of viewers for such a purpose. The Court was therefore without jurisdiction, and the proceedings are void.

Act of May 23, 1889, P. L. 314.
Lewis on Eminent Domain, § 603.
Zack *v.* Penn. Railroad, 25 Pa. 394.
Reitenbaugh *v.* R. R., 21 Id. 100.

W. H. Jessups (*Alfred Hand* with him), for appellee.

The City of Scranton having joined issue before the jury can not now except to the jurisdiction of the Court.

Wilson *v.* The City of Scranton, 141 Pa. 621.

July 11, 1894. MITCHELL, J. The statement in the charge that "the strip of land is taken absolutely from Mr. Larkin; the title to it is taken from him and vested in the city of Scranton by virtue of this proceeding, for all time," was probably inadvertent, but it was unfortunate, for although it may not have substantially affected the amount of damages, yet we cannot say that

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it did not do so. It bore directly on that subject; and was clear technical error: Wilson *v.* Scranton, 141 Pa. 621.

The charge was also unfortunate in the expression in reference to the stone building that the jury "have also the right to consider the condition of the property in the rear of that building in determining what it would require to place it in such convenient position as it was before, and that consideration may be entirely independent of the question of the value of the property which the city admits it has taken for public purposes." The last clause of this sentence might easily lead the jury to suppose that they should assess the cost of replacing the building as a separate and independent element of the damages. It was an item for consideration, but only as a part of and in clear and complete subordination to the general criterion, the difference in market value between the plaintiff's whole property before the taking, and what remained to him after it. The distinction, and the proper use of such incidental evidence, are fully explained in Dawson *v.* Pittsburg, 159 Pa. 317.

The objection to the jurisdiction raised in the third assignment of error need not be considered. It comes too late. The city had notice of the appointment of the viewers, of their report, and of the plaintiff's appeal, and when the issue was framed on the appeal, the city pleaded to it without objection. As in Wilson *v.* Scranton, 141 Pa. 621, and Ogden *v.* Philadelphia, 143 Pa. 430, the subject matter was one within the general jurisdiction of the Court, and the parties by their conduct had waived the right to object that they were not properly before it.

Judgment reversed and venire de novo awarded.

S. H. T.

Jan. '94, 225. May 9, 1894.

Hague v. Hague, et al.

Will—Deed—Estate conveyed by "to S. and children"—Construction.

I. S. made a deed conveying to S. J. H. and her children in fee a certain tract of land, and by his will directed a delivery by his executors of this deed to the said S. J. H. *Held*, that S. J. H. took a life estate with remainder to her children.

Shirlock *v.* Shirlock, 5 Pa. 367, overruled.

Appeal of Jeffries Hague and Sarah Jane his wife, plaintiff, from the decree of the Common Pleas of Fayette County sitting in Equity, entered on a hearing on a bill and answer on a bill in equity to quiet title, wherein Torrence Hague, Mary M. Hague, Snyder A. Hague, William B. Hague, Edward W. Hague, Leanna D. Hague and Faith Hague, were defendants.

The bill alleged that the plaintiffs were father and mother of the defendants; that the said Sarah Jane Hague was the daughter of James Shoaf, Sr., who by his last will and testament dated 14th June, 1881, duly proved and registered, directed his executor therein named to deliver to the said Sarah Jane Hague "a deed of conveyance for thirty-three acres and one hundred and thirteen perches of land, immediately after the death of my wife or at any time she may cease to be my widow"; the deed was dated June 15, 1881, and was in the possession of testator from the day of the date of the deed until the day of his death, July 3, 1881; that by this deed, which was not recorded, the testator had granted and conveyed unto the said Sarah Jane Hague and her children in fee a certain tract of land in Fayette County, Pennsylvania, described therein as follows, etc.; that at the date of the execution and acknowledgment of said deed the first named defendants were *in esse*, and the last four named were born after the death of testator; that "under the said deed of conveyance your oratrix the said Sarah Jane Hague and her said children, Torence L., Mary M., and Snyder R., took the title in fee simple to the said real estate as tenants in common in the proportions of one-fourth each, and the said Sarah Jane Hague is now in possession of the said real estate, as tenant of the widow of the said testator; that notwithstanding the premises the said William B., Edward W., Leanna D., and Faith, claim an interest in said real estate under the said deed and will and assert title to said land, alleging that said deed and will created an interest in the same in them and thereby creating a cloud upon the title to the said real estate and preventing the said tenants in common from making sale of the same; and that your orators being in possession of said land are without remedy at law and therefore need equitable relief as follows: (1) That your Honors will construe the said last will and testament and the said deed and define the rights and interests thereunder of the parties to the bill of complaint; (2) That your Honors will make a decree quieting the said title in the said Sarah Jane Hague, Torrence L., Mary M., and Snyder R., and declaring that the said William B., Edward W., Leanna D., and Faith, have no interest in said real estate or title to the same; (3) That the said William B., Edward W., Leanna D., and Faith may by injunction be restrained from asserting any title to or interest in said land; (4) That your Honors will grant unto your orators such other and further relief as to your Honors may seem meet and as the exigencies of the case may require."

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Defendant's answer admitted the facts set forth in all the paragraphs of the plaintiff's bill except those set forth in the sixth, and alleged that under the said will and deed of James Shoaf, Sr., Sarah Jane Hague took but a life estate in said tract of land *subject* to the life estate of her mother, Malinda Shoaf, and that the fee passed to all the said defendants and any children who may hereafter be born to the said Sarah Jane Hague, share and share alike.

The master to whom the bill and answer were referred, W. A. Hogg, Esq., found as a matter of law that Sarah Jane Hague, plaintiff, took an estate for life in the land, with remainder to her children, subject to the estate granted by decedent to his widow, Malinda Shoaf.

The plaintiff excepted to the master's finding, and the Court below overruled the exceptions and confirmed the report. The plaintiff took this appeal and assigned for error the action of the Court in overruling the exceptions and confirming the master's report.

W. G. Guiler, for appellants.

The language of the deed, both in the conveyance clause and in the habendum, clearly shows that Sarah Jane Hague and her children *in esse* at the time of testator's death took the land as tenants in common in fee.

Shirlock *v.* Shirlock, 5 Bar. 367.
Hamilton *v.* Pitcher, 53 Mo. 334.

Samuel Ewing, for appellees.

May 21, 1894. GREEN, J. Although the grantees in the deed are designated as "Sarah Jane Hague and her children," which if the children were strangers would constitute them all tenants in common, it must be admitted that the weight of authority holds the mother to be only a tenant for life. Shirlock *v.* Shirlock, 5 Pa. 367, which held the mother and children to be tenants in common, has never been followed, and has been several times questioned and departed from in subsequent cases, and cannot now be regarded as authority.

In Coursey *v.* Davis, 46 Pa. 25, the subject was fully considered in an elaborate opinion by Mr. Justice READ, in which the ruling in Shirlock *v.* Shirlock was distinctly repudiated. The words of the grant in Coursey *v.* Davis were, "To the said Mildred Ann Davis and her children exclusively, and their heirs and assigns, to have and to hold the premises to the said Mildred Ann Davis, and to her children exclusively and their heirs and assigns," and we held that these words vested in Mildred Ann Davis a life estate only, with reversion in fee to her children as a class, so that those in being at the date of the deed, as well as those subsequently born, would be entitled to take in the distribution, on the termination of the life estate at her death. We can see no material difference between the words of the grant in that case and in this.

In White *v.* Williamson, 2 Grant's Cases, 249, we held that a deed to A "for the use of the wife and children of B," conveys a life estate to the wife of B, with remainder to her children; and the children take as a class, and not individually; embracing children *in esse* and those thereafter born. Mr. Justice STRONG, in the course of the opinion, referring to the declaration of trust, said, "Under that declaration what interest did she take? Was it a life estate, with remainder to her children, or was it a tenancy in common with them? The Court below thought it was the former, and so instructed the jury. We incline to concur in that opinion. Under that declaration the children take as a class, not individually. The grant is not to the children then *in esse*, but it embraced those after born. It was the gift of a father for the benefit of his descendants. If the time of the distribution was the date of the gift, then after born children must have been excluded; for where a gift is to a class the rule is that the time of distribution defines the individuals who constitute the class."

In Wolford *v.* Morgenthal, 91 Pa. 30, the words of the grant were, to trustees named, "in trust for the use and benefit of Margaret Morgenthal and her heirs forever, that is the children, if any, begotten by Frederick Morgenthal; and her daughter Elizabeth Wire, is to be made equal, to be for them and their heirs forever, after the decease of Frederick Morgenthal, her present husband." Elizabeth Wire was a daughter of Margaret by a former marriage. Mr. Justice MERCUR, delivering the opinion, said, "The same estate vested in Elizabeth as if she had been begotten in lawful wedlock by Frederick upon the body of Margaret. It therefore follows that the word children is not a word of limitation, but a word of purchase: Melsheimer *v.* Gross, 8 P. F. Smith, 412. What then is the estate taken by Margaret, and by the children respectively including Elizabeth? The answer is the mother took a life estate with remainder in fee to the children as a class. It was a vested remainder in fee in Elizabeth who was living at the time of the execution of the deed, and opened to let in the after born children as their births respectively took place;" citing many authorities. In Coursey *v.* Davis, *supra*, also, we decided that after born children were let in until the death of the mother.

It will be perceived that in all the foregoing cases it was held that the mother took only an estate for life and that the children took the fee. And in determining what children were embraced in these several grants, we held in all, that the time of distribution was the death of the mother, and that all after born children up to that time were entitled to participate.

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The same rule was held in Haskins *v.* Tate, 25 Pa. 249, where a testator devised as follows, "I further will that the plantation I bought of my son Robert lying near Hills Mill shall be equally divided amongst my son Robert's children, he and them enjoying the benefits of it whilst he lives." We held that children born after the death of testator, and living at the death of Robert, participated equally with those born before; LOWRIE, J., said, "We think this case falls within the rule that on a limitation to a class, which may include persons not yet born, the time of the distribution defines the members that are to constitute the class."

To the same effect is Gernet *v.* Lynn, 31 Pa. 94.

The foregoing authorities indicate clearly that the decree recommended by the master and adopted by the Court below, was entirely correct and must be affirmed.

Decree affirmed, and appeal dismissed at the cost of the appellants. W. D. N.

Orphans' Court.

April '93, 390.

Kendrick's Estate.

Wills—Legacy to creditor—When presumed to be in satisfaction of debt—Pennsylvania rule—Beneficial societies—Beneficiary of certificates in.

The rule of law in Pennsylvania that a legacy to a creditor will be deemed to have been given in satisfaction of the debt is not a favorite rule, and it does not apply unless the legacy is equal to or greater than the debt, and is not contingent or uncertain.

The exercise of the power of appointment of a beneficiary of a certificate of membership in a beneficial society is in the nature of a testamentary disposition.

Beneficial associations are not life insurance companies and the member has no property interest in the fund to be paid at his death which can be considered assets for the payment of debts, and the executor or administrator, as such, has no right to claim it. The member has only a power of appointment within the classes limited by the society.

The proceeds of the certificates in beneficial societies are not assets for the payment of debts, even though so intended.

Sur exceptions to adjudication.

The facts as they appeared at the audit before ASHMAN, J., were as follows:

Charles H. Kendrick died in March, 1892, having made his will the year before. He left a widow but no issue. Under the terms of his will George W. Kendrick, Jr., the decedent's brother, was his executor. After directing the payment of his just debts and funeral expenses, the decedent left all the "rest and residue" of his estate to his executor in trust for Louisa Kendrick (his wife) for life: in default of issue then over to various nephews. The decedent had been for a number of years in business, his brother, George, from time to time furnishing a large part of the capital. At the time of the testator's death there was a balance on this account of some $27,000 owing by him to George W. Kendrick, Jr. The decedent held the following:

POLICIES OF LIFE INSURANCE.

	Date	Company	Payable to	Am't
A	1889 Oct 24	Travellers Ins. Co. of Conn.	his estate	$5,000
B	1889 Oct 24	Mutual Life Ins. Co. of N. Y.	his estate	5,000
C	1889 Oct 25	Mutual Reserve Life Ins. Co. N.Y.	his estate	10,000
	1890 Nov 12	This Policy was transferred to his wife Louisa Kendrick,		
	1891 Jany 20	This Policy was transferred back to his estate		

CERTIFICATES OF MEMBERSHIP.

D	1889 Oct 24	N. W. Masonic Aid Ass'n	his devisee if specially devised by will, otherwise to his heirs	10,000
				30,000

All of which were included in the inventory and appraisement filed by the executor.

In addition to the foregoing the decedent had certificates of membership as follows:

E.	1883	March 20 American Legion of Honor, *brother* Geo. W. Kendrick, Jr.	$ 5,000
	1889	Dec. 26 This was transferred to *wife* Louisa Kendrick	
	1891	March 6 This was transferred back to *brother* Geo W Kendrick Jr.	
F.	1890	Jan 16 Knights Templars' etc Aid Ass'n *wife*, Louisa Kendrick	5,000
	1891	Feby 25 This was transferred to *brother* Geo W Kendrick Jr. Collected by Geo W Kendrick Jr. personally	10,000

The inventory and appraisement filed shows assets including the $30,000 above set forth as A, B, C and D of $70,614. Of this amount there were horses, carriages, harness, etc., appraised at upwards of $23,000, but which were carried on the books of the decedent at the time of his decease at upwards of $40,000.

The account shows that but $15,000 of the insurance or membership moneys appraised at $30,000 could be collected by the accountant.

The certificates of membership set out above

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form the present issue; it being disputed whether or not they should be taken as part payment of the indebtedness of decedent to the beneficiary.

The learned auditing Judge decided that they should be so taken.

To this, George W. Kendrick, Jr., now excepts.

J. Henry Williams and *George S. Graham*, for exceptant.

A. The contracts in associations such as those in question are not contracts of life insurance.

B. The member in the association has no property interest in the fund to be paid at his death.

C. The fund paid at the death of the member cannot be considered as assets for the payment of debts, and in no case has an executor or administrator, as such, the right to claim the fund.

D. The member has only a power of appointment or designation, within the classes named in the laws of the society.

Bacon on Beneficial Societies, sec. 241 and Note 2.
N. W. Masonic, etc. *v.* Jones, 154 Pa. 99.

The auditing Judge made the case turn upon a single point: "Whether these benefits were intended by the testator to be in satisfaction of his debt to the claimant." To decide this question affirmatively, it is admitted, that it must appear that the decedent so intended, for if he did not, then there is no power or authority for such an application.

In considering certificates of an exactly similar kind, in the case of Vollman's Appeal, 92 Pa. p. 50, the Court used this significant language: "The certificate specified, that upon his (decedent's) death, the amount was to be paid to the children of his brother, Jacob F. Lang. As between Charles F. Lang, the decedent, and the children of Jacob Lang, the policy of life insurance described in this case became the subject of an executed gift to the latter from its date."

This dictum of the Court is sound and thoroughly applicable to the case in point, as between the decedent, Charles H. Kendrick, and his brother, the certificates became the subject of an executed gift to the latter from their dates respectively.

Only those who come within the limitations which the society has fixed and the law sanctioned can be made beneficiaries.

Commonwealth *v.* Beneficial Association, 137 Pa. 412.
N. W. Masonic Aid Ass'n *v.* Jones, *supra*.

The Court in Karch's Estate, 133 Pa. at p. 84, said, in considering an exactly similar question to this: "As to the other matter, the decedent's debt to his wife was clearly proved. Considering this relationship, the fact that his life was insured in her favor raised no presumption that the policy was a security for her debt." It would seem, therefore, that this inference from the relationship of brother and creditor is equally unwarranted and that the question is not an open one, but decided against such an inference. The Courts will lay hold of slight circumstances to get rid of the rule that a legacy to a creditor shall be deemed to have been given in satisfaction of the debt. The rule itself is not founded in reason or equity.

Byrne *v.* Byrne, 3 S. and R. 54.
Horner *v.* McGaughy, 62 Pa. 189.

This being the policy of the law, surely there ought to be no attempt to make the circumstances of this case analogous to a legacy to a creditor, for if that be regarded with disfavor, how much more ought the solemn declaration of the benefit certificate, in conjunction with the avowed purposes of the society, exclude any attempt to convert the certificates into payments on account of the debt.

The rule in Pennsylvania, if we are obliged to discuss this so-called analogy, is this: "A legacy to a creditor which is equal to or greater than his debt, and not contingent or uncertain, is presumed to be a satisfaction of the debt."

Wesco's Appeal, 52 Pa. 195.
Horner *v.* McGaughy, 62 Id. 189.

In this case the certificates do not either equal or exceed the debt.

Henry N. Paul, Jr., contra.

May 5, 1894. FERGUSON, J. The decedent had several policies of insurance upon his life in regular life insurance companies, amounting in the aggregate to the sum of $30,000, and, in addition thereto, held certificates of membership in two organizations, "The American Legion of Honor" and "The Knight Templar's Aid Association," from each of which the beneficiary whom he should designate and appoint would be entitled upon his death to receive the sum of $5000.

In the case of The Knight Templar's Association the beneficiary could be "the families, heirs, executors, administrators or assigns" of the deceased member, but in The American Legion of Honor the beneficiary was limited to "the husband, wife, affianced husband, affianced wife, relations, or persons depending upon such member."

The certificate in the American Legion of Honor was taken out on March 20, 1883, and was made payable to decedent's brother, Geo. W. Kendrick, Jr., and the certificate in The

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Knight Templar's Association was taken out Jan. 16, 1890, and was made payable to decedent's wife, Louisa, to whom he had been married a few months previously. On Dec. 26, 1889, he made the certificate in The American Legion of Honor payable to his said wife, but in February and March, 1891, respectively, he made them both payable to his brother, George W. Kendrick, Jr. This was done without his brother's knowledge, who never knew that these certificates were payable to him until after the decedent's death.

It appeared that the decedent had been indebted to his brother since 1882, and this indebtedness had increased every year until, at the time of the decedent's death, it amounted to upwards of $26,000. The question raised before the auditing Judge was whether the proceeds of these two certificates should be considered as payments upon account of this indebtedness. The auditing Judge has decided this question in the affirmative. To justify this finding it should appear that the parties to the transaction so intended, but there is not a particle of evidence to show any such intention upon the part of either of them. On the contrary, the decedent made both of the certificates payable to his brother as "brother," and the brother never knew that he had been appointed as the beneficiary until after the decedent's death, and it does not appear that he even knew that the decedent held memberships in these organizations. The only possible inference to draw from these circumstances is that what the decedent did was inspired by motives of brotherly love and affection alone. That he did not name his brother in order to pay or secure his claim is evident, from the fact that, in one of these associations, he was prohibited by the laws thereof from making a creditor a beneficiary, and, in the other, while he may have so made a creditor, the certificate was made payable to his brother as such. If he had intended this last certificate as a payment on account of his indebtedness, he could easily have said so, and the fact that he did not so state raises a strong presumption that it was not so intended. Besides he was at this time carrying $30,000 of other policies of insurance on his life, which were issued in the regular way, and which, by the terms thereof, could have been made payable to a creditor, or any one who had an insurable interest. If he intended to secure his brother, why did he not assign a part of these policies, about which there could be no question as to his right?

The auditing Judge concedes that, "if nothing appeared in this case beyond what was shown by the certificates, the only possible inference would be that he (decedent) made the claimant his beneficiary solely from motives of brotherly affection." What else does appear that can change this conclusion? Absolutely nothing, excepting the circumstance that the brother was also a creditor. It is true that the exercise of this power of appointment in these associations is in the nature of a testamentary disposition, and that it is a rule of law in Pennsylvania, although not a favorite one, that a legacy to a creditor will be deemed to have been given in satisfaction of the debt, but this rule does not apply unless the legacy is equal to or greater than the debt, and is not contingent or uncertain: Wesco's Ap., 52 Pa. 195; Horner *v.* McGaughy, 62 Pa. 189. In this case, at the time of the transfer of these certificates, the indebtedness of the decedent was more than double the amount of the so called legacy, and was upon an open account which was constantly increasing in amount. The application of this rule cannot therefore be invoked.

It has been held that these associations are not life insurance companies, and that the member has no property interest in the fund to be paid at the time of his death which can be considered assets for the payment of debts, and the executor or administrator, as such, has no right to claim it. The member has only a power of designation or appointment within the classes limited by the society (N. W. Masonic, etc. *v.* Jones, 154 Pa. 99; Bacon on Beneficial Societies, § 241, note 2), and these are those who are bound to him by ties of blood and relationship, or dependency: Com. *v.* Beneficial Association, 137 Pa. 412. It will thus be seen that the proceeds of these certificates are not assets for the payment of debts, even though the parties so intended; but in the case now under consideration there is not the slightest evidence of such intention.

The exceptions in this case are sustained. The adjudication will be modified accordingly.

F. B. N.

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WEEKLY NOTES OF CASES.

VOL. XXXV.] *FRIDAY, OCT. 5, 1894.* [No. 4.

Supreme Court.

Jan. '94, 266, 267, 268, 269, 270. March 26, 1894.

In re Vernon Park.
City of Philadelphia's Appeals.

Eminent domain—Land taken by city for a public park—Act of May 13, 1857—Proceedings under—Act of June 13, 1874—Act of May 26, 1891.

The taking of land by the city for a public park is in substance the same as the taking of land for a street. It is the exercise of the power of eminent domain.

Under the Act of 1857, where land is taken by the City of Philadelphia for a park, the proceedings thereupon follow the same course as required in proceedings for the assessment of damages for opening streets at the time the park proceedings are begun.

The Acts of June 13, 1874, and May 26, 1891, are both affirmative Acts. Under the Act of 1874 an appeal is given from "the ascertainment of the damages" (occasioned by opening streets), "or the filing a report thereof in Court." Such appeal must be taken within thirty days and "not afterwards." The Act of 1891 gives no appeal from the award, but from the decree of confirmation by the Court of Quarter Sessions. The two Acts work in entire harmony.

Both the Act of 1874 and the Act of 1891 extend to park cases.

Appeals of the City of Philadelphia from the decrees of the Common Pleas No. 1, of Philadelphia County, *in re* condemnation of property for Vernon Park, belonging to the estate of John Wister, senior, estate of John Wister, junior, estate of Peter Leetin, Edward Kolb, and Oliver Jester.

Upon petition of the City of Philadelphia, viewers were appointed by the Court of Quarter Sessions on July 13, 1892, to assess the damages sustained by the various property owners by reason of the taking of their property pursuant to an ordinance condemning and appropriating certain premises in the Twenty-second Ward for a public park. The viewers filed their report on August 24, 1893, awarding, *inter alia*, damages as follows:—

To estate of John Wister, Sr.,	$154,000
To estate of John Wister, Jr.,	52,500
To estate of Peter Leetin,	30,000
To Edward Kolb,	36,200
To Oliver Jester,	28,000

On November 18, 1893, a decree was entered by the Court of Quarter Sessions confirming the report. Appeals from this decree as to the above named awards were filed by the City of Philadelphia in the Court of Common Pleas No. 1, and in the Court of Quarter Sessions on November 21. On December 6, 1893, a petition was filed in the Court of Common Pleas No. 1, setting forth the filing of the said report and its confirmation, and praying that a rule be allowed on behalf of the estate of Peter Leetin on the City to show cause why the appeal taken by the City from the award should not be quashed, on the ground that it was not allowed by law; the rule was granted, and on December 18 was made absolute. On December 20 the city moved for a rule to show cause why it should not have leave to file its appeal *nunc pro tunc*, which motion was, *eo die*, refused. The estates of John Wister, Sr., and John Wister, Jr., filed like petitions, and the subsequent proceedings were the same, terminating in the City's motion for rule to show cause why it should not have leave to file its appeal *nunc pro tunc*, being refused on December 20. On December 23, without the filing of petitions or the entry of rules to show cause, decrees were made quashing the City's appeals as to the awards to Kolb and Jester. The City of Philadelphia appealed, assigning as error the action of the Court in the various cases.

Francis L. Wayland, assistant city solicitor (*Charles F. Warwick*, city solicitor, with him), for the City, appellant.

The authority for condemning and taking ground for public parks and squares is found in the Act of 13th May, 1857, sec. 4; which Act also determines the practice in accordance with which the damages for such taking shall be assessed. The provisions thereof are as follows:—

"The councils of said city, whenever they shall select any square or other area of ground to be laid out and maintained forever as an open public place or park for the health and enjoyment of the people shall have the power, if they cannot agree with the owner or owners thereof as to the price, to cause a petition to be filed in the Court of Quarter Sessions of the City and County of Philadelphia, on behalf of said city, setting forth by proper metes and bounds the ground so selected, and that by ordinance the said councils have appropriated the same for said purpose; whereupon the said Court shall appoint a jury to assess the damages in the manner now provided by law, *and the proceedings thereupon shall be the same and with like effect as upon the assessment of damages for the opening of streets in the said city.*"

To ascertain definitely, therefore, the method of determination and assessing the damages sustained by reason of the appropriation of land for a park or square, it becomes necessary to review the legislation regulating the assessment of damages in cases of street openings.

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Act of June 13, 1836.
Act of April 12, 1851.
Act of April 13, 1854.
Act of April 21, 1855.
Act of March 16, 1866.
Act of June 6, 1873.

It will be seen that a uniform practice was established as to road or street openings. By the Act of 13th June, 1874, sec. 1, it is provided:—

"In all cases of damages assessed against any municipal or other corporation or individual or individuals, invested with the privilege of taking private property for public use, for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements, whether such assessment shall have been made by the viewers, or otherwise than upon a trial in Court, and an appeal is not provided for or regulated by existing laws, an appeal may be taken by either party to the Court of Common Pleas of the proper county, within thirty days from the ascertainment of the damages, or the filing a report thereof in Court, pursuant to any general or special Act, and not afterwards."

Under the provisions of this Act an appeal would lie from the assessment of damages before such assessments had become a judgment; that is to say, before the same had been duly confirmed by the Court of Quarter Sessions, as provided by Act of 13th April, 1854.

By the Act of 16th May, 1891, it is provided that "whenever it shall be deemed necessary in the laying out, opening, widening, extending or grading of streets, lanes or alleys, the construction of bridges and the piers and abutments therefor, the construction of slopes, embankments and sewers, the changing of water courses or vacation of streets or alleys, to take, use, occupy or injure private lands, property or material," upon the application of the municipal corporation taking the property, or doing the injury, or any person interested, the Court of Common Pleas of the county shall appoint three viewers to assess the damages for such taking or injury.

"And upon the report of said viewers, or any two of them, being filed in said Court, any party may within thirty days thereafter file exceptions to the same, and the Court shall have power to confirm said report or to modify, change or otherwise correct the same, or change the assessments made therein, or refer the same back to the same or new viewers, with like power as to their report, or within thirty days from the filing of any report in the Court, any party whose property is taken, injured, or destroyed may appeal and demand a trial by jury, and any party interested in any assessment of damages or benefits may, within thirty days after the final decree, have an appeal to the Supreme Court." (Section 6.)

By the Act of 26th May, 1891 (P. L. 116), it is provided:—

"That whenever any report of viewers, appointed by any Court of Quarter Sessions to assess damages for the opening, widening, or change of grade of any street, road or highway, shall be confirmed by the Court of Quarter Sessions to which the said report is made, an appeal may be taken from the said Court of Quarter Sessions by any party aggrieved by the said decree of confirmation to the Court of Common Pleas in said county for a trial by jury, according to the course of common law, *within thirty days from the entry of said decree of confirmation* by the Court of Quarter Sessions, and not afterwards."

The foregoing comprise all the Acts regulating and establishing the practice to be followed in the assessment of damages for street and park openings, and it is submitted, a consideration of these statutes shows:—

1. That the Act of 13th May, 1857, has never been repealed, and that the jurisdiction of the Court of Quarter Sessions of cases of the opening of parks and squares, vested by that Act, has never been divested.

2. That the jurisdiction of the Court of Quarter Sessions of cases of street openings has never been divested.

3. The obvious intention of the Legislature to secure uniformity of practice in the assessment of damages for taking of land for parks and for taking of land for streets.

4. That the Act of 26th May, 1891, is the most recent legislation regulating proceedings in street openings; and proceedings for park openings being the same as proceedings for street openings, the former are by it withdrawn from the operation of the Act of 1874.

This question in all its essential particulars has been passed upon by this Court in the case of

Kugler's Appeal, 55 Pa. 123.

And the principle therein established is so obvious as to account for the lack of subsequent decisions on this point.

John G. Johnson, for Wister estates, appellees.

Under the Act of 1874 the appeal was not taken in time, inasmuch as it was not within thirty days of the filing of the jury's report. It is claimed, however, that the Act of 26th May, 1891, gives the city a right to file an appeal within thirty days of the confirmation by the Court of Quarter Sessions of the jury's award. The Act relied on confers the right to appeal after confirmation only in cases of street assessments.

Francis E. Brewster, for Leetin estate, appellee.

The Act of May 26, 1891, cannot be construed either by its express terms or necessary implication to apply to park cases. By its very terms it applies to certain proceedings specifically mentioned, thereby necessarily excluding all others except those referred to.

Mayer Sulzberger and *George P. Rich*, for Kolb and Jester, appellees.

July 12, 1894. MITCHELL, J. The land over which this controversy arises was taken by the City of Philadelphia for a public park under the authority of the Act of 13th May, 1857, P. L.

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489, which enacts that the Courts shall appoint a jury to assess damages in such cases, "and the proceedings thereupon shall be the same and with like effect as upon the assessment of damages for the opening of streets in said city." The fundamental question on which this case must turn is the construction of that statute; does it mean that proceedings in park cases shall until specifically and expressly altered be the same as in street cases under the law as it was in 1857, or as the law may be in regard to streets from time to time when park proceedings are begun?

There can be little doubt as to the answer to this question. The taking of land for a public park is in substance the same as the taking of land for a street. It is an exercise of the same power of eminent domain; at the discretion of the same municipal body; for the same public reasons, the general benefit of the citizens; for a closely analogous public use; and the effect upon the property rights of the private owner is precisely the same. There is no good reason why the proceedings in regard to his compensation should not be the same, and it was the manifest intent of the Legislature to establish a uniform system for both. The vesting of a general right of eminent domain for park purposes in the City of Philadelphia, to be exercised at its own discretion was, however, an unusual feature in legislation. The Act of March 29, 1849, P. L. 259, had authorized the commissioners of any incorporated district in the County of Philadelphia to purchase one or more squares of ground to be kept unbuilt upon and open for the public use forever, and the consolidation Act of February 2, 1854, sec. 39, had provided that it should be the duty of councils "to obtain by dedication or purchase" an adequate number of squares, and to lay out and maintain them as open public places for the health and enjoyment of the people forever. But the power to take by eminent domain was new, and park cases were likely to be rare in comparison with street or road cases in which the jurisdiction and proceedings were familiar. The Legislature took the easiest and most natural way to prescribe the same method for both, by enacting that the former should be "the same and with like effect" as the latter. The proceedings in street cases were set up as the model or standard for two things desired and intended to be made alike, and necessarily when a change was thereafter made in the standard it involved a like change in everything that was directed to be conformed to it. If any further authority is needed for this construction of the statute, it will be found in the principles laid down in the analogous case of Kugler's Appeal, 55 Pa. 123.

When, therefore, the Act of 26th May, 1891, P. L. 116, gave to any party aggrieved an appeal in street cases, within thirty days after a decree of confirmation of the viewer's report in the Quarter Sessions, it gave the same right in all other cases where the proceedings were directed to be the same, including park cases under the Act of 1857.

At the time of the passage of that Act there was no appeal to a common law jury in road cases, and the Constitution of 1874, in Sec. 8 of article 16, having declared that there should be, the Legislature by the Act of 13th June, 1874, P. L. 283, expressly provided an appeal for *all cases* of property taken, in which the assessment of damages should be by viewers or otherwise than upon a trial in Court. The appeal under this Act must be taken within thirty days of the filing of the report, and it is argued that this is the only Act giving an appeal in park cases, and therefore the appeal here was too late. The Act of 1891, *supra*, mentions only "damages for the opening, widening or change of grade of any street, road or highway," and the argument is that it does not apply to park cases, or repeal the Act of 1874 in relation thereto; that the Act of 1874 covered the general right of appeal in several classes of cases, while the Act of 1891 relates to the right in certain limited and prescribed cases only, and does not extend to park cases which are left under the Act of 1874. This argument, however, runs directly contrary to the whole construction of the Act of 1857. That Act declared that the proceedings under it should be "the same and with like effect" as in street cases, and the necessary construction was, as already shown, to make the latter the exemplar to which the others should conform from time to time as changes might be made. If there were no Act of 1874 no question could be made, indeed it is conceded by appellees that the appeal under the Act of 1891 would extend to proceedings under the Act of 1857. Why, then, does the Act of 1874 prevent that result? There is no conflict between the Acts of 1874 and 1891, nor does the latter involve the repeal of the former. Both are affirmative Acts, and in furtherance and extension of the remedy. Under the Act of 1874 the appeal is given from "the ascertainment of the damages or the filing a report thereof in Court," and must be taken within thirty days "and not afterwards." Under the Act of 1891 the appeal is not from the ascertainment of the damages or filing a report thereof at all, but from the decree of confirmation by the Court of Quarter Sessions. The two systems are not irreconcilable but may run together with entire harmony. The Act of 1874 gives an appeal from the award itself, of which the party appealing may avail himself at once without waiting for the action of the Court, and

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must avail himself if at all within thirty days "and not afterwards" under that Act. The Act of 1891 gives no appeal at all from the award, but allows "any party aggrieved by the said decree of confirmation" to appeal therefrom; a different appeal, at a different stage of the case, and not necessarily to the same party. The Legislature would seem to have regarded the remedy at the earlier stage as insufficient, and accordingly provided an additional one at a later period. Both are in furtherance of the same right to a jury trial which the Constitution secures, and both are open to the parties that they may make their choice.

Judgment reversed, appeal reinstated, and procedendo awarded. W. D. N.

Jan. '94, 412. April 26, 1894.

Searight's Estate.

Searight's Appeal.

Will, construction of—Conversion—Intention of testator—Devotion of real estate to payment of debts.

Where a testator who has considerable real estate but large liabilities directs his executors to hold his real estate for five years, giving them a power to sell or encumber, meanwhile, for payment of debts, his intention to devote the lands to payment of debts is manifest, and the rents and profits of the lands should be awarded to the creditors, not to the widow and next of kin.

This does not raise a question of conversion, but a question of intent.

Appeal of Keziah Searight *et al.*, being the widow and children of F. W. Searight, deceased, from the decree of the Orphans' Court of Cumberland County, adjudicating the second and final account of Joseph A. Stuart, one of the executors of F. W. Searight, and making distribution of the estate.

Edward B. Watts, Esq., the auditor to whom the account was referred, found the following facts:

"1. F. W. Searight died on the 8th day of August, 1888, leaving a will, which was duly proven after his death. The will is as follows:

"'Item. I hereby authorize and empower my executors hereinafter named to keep my estate intact and undistributed for a period of five years after my decease if they see fit so to do.

"'Item. Within said period of five years I empower my said executors to sell and convey my real estate for the purpose of raising money and to mortgage or in any way encumber or pledge either my personal or real estate for the purpose of borrowing money if they see fit so to do.

"'Item. I empower my executors at any time before final settlement of my estate to sell and convey any or all of my real estate wheresoever situate for the purpose of payment of my debts if they see fit so to do.

"'Item. At the end of said five years or before or after said period upon settlement of my estate by my executors, I hereby direct that my wife and children shall take such portions of my estate as they would respectively be entitled to under the intestate laws of this Commonwealth.

"'I hereby appoint my wife Keziah Searight, R. M. Searight and Joseph A. Stuart to be the executors of this my last will and testament.

"'In testimony whereof I have hereunto set my hand and seal this 4th day of April, A. D., 1888.'

"Letters testamentary were duly granted to the executors named in the will.

"F. W. Searight died possessed of certain real estate (farms) and personal property, but he was heavily in debt. His estate is not sufficient to pay the debts.

"The accountant on November 6th, 1891, filed a first account, which was made up of personalty and the income of the real estate. The balance in his hands as shown by that account was distributed as personalty to all the creditors of the estate, by an auditor appointed by the Court, without objection on the part of anybody. A dividend, however, of only .0472 per centum of the debts was thereby paid. The account now before the auditor is made up chiefly of income from the real estate and the proceeds of the sales of the real estate. The income is from the proceeds of the crops of the years 1891 and 1892. The sales of the real estate took place in the fall of 1892, and were confirmed by the Court on December 16, 1892.

"The accountant in his capacity of executor collected the income from the real estate with the exception of $962.23, which was collected by his co-executors. The real estate did not sell for enough to pay the judgments that were against it at the time of F. W. Searight's death. The debit side of the account shows charges to the amount of $43,130.00, and the credits claimed amount to $31,102.21. Exceptions to the account were filed by the co-executors and by creditors.

"2. The widow and heirs of F. W. Searight claim the proceeds of the sale of all the crops gathered from the real estate and charged on the debit side of the account. A suit has been brought by them against Joseph A. Stuart to No. 600 May term, 1893, in the Court of Common Pleas of Cumberland County for the recovery of these crops. It was agreed before the auditor

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that he should pass upon this question and that the said suit should be merged in his determination and be ended thereby."

The auditor found that:

"The claim of the widow and heirs of F. W. Searight, deceased, for the crops cannot be sustained. While as an abstract proposition of law it may be admitted that, where an administrator has collected the rents of decedent's realty he must pay over the same to the widow and heirs, yet that rule does not apply in this case. The will of F. W. Searight, authorizing and directing his executors to keep his estate intact and undivided for a period of five years after his decease, if they saw fit to do so, and his directions in regard to selling, mortgaging or pledging his estate for the payment of his debts, manifests clearly an intention on his part that his executors should continue on, for that period at least, in the management of his estate just as if the testator were living. He does not give his wife and children anything until the end of said five years. The crops having been gathered within that period must be considered assets for the payment of the debts of the estate, and they should be so distributed."

Exceptions to the report of the auditor were dismissed by the Court, STEWART, P. J., specially presiding, saying:

"The executor charged himself in his account with the proceeds derived from the testator's real estate, during the period between the death and the sale, amounting to $3,444.78. These proceeds were claimed by the widow and children. By agreement between the parties the question of their ownership is to be determined in this proceeding. The auditor's report awards them to the executor for the benefit of the creditors of the estate, and to this ruling the widow and children except.

"The argument with respect to this branch of the case, has been confined to the question of conversion by the will, as though its determination depended wholly upon the answer to that.

"It is not, as I view it, a question of conversion of the real estate by the terms of the will. If it were, a result unfavorable to the creditors would follow, for I think it manifest that the purpose of the testator was to conserve his estate as it then was, and not convert it. Indeed this purpose is aptly expressed at the outset, when he authorizes his executors to keep it intact and undivided for a period of five years. Whatever power of sale he gives them, is to be exercised during this period, and in connection with the purpose he expressed. He contemplated that the sale of some portion of his real estate might be necessary, to save the balance, but in no event was such power to be exercised, except to raise money to pay debts, and even then its exercise was committed to the discretion of the executors. The power to sell is a naked power, not coupled with any interest; it was given as a means to an end other than the distribution of the estate, and was conditional, not absolute. If the executors are entitled to the fund, therefore, it must be on other grounds.

"The governing purpose of the will, was to keep as much as possible of the real estate from being consumed by the indebtedness which had become fastened upon it, in the interest of his widow and children. That the scheme of committing the entire estate to the executors, for a period of five years, was accepted as a means to this end, is apparent. It was not the personal estate that he had regard to, when he expressed the desire that his estate should be kept intact; this he knew would be required for the payment of debts, and more too, hence the power in the executors to pledge his real estate to borrow money, or sell whatever part of it might be necessary for this purpose. He commits the entire estate to the executors for five years, with such power as would enable them to so manage and apply it that at the end of the term the largest possible amount of it might pass to his beneficiaries. That he intended the income derived from his real estate, during this period, should be diverted to other uses, is not probable, since he must have known that it would be needed for the general purpose he had in view, to the accomplishment of which he had subordinated everything for a fixed period.

"The power to apply this income to the payment of debts, is implied in the larger power given to the executors in the management of the estate, and the fact that the testator made no other disposition of it, helps largely to this conclusion. It is not until the end of the five years that the interest of the widow and children in the estate is to begin, unless, because of failure or abandonment of testator's scheme to conserve the estate an earlier settlement be required, in which case they were then to take, but they get nothing until one or other of these events happens.

"I am of opinion that the auditor properly awarded the fund to the executor for the general creditors, and the exception of the widow and heirs is overruled, as well also and for like reasons, the exception of certain lien creditors who claimed that these proceeds were to be distributed as real estate.

"And now, 9th February, 1894, exceptions dismissed, the auditor's report is confirmed, and payment by the executors is ordered in accordance therewith."

The widow and children took this appeal, assigning as error the action of the Court in dismissing the exceptions and the failure to award to them.

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E. W. Biddle and *M. C. Herman* for appellants.

The only question raised by this appeal is whether the income of testator's farms is diverted by his will from his widow and children to his creditors.

It is well settled that, in the absence of a testamentary provision which produces a different result, the rents, issues and profits of a decedent's real estate accruing after his death belong to his widow and heirs; and the personal representative is not authorized to receive them.

Adams *v.* Adams, 4 Watts 160.
Merkel's Estate, 131 Pa. 584 (611).

If the personal representative collects the income of the lands, the widow and heirs may recover the same from him; their right to the income is as absolute as was the right of their ancestor.

McCoy *v.* Scott, 2 Rawle 222.
Bakes et al. *v.* Reese, 150 Pa. 44.

And where lands are sold by order of Court for payment of debts, the widow and heirs are entitled to the rents therefrom until payment of the purchase money and delivery of the deed.

Kalbfus *v.* Rundell, 134 Pa. 102.

It is further well settled, that when a *discretionary* power of sale is given by a will, no conversion of realty into personalty will take place until a sale is *actually made*.

To work a conversion, at testator's death, the direction to sell must be positive, irrespective of contingencies and independent of discretion.

Peterson's Appeal, 88 Pa. 397.
Anewalt's Appeal, 42 Id. 414.
Chew *v.* Nicklin, 45 Id. 84.
Hunt's and Lehman's Appeals, 105 Id. 128.

The lands of testator, therefore, passed to his children by descent, subject to the widow's statutary dower.

Blackstone, Com. II. 241-2.
Selfridge's App., 9 W. & S. 55.
Vowinckel *v.* Patterson, 144 Pa. 28.

H. S. Stuart and *John Hays*, (*Stuart* with them), for appellee.

We contend that the chain of descent was broken; that the power in the executors to sell was one coupled with an interest such as would break the chain of descent, vest the title in them and give them the right to the proceeds of the land. Certainly is this true within the period of the five years fixed by the will for settlement and distribution. If the widow and children were entitled to the proceeds of the land it would have been on the theory that they were the owners of it, and if so they could have brought ejectment and ousted the executors from its control, but no one can conclude from any reading of the testator's will that such was his intention.

Dundas' Appeal, 64 Pa. 325.
Miller *v.* Meetch, 8 Id. 425.
Burr *v.* Sim, 1 Whart. 265.
Osgood *v.* Franklin, 2 Johns. Ch. 1-29.
Estate of Kenderton Smith, 4 Phila. 181.

The intention of the testator as shown by his will was clearly to devote the estate, including its proceeds, for five years to the payment of his debts.

July 12, 1894. MITCHELL, J. The widow and heirs are entitled to the income of the real estate between the death of testator and the sale, unless the will has taken it out of the usual course of devolution, and put it in the hands of the executors for the payment of debts. It is not a question of conversion, as the learned Judge below rightly held, but of intent.

The testator had large assets, but also large liabilities, and the will indicates that he knew that a settlement of his estate in the usual course of law, would leave little or nothing to his family. He had, therefore, the choice of letting the family get along for a few years without income in order that they might then have something saved, or of letting them take the chances of the income from the farms for a few months and then have nothing. He plainly chose the first alternative. His will empowers his executors, of whom the widow was one, to keep his estate intact and undistributed for a period of five years, and during that period, at their discretion to sell and convey, or to mortgage or pledge any of his real or personal estate for the purpose of raising money for the payment of debts. At the end of the five years, or upon the settlement of the estate by the executors, distribution was to be made. Nothing could be plainer than the general intent, and guiding purpose of the testator to take his estate out of the ordinary legal devolution, and to prevent a present distribution of any of it to the heirs, in the hope of ultimate advantage. The power expressly given over the whole estate, real and personal, to sell, mortgage or pledge for payment of debts, necessarily includes the power to manage, to collect and apply the income of the whole for the desired purpose. This the executors have done.

Decree affirmed.

J. D. B., Jr.

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Jan. '94, 502. April 27, 1894.

Searight's Estate.
Stuart's Appeal.

Equity—Subrogation—Judgment—Lien of survives for five years from death of debtor—Act of February 24, 1834, sec. 25, P. L. 77, not repealed by Act of June 1, 1887, P. L. 289—Constitutional rule requiring amended Act to be quoted—Intention of Legislature.

Subrogation is an equitable principle, and will not be allowed to overcome a higher equity.

The Act of June 1, 1887, P. L. 289, does not alter the provisions of the Act of February 24, 1834, sec. 25, P. L. 77, that the lien of a judgment in force at the death of the judgment debtor is continued unimpaired for five years from the date of such death.

The Act of June 1, 1887, P. L. 289, was passed to amend the Act of March 26, 1827, P. L. 129, and in obedience to the constitutional requirement it recites and re-enacts that Act with the amendment. This re-enactment embracing the declaration that no judgment shall continue a lien for more than five years must not be held to effect a repeal of the provision for continuance of the lien by death of the debtor, when such repeal was manifestly not within the legislative intent.

The requirement of the Constitution, Art. 3, Sec. 6, that laws shall not be amended, etc., by title only, but by re-enactment at length, applies only to express amendments.

Appeal of Joseph A. Stuart, a judgment creditor of F. W. Searight, deceased, from the decree of the Orphans' Court of Cumberland County, making distribution of the estate of said F. W. Searight.

The facts were found by the auditor, E. B. Watts, Esq., as follows:—

"4th. (3) Among the judgments presented for participation in the distribution is one of Helen Bosler, et al., executors of James W. Bosler, deceased, for use of the Fidelity Insurance, Trust and Safe Deposit Company against George P. Searight and F. W. Searight, entered originally March 17, 1885 to No. 283 April T., 1885, for $9683.33. The money for which this judgment was given was loaned to George P. Searight; F. W. Searight united with his brother George in the judgment to secure the loan. F. W. Searight was therefore a surety in the judgment. F. W. Searight died, as before stated, on August 8, 1888, while the judgment was in full life. The judgment, however, was not revived against George P. Searight, who is still living, until after the expiration of five years from the date of its entry, to wit, on July 30, 1890, when it was revived for $11048.99. There were other judgments against George P. Searight originally, subsequent in point of lien to this judgment, but by reason of the said failure to revive within five years these other judgments acquired positions against George P. Searight in advance of this one. George P. Searight's real estate was sold on execution by the sheriff on the 6th day of February, 1891. In the appropriation of the proceeds of that sale, after the payment of a purchase money mortgage, the fund was awarded next to a judgment of Lewis F. Lyne against F. W. Searight and George P. Searight entered January 3, 1887, to No. 168 Jan. T., 1887 for $7000, and the balance which was $10,006.74 to a judgment of Joseph A. Stuart against F. W. Searight and George P. Searight, entered April 6, 1887 to No. 602 April T., 1887 for $75,558.64. The money represented by the Lewis F. Lyne judgment was loaned by the plaintiff to F. W. Searight and George P. Searight, each receiving $3500. So that each was principal as to one-half and surety as to the other half. Under these facts certain lien creditors of F. W. Searight objected to the allowance of the Fidelity Insurance, Trust and Safe Deposit Co., to participation in the distribution of the fund arising from the sale of the real estate of F. W. Searight.

"(4) Joseph A. Stuart claims under his judgment No. 602, April T., 1887 for $75,558.64 revived to No. 274, May T., 1892, the right in this distribution to be subrogated to the extent of one-half of the judgment of Lewis F. Lyne as against the estate of F. W. Searight, because the entire judgment of Lyne was paid out of the proceeds of the sheriff's sale of the real estate of George P. Searight, when only one-half of said judgment was George P. Searight's debt."

The Court below, STEWART, P. J., specially presiding, in discussing exceptions to the report of the auditor on these points, said:—

"Subrogation was claimed for Joseph A. Stuart under the following circumstances. Lewis F. Lyne was plaintiff in judgment No. 168 Jan. T., 1887, for $7,000 against George P. Searight and F. W. Searight. Stuart was plaintiff in a later judgment against George P. Searight to No. 602 April T., 1887, for $75,588. In January, 1891, the real estate of George P. Searight was sold at sheriff's sale, and the whole amount of the Lyne judgment was paid out of the proceeds, leaving but $10,006.64 to be applied to the Stuart judgment. In the Lyne judgment the defendants were joint debtors, each owed the one-half, and each was surety for the other; but in the distribution, George P. Searight's real estate was made to pay the debt of both. Stuart being thus deprived of his security on which his lien rested, asks to be subrogated to the right of the plaintiff in the Lyne judgment, to compel payment of F. W. Searight's share of the original liability for his indemnity. The auditor disallowed the claim, and his ruling is excepted to.

"I think it may be conceded that when George P. Searight's property had been taken to

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pay the entire debt, Stuart was in position,—other things being equal—to require that F. W. Searight's estate should be subjected to the payment of his judgment, to the extent that he had been disappointed by the appropriation of the fund which had been pledged to him to another's advantage. The cases of Neff *v.* Miller, 8 Barr 347; Gearheart *v.* Jordan, 1 Jones, 325, and Huston's Appeal, 19 P. F. Smith, 488, sustain this view. But other things then were far from being equal, as between these several debtors, when $3,500 of George P. Searight's money was taken to pay F. W. Searight's portion of the Lyne judgment, the estate of the latter was fixed for a debt of George P. Searight amounting to $11,038 which he owed on a judgment No. 283 April T., 1885—revived to a later term, held by the Fidelity Insurance and Trust Co., and on which F. W. Searight was surety. The sheriff's sale which swept away from Stuart the same estate which was the security of his judgment, demonstrated beyond all doubt, if such demonstration were needed, that the whole burden of the Trust Company's judgment for the debt of George P. Searight, rested upon the estate of F. W. Searight. It would be a strange principle that, in such a state of facts, would allow George P. Searight to enforce the Lyne judgment, for the recovery of any excess he may have paid them, without regard to the larger indebtedness which he himself owed. It would be just as inequitable to allow Stuart to do it, for, admitting his equity, it is entirely overcome by the superior equity in F. W. Searight's estate. His rights rise no higher than the rights of his judgment creditors. It is through the latter that he acquired whatever right he has, for, since the latter is first to feel the injury, it is to him the right first attaches. Though this be true, it does not always follow that the debtor may enforce the right. Who may enforce it depends upon the equities of the case, sometimes the debtor, sometimes the creditor, as the case may be; but in no case may the latter do what the former could not do with the right conceded to be in him. Allowing Stuart to succeed to all of George P. Searight's rights in the Lyne judgments, he would be entitled to get nothing therefrom so long as the former remained indebted to F. W. Searight's estate a larger amount.

"The exceptions to the ruling of the auditor cannot be sustained and are accordingly dismissed.

"The right of the Trust Company to participate in the distribution of the proceeds arising from the sale of the real estate is resisted on the ground that its judgment No. 285 April T., 1885, entered 11th March, 1885, was not revived, and consequently lost its position in favor of later judgments, which are now entitled to priority over it, and which are more than sufficient to exhaust the fund, and that this results, notwithstanding the death of the judgment debtor in 1888, and the sale of the real estate within five years thereafter. The contention is that the continuance of the lien of a judgment for five years from the death of the defendant therein, preserving whatever priority it may have, is dependent upon the Act of 24th February, 1834, section 25; that as the law stood prior to the passage of that Act, no judgment continued a lien with priority over subsequent judgments for a longer period than five years, unless within that period it was revived, (Act of 26th March, 1827); that the Act of 1st June, 1887, being a supplement to the earlier Act of 26th March, 1827, re-enacted it, and that the general affirmative words used therein, to wit, 'and no judgment shall continue a lien on such real estate for a longer period than five years from the day on which said judgment may be entered or revived,' etc., operate to repeal the Act of 24th February, 1834, so far as it gave continuance of lien, and that since the passage of the Act of 1st June, 1887, nothing, not even death itself, can continue the lien of a judgment beyond five years without a revival.

"This argument would have much force were the Act of 1st June, 1887, an original Act and not supplemental. Were such the case its effect would doubtless be to restore the law as it stood prior to 1834, since a subsequent statute if it have negative words, is generally allowed to repeal the former. But the fact that it is supplemental is of great, if not controlling significance. We dare not overlook the fact that as an amendment, to give it any validity at all, it was necessary to recite in terms the original statute and re-enact it. The negative words relied upon in the argument to effect the repeal are found in the original Act. The purpose of their insertion in the Act, could not have been what is now sought to be gathered from the supplement, for prior to that legislation, death did not operate to continue the rank of the judgment, with its lien, for five years, and therefore, such a thing as repeal could not have been in contemplation, in re-enacting the law with these words left in it. Did the Legislature intend that they should have a larger significance than they had in the original Act? If not no artificial rule for the interpretation or construction of statutes can give it to them. This supplement of 1887 became operative at once upon its passage. It is not too much to say, that thousands of judgments were then resting upon no other security than that afforded by the Act of 1834. Are we to assume that the Legislature intended to sweep away the security from beneath them, supposing it had the power to do so, and leave them valueless? When such large results would follow, if

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the Legislature were efficient to the end, the purpose to accomplish them, if not expressed in words, should be indicated by something more than a rule of construction. The supplemental Act has a purpose clearly expressed in its last seven lines, which are the addition made to the original Act and the only change made in it. They do not remotely relate to the question under consideration, but do go to show that they themselves constitute the amendment exclusively.

"The weakness of the counsel's argument, is in giving to an artificial rule of construction, greater force than to the Act of Assembly itself. It would use the rule, not as an aid to discover the purpose of the Legislature, but to arbitrarily assign a purpose, which not only is not expressed, but is negatived by all the surrounding circumstances. It applies the rule, to make it accomplish certain results and then insists that such results were intended. This would give to rules of construction the force of constitutional law. Certainly the language employed in the supplement would support the contention of counsel, were it not evident that the intention to repeal did not exist. 'A thing within the intention, is within the statute though not within the letter; and a thing within the letter is not within the statute unless within the intention.' People *v.* Insurance Company, 15 John. 380.

"The conclusion of the auditor with respect to the right of this judgment, in the order of its priority is correct, and the exceptions thereto are overruled."

Joseph A. Stuart appealed, assigning as error the finding of the Court that the lien of the Bosler judgment was continued and awarding any part of the fund to this judgment, and in not awarding to him subrogation in the Lyne judgment.

John Hays (*H. S. Stuart and Stuart* with him) for appellant.

Richard C. Dale and *M. C. Herman* (*J. E. Barnitz* with them) for the Fidelity Trust Co., guardian, appellee.

July 12, 1894. MITCHELL, J. If it were necessary to consider the appellant's right of subrogation to the Lyne judgment, the question might well be rested on the opinion of the learned Judge below, which shows clearly the absence of any equity on which such subrogation could rest. But even conceding the right, the Lyne judgment was junior to the Bosler lien if that was still alive against F. W. Searight's land. The only question, therefore, is whether the Bosler judgment having lost its lien against the land of G. P. Searight, the principal, still kept its hold on the estate of the surety, by virtue of the latter's death while it was an undisputed lien.

The question is settled by the cases of Winton *v.* Little, 94 Pa. 64; Kindt's Appeal, 102 Pa. 441; and Campbell *v.* Sherman, 151 Pa. 70, unless the law has been changed by the Act of June 1, 1887, P. L. 289.

That Act amends the Act of March 26, 1827, P. L. 129, by adding a clause preventing the continuance of the lien of a judgment as against a terre tenant whose deed is recorded, unless he be named as terre tenant in the original scire facias. This appears to be the whole scope of the amendment, but in obedience to the constitutional requirement the Act quotes the whole of section first of the Act of 1827, and then re-enacts it in the same words, with the addition above mentioned. In so doing it necessarily re-enacts the words "and no judgment shall continue a lien . . . for a longer period than five years . . . unless revived," etc., and the argument is strongly urged by appellant, first, that the Act of February 24, 1834, continuing the lien of judgments against the lands of a decedent, being in *pari materia* is repealed by the general negative words of the Act of 1887, and secondly, that it cannot be considered as excepted from such effect, and allowed to remain as an amendment to the Act of 1827, because it is not "re-enacted and published at length" as required by section 6 of article 3 of the Constitution.

The second proposition may be disposed of first. The Act of 1887 does not undertake to amend the Act of 1834, and therefore did not need to repeat its terms. The constitutional provision has reference to express amendments only. Its object, like that of section 2 of the same article requiring each Act to have its subject clearly expressed in the title, was to secure to the legislators themselves and others interested, direct notice, in immediate connection with proposed legislation, of its subject and purpose. The Constitution does not make the obviously impracticable requirement that every Act shall recite all other Acts that its operation may incidentally affect, either by way of repeal, modification, extension, or supply. The harmony or repugnance of Acts not passed with reference to the same subject can only be effectually developed by the clash of conflicting interests in litigation, and the settlement of such questions belongs to the judicial not the legislative department. No constitutional provision is involved in the present case.

The words of the Act of 1887, "no judgment shall continue a lien," etc., are general and negative, and *prima facie* therefore, repeal everything in conflict with them. But they are not to be extended to subjects not within the legislative intent. They are part of the Act of 1827, and are re-enacted without change, *pro*

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forma in order to add the subsequent provision about terre tenants. The Act of 1827 in its turn adopted them from the Act of April 4, 1798, 3 Sm. 331, under which they had been given their broadest effect by this Court in Fryhoffer *v.* Busby, 17 S. & R., 121; Bank *v.* Crevor, 2 Rawle 224, and other cases. The same construction was apparently given to the Act of 1827, though the absence of reference to it, even in cases which arose after its passage, and the continued recurrence to the Act of 1798 are not a little remarkable. See Downey's Appeal, 2 Watts, 297; Jack *v.* Jones, 5 Whart. 321, and Konigmaker *v.* Brown, 14 Pa. 269. In all of these cases it was held that as against junior encumbrances, the lien of judgments expired in five years although the judgment debtor had died within that period.

The Act of Feb. 24, 1834, sec. 25, P. L. 77, changed the law in such cases by declaring that the lien should continue to bind the estate for five years without revival, and during that term the judgments should rank according to their priority at the time of death. This Act established a broad line of distinction between judgments against living defendants, the liens of which were limited to five years absolutely, and judgments against defendants who had subsequently died, the liens of which were extended five years from the date of death. The Act of 1827 was a supplement to the Act of 1798, and both dealt directly with the subject of judgments only. The Act of 1834 was entitled "An Act relating to executors and administrators," and not only its title, but its seventy carefully drawn sections show that it was intended to deal directly only with that subject, and touched the subject of judgments only incidentally in connection with the estates of decedents. The Legislature therefore in 1887 had before it a clear distinction between classes of judgments, existing for more than half a century under separate statutes, and when under such circumstances it took up one of those statutes for amendment, we must assume that it legislated with that established distinction in view, until it shows a clear intention to disregard or abolish it. Notwithstanding therefore the generality and the negative character of the language of the Act of 1887 we are of opinion it has not affected the Act of 1834.

Decree affirmed.

J. D. B., Jr.

Jan. '94, 434. April 26, 1894.

Searight's Estate.
Coyle's Appeal.

Equity—Subrogation—Executor paying claims against his testator's estate—Rule as to personal property and as to real estate.

Where an executor in good faith and with reasonable grounds to believe the estate in his care solvent pays off judgments, he has an equitable right of subrogation, so far as personal estate is concerned, provided it can be allowed without injury to others.

But as to lien creditors upon real estate, their rank and standing are fixed absolutely as matter of law by a sale, and they participate accordingly in the proceeds. After sale no new rights of lien or claim on the proceeds can be acquired by subrogation or otherwise. The rights of creditors are determined by the record, and the Court cannot proceed to determine whether subrogation would work injury; that it would work injury is a presumption *juris et de jure*, and it cannot therefore be allowed.

Appeal of James Coyle and Keziah Searight from the decree of the Orphans' Court of Cumberland County, making distribution of the estate of F. W. Searight, deceased.

The facts are stated in the opinion of the Court below, STEWART, P. J., specially presiding:—

"In view of the other facts in this case, it is a matter of little significance that the executor when he paid the principal and interest on certain judgments, instead of having the claims assigned to himself, had them marked paid and satisfied. At law this would imply an extinguishment of the debt, but such conclusion is avoided in equity, whenever the ultimate payment of the debt should, in good conscience, be required of some one else. In entire good faith, and in the honest belief that the estate was more than adequate to the payment of all its liabilities, the executor, in advance of the sale of the real estate of the testator, applied certain assets to the payment of certain liens. Now that the estate has all been converted, and its insolvency appears, it is contended that he is concluded by the entry of satisfaction upon the judgments, and that he cannot make use of them in the distribution of the estate for his reimbursement.

"Had these claims been assigned to him, his right to use them could not have been questioned. This would have been the better and safer course, since it would have given him under any circumstances all the right of the plaintiffs in the judgments. Notwithstanding they were marked paid, he may still use them, but only on condition that the exercise of this right works no injury to the other parties. He might have had an absolute right by an assignment, whereas he now has only a conditional one. He has lost this much advantage and no more, and the govern-

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ing question is, would allowing these claims to be kept afoot for the executor's reimbursement, result in giving the creditors of the estate less than they would have received had they not been paid? Of course, it would result greatly to their advantage were these claims to be eliminated from the distribution; but they are not entitled to be advantaged at the expense of an innocent party; they are entitled simply to the rights they had, unimpaired and unaffected by anything the executor may have done. If what the executor asks is consistent with these, he is entitled to it, no matter if the record does show satisfaction. Now it is not pretended that any creditor gets less, in consequence of the executor's act, than he otherwise would have done. Where then is the injury? The status of each creditor was fixed at the death of the testator, and it remains undisputed. To give to the receipts which the executor took in these cases the effect of an assignment to himself, is to do simple justice to him without prejudicing the rights of any one concerned.

"It was urged upon the argument of the case that certain lien creditors bid upon the testator's real estate an amount just sufficient to cover their liens, assuming, as they had a right to do, that the judgments which the executor had paid, in whole or in part, were in point of fact satisfied and extinguished to the extent of the payments made, and that to allow the executor to recover on these judgments now would disappoint them.

"Be it so, such fact would not of itself operate to defeat the executor's claim. More than simple disappointment is required to work that result, injury is the essential ingredient. Were there a finding by the auditor that any subsequent lien creditor, bidding at that sale for his own protection, had been misled into bidding less than he otherwise would have done, because of these entries of payment and satisfaction upon the record, and that in consequence his judgment would not be reached in the distribution if the executor should be allowed his claim, doubtless such finding would establish a superior equity in the creditor, arising from the injury that resulted to him, and which was caused by the act of the executor. Not only is there no such finding by the auditor, there was no request for any finding on the subject, and there is no exception to the report because of its omission. The exception taken is, that the auditor allowed the executor's claim, and the only ground assigned is that the receipts showed payment and extinguishment of the debt. Such a thing as injury special or general is not suggested. If a finding on this subject was desired, it should have been submitted to the auditor. If the findings do not cover all the ground that is thought important, exceptions should be taken to their insufficiency. True the Court may supplant the findings of an auditor, but it rarely occurs that the Court does so of its own motion when counsel are content with the report as it stands. We have not been asked for any additional findings, nevertheless we have examined the evidence to see what, if any, warrant there is for this contention on the part of the judgment creditors. We fail to see anything which would justify a finding that would avail them in the least. The only witness who testifies with respect to this matter is Mr. Wetzel, who says that he made a close calculation of the liens; that he omitted therefrom such as were paid by the executor because they were marked satisfied; that he attended the sale as a purchaser, and bid $75 per acre on the mansion tract, based on the calculation he had made. This comes far short of establishing a superior equity to that of the executor. He says he attended the sale as a purchaser. To purchase for whom? for himself? or as attorney for the plaintiff in the judgment? If for himself, he not being shown to be a creditor, of course, he has no standing; if as attorney for a judgment creditor, to what extent was he authorized to bid? Did his bid reach the judgment he represented? Would he have continued bidding until that result had been reached, had he known that the prior judgments were to be paid out of the bid? In short, where and how is he injured? It will not do to assume that on a different basis of fact he would have acted otherwise than he did. That is not to be left to inference, but is to be proved as any other essential fact, and yet there is not enough in the evidence to support an inference of the feeblest sort that Mr. Wetzel would have bid an additional dollar had he known these claims of the executor were to be paid. If he was prepared to bid an amount sufficient to protect all or part of the judgment he represented, notwithstanding these earlier liens marked satisfied were to be paid out of the bid, why did he not say so? Unless he would have so done, his client is in no way prejudiced by allowing the executor to assert these claims. Disappointed he may be, but injured he certainly is not.

"I see no reason why equity should not be allowed to do its perfect work in keeping afoot these judgments for the protection of the executor.

"The exceptions which relate to so much of the report are overruled.

"And now, 9th February, 1894, exceptions dismissed, the auditor's report is confirmed, and payment by the executors is ordered in accordance therewith."

James Coyle and Keziah Searight, judgment creditors, appealed, assigning as error the action

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of the Court in allowing the executor to be subrogated in case of the judgments paid by him.

E. W. Biddle and *M. C. Herman* (*W. A. Kramer* with them), for appellants cited:

Gring's Appeal, 89 Pa. 336.
Douglass's Appeal, 48 Id. 223.
Indiana County Bank's Appeal, 95 Id. 500.
Harner's Appeal, 94 Id. 489.

John Hays, for appellees.

July 12, 1894. MITCHELL, J. That the executor in good faith, and with reasonable grounds to believe that the estate was solvent, paid the interest and the judgments, gives him, as the auditor found and the Court below held, an equitable right of subrogation, to which he may be entitled even at the present time provided it can be allowed without injury to others. So far, therefore, as the fund was the proceeds of personal property, the distribution may be sustained upon the opinion of the learned Judge below.

But with regard to the proceeds of the real estate the case is entirely different. There were lien creditors with rights of priority between themselves, and as to other creditors. They stood in line, and when one of them stepped out by expiration of his lien, or payment, or any other cause, all those in the rear advanced a step towards the front. Their rank and standing were fixed absolutely as a matter of law by the sale. After that no new rights of lien, or claim on the proceeds, could be acquired by subrogation or otherwise. This was firmly settled in Douglass's Appeal, 48 Pa. 223, and Gring's Appeal, 89 Pa. 339, where even sureties who had an unquestioned right of subrogation, were held to have lost it as against junior encumbrances by failing to assert it until after a judicial sale.

The learned Judge below apparently treated this rule as dependent on the particular facts of each case, showing actual injury to the junior lien holders, and as there was no evidence in the present case that the appellants would have bid any more at the sale if they had known that Mr. Stuart was entitled to subrogation to the interest and judgments he had paid, he held that they were not injured, but only disappointed by the subrogation. The rule, however, is a presumption of law, not rebuttable, and the fact is to be decided by the state of the record at the date of the sale. In Harner's Appeal, 94 Pa. 489, it was held that a judgment creditor had a right to rely on the apparent priority of his judgment shown by the satisfaction of record of an earlier one, and in Indiana County Bank's Appeal, 95 Pa. 500, it was said by the present Chief Justice, "The rights of those claiming to participate in the proceeds of a sheriff's sale are to be determined by their status as shown by the record at the time of the sale." In none of the cases is any reference made to the evidence, or the fact of injury to the junior encumbrances, the inference of injury is drawn as a presumption *juris et de jure*, and the rule is a rule of policy in the interest of certainty in judicial sales.

It is unfortunate for the executor that his very carefulness to have the payments noted on the record should work to his disadvantage now, but the payments of interest must stand on the same basis as the payments of principal. Both being on the record as reductions or satisfaction of the judgments at the time of the sale, must be conclusively presumed to be so, as against junior judgment creditors claiming the fund.

Decree reversed, and distribution directed to be made in accordance with this opinion.

J. D. B., Jr.

Jan. '94, 383. March 8, 1894.

Ihrie's Estate.
Leary's Appeal.

Construction of will—Illiteracy—Division per stirpes or per capita—Word "between."

Wills, like contracts, are to be construed according to the actual intent of the maker as ascertained from his words.

Illiteracy raises no presumption that words are used incorrectly. At most it lets in the conjecture that they may be. The great mass of the words even of illiterate persons are used correctly.

The word "between" properly refers to two and not more. Hence where a testatrix provided that the residue of her estate should be divided "between my husband's grandchildren and the children of A." the fund was awarded one-half to each class named.

Appeal of John L. Leary *et al.* from the decree of the Orphans' Court of Northampton County, making distribution of the estate of Eliza M. Ihrie, deceased.

The Orphans' Court, sustaining exceptions to the report of an auditor, E. J. Fox, Esq., held that under the will of the testatrix her residuary estate should be distributed one-half to the fifteen grandchildren of her deceased husband, and one-half to the four children of Ferdinand Poree. Numbers of the first class appealed assigning this distribution as error, and claiming that the distribution should have been *per capita*. The facts are stated in the opinion of the Supreme Court.

Russell C. Stewart and *George Ross*, for appellants.

R. I. Jones and *L. J. Drake*, (of Boston, Mass.) (*W. S. Kirkpatrick* with them), for appellees.

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July 11, 1894. MITCHELL, J. The testatrix wrote, "The residue of my estate is to be divided between my husband's grandchildren, and the children of Ferdinand Poree." Did she mean that the fifteen grandchildren should take one-half, and the four Porees the other half, or did she mean a division *per capita*, one nineteenth to each?

The word "between" refers properly to two, and not more. It is true that it is not unfrequently used, especially by the uneducated, and colloquially, in the sense of among, as referring to more than two objects. But that admittedly is not its correct use. The presumption is in favor of the proper and correct use of words, whether technical or belonging to the language of ordinary life. If we rest on this presumption the distribution of the residuary estate into two parts was right.

It is conceded that neither group of beneficiaries could have inherited from the testatrix, and we therefore get no light from the analogy of the intestate law, nor are there proved any family relations or other special circumstances which can be taken into consideration as guides to actual intent. We come back therefore to the presumption as to the meaning of the words, unless we find something in the will itself that shows their use in a different sense.

It is said that the popular use of between by the uneducated is in the sense of among, and that the testatrix was illiterate. The auditor reports, however, that she "was a woman of education and refinement," though the will itself would not indicate education either in spelling or grammar. That, however, is far from conclusive, as there are many people of fair education who never acquire the habit of correct spelling, and as to the grammar, the faultiness in that respect may be accounted for, as well as the very confused and disorderly arrangement of the bequest, by the suggestion of the learned Judge below, that this will was made carelessly and intended at first as a mere memorandum. But if we concede that the testatrix was illiterate, it would not follow that she used the word incorrectly. The great mass of the words even of illiterate persons are used correctly. The lapses are only occasional, or the language would cease to serve the purposes of communication. Illiteracy, therefore, raises no presumption that words are used incorrectly. At most it lets in the conjecture that they may be. That is the utmost effect that it could have here. We can suppose or guess that the testatrix may have meant "among," but even that guess becomes highly improbable, when we note that in the clause preceding the one in question, she uses the word "among" with entire accuracy, directing her "linen to be divided among the grandchildren," and follows this immediately by the direction that the residue of her estate shall be divided not "among" but "between" the grandchildren and the children of Ferdinand Poree.

Again it is said that the prior parts of the will show that when the testatrix desired to make a division *per stirpes* she knew how to do so, and almost invariably used the words "one portion" or "one share," and if that had been her intention in regard to the residue she would have been likely to use the same phrase. But that is a two-edged argument, for the same parts of the will show also that when she intended a *per capita* division, she made it plain by the expression "share and share alike."

On a general view of the whole will we see no ground on which to give the word "between" any other than its proper meaning, and according to that the grandchildren of Gen. Ihrie are one class, taking half, and the children of Ferdinand Poree, another class, taking the other half of the residuary estate.

As wills, like contracts, are to be construed according to the actual intent of the maker, as ascertained from his words, precedents are of comparatively little value, but illustrations in accord with the views herein expressed will be found in Young's Appeal, 83 Pa. 59; Osburn's Appeal, 104 Pa. 637; and Green's Est., 140 Pa. 253.

Decree affirmed.

GREEN, J., dissented.

J. D. B., Jr.

Jan. '94, 161. February 9, 1894.

Robinson v. Pennsylvania Railroad Company.

Charter—Construction of—Right of way—Discretion in location of—How to be exercised—Anticipation of future use—Practice—Verdict—Amendment of.

When the charter of a railroad company limits its power to take land for right of way to a strip four rods in width, "except in the neighborhood of deep cuttings or high embankments, or places selected for sidings, turnouts, depots, engine or water stations," no greater width than four rods can be taken unless it affirmatively appear that one or more of the exceptional circumstances specified in the charter exists.

The mere fact that the engineer who located the line testified that there was a cut thirteen feet on a farm through which the right of way was surveyed, without further evidence to show the length of the cut or its location, does not justify the taking of an additional width for the whole length of the line; the burden of proof is upon the railroad company both as to the extent and location of such cuts or embankments.

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So if extra width is claimed for stations, sidings, etc., the necessity for the same and their location must be positively shown.

While the discretion as to the location of stations, sidings, etc., belongs to the company, it must be exercised in good faith, and the necessity, extent and location of the extra appropriation for such purposes must be definitely shown.

How far a railroad company may anticipate its future uses not decided, but it seems that if four rods is all that can be taken for present use no more can be taken for anticipated future use.

Where the evidence shows that a right of way 147 feet in width was taken and that the same was located by a central line, a verdict for a plaintiff in ejectment "for the land named in the writ (being the said 147 feet in width for a distance of almost a mile) in excess of 66 feet" is not void for uncertainty; the practical effect of this finding is that the appropriation by the railroad company was properly exercised as to 33 feet on each side of such line, and the verdict will be so amended.

Appeal of the Pennsylvania Railroad Company from the judgment of the Common Pleas of Chester County, in an action of ejectment by Moncure Robinson, Jr., and Lydia, his wife.

On the trial, plaintiffs proved their ownership of a farm in Chester County through which the defendant company had surveyed right of way for a branch road known as the Trenton Branch or Cut-off. In the construction of this road defendant's property was traversed about 4250 feet, of an average width of about 140 feet. taking in all over 13 acres of plaintiff's land, Plaintiffs alleged that no power existed in the defendant to take more than an average width of 66 feet, and therefore they brought this suit to recover the said strip of land, or so much thereof as it might be determined the defendant was assuming illegally to hold.

The defendant's engineer testified that their map only showed the centre line and that they had determined to take 70 feet on each side of the centre line through the land of defendant. He also testified that considerable cutting and filling was required to be done on this land, the deepest cut being about thirteen feet and the highest embankment about the same; there was no accurate testimony given as to the location or extent of the cuts and embankments.

Other facts appear in the charge to the jury as follows:—

"The case we are trying narrows itself down to a comparatively small compass.

"Mr. Robinson, as you have heard, is the owner of some two hundred acres of land in the township of Tredyffrin, through which the Pennsylvania Railroad Company has located a new road, styled the Trenton Cut-off. He objects to that location. He says that the company has no right to locate its road in the way in which it has attempted to do; and he has therefore brought his action of ejectment to dispossess it of the land. The company has not only located the railroad, but has actually built it, and is, therefore, in possession of the land. He says it has no business to be there, and his only remedy to get rid of it is by an action of ejectment. This is an action that will remove them from the occupancy of his land. The company justifies this occupancy by saying that the laws of the Commonwealth have given it certain powers; that it was authorized by the Legislature many years ago to locate and build branch roads to its main line; and by virtue of the power thus conferred it has entered upon this land, taken possession of it, and built this road.

"The Legislature, in granting this power to this company, has imposed certain duties, or certain restrictions, upon it. One of them, it is alleged upon the part of these plaintiffs, is that before it can undertake to locate its road, or at least undertake to build the road, the route must receive the approval of the company itself. And they say that in this case there is no evidence to show you that the company ever so located it; that it was located simply by the chief engineer and the vice-president of the company. If that is so, in our judgment it is not a location of the road. But you will consider whether or not the testimony in the cause bears them out in this. Mr. Crawford tells you that he directed this route to be run; to be located; and to be marked upon a map. That map was submitted to Mr. DuBarry, the vice-president of the road; that he subsequently saw that map, and it bore the signature of the secretary of the company, as well as the corporate seal of the company. Was that the act of the company? Did it adopt the route which Mr. Crawford had directed to be run and had located? Of course an engineer must be the first officer to point out where the road should go, in his judgment. He makes it not exactly upon the ground, but upon a map, for the use of the company; to show the officers where, in his judgment, the road should be located. But in our opinion this would not be sufficient, even if it was approved by the vice-president of the road. In our judgment it would require the action of the company. There must be some action on the part of those who represent the company, and the chief-engineer and the vice-president, you will understand, do not represent a railroad company in its corporate capacity. It must be recognized through the officers of the company, they who constitute the corporation itself, and these are the president and its board of directors. But the question for our consideration is, whether or not you can say here that this route, from the evidence which is submitted (and it is all in what Mr. Crawford has said), was adopted by the railroad company

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as a corporation. If you are satisfied from the testimony that the company acted upon it, then that is sufficient, in my judgment, to locate the road. In the opinion of the Court it does not require that the corporate officers shall fix the width of the route, or the amount of land taken. They are called upon by the Act to designate and point out the route, and the Act itself fixes the width which that shall be, unless they see fit to limit it in extent.

["Then the question following that is, if they located this route, has the company appropriated to itself more land than the law allows? Has it taken more ground in the construction of this road than the Act of Assembly warrants?] We have had occasion before to consider this question in another branch of this case, and we then gave it a good deal of consideration and reflection, although we were not called upon to express the opinion which we reached at that time. [In the opinion of the Court this company is limited in its taking of ground to sixty-six feet. The Act itself prescribes the amount of land to be taken. It authorizes it, in locating the line, not to take more than sixty-six feet, except where certain contingencies exist, such as deep cuts, or high embankments, or where, in the judgment of its officers, it is necessary to locate sidings, or stations, or water tanks, or something of that kind, and there they are authorized to take more. Is there any evidence in this case showing that such a thing was necessary on the property of Mr. Robinson? I fail to discover it if there is.] It is true, Mr. Crawford says that they have thought that it might be necessary, some time in the future—this is about the substance, as I gather it, of his testimony—that it might be necessary some time in the future to locate sidings on Mr. Robinson's ground; that it might be necessary to locate stations there, or buildings of some kind, for the use of the road. When he does not know, he is not able to tell, and nobody else can. It may never be necessary to do so. If the road increases in tonnage, in business, then it may become necessary. But if such a thing should not occur, then it might not be necessary to locate them. The Act seems to contemplate, in the estimation of the Court, that that necessity is to be determined at or about the time the road is located. That is, the company must select where it will locate its sidings, where it is necessary to have these turnouts, where it is necessary to have switches, where it is necessary to erect its stations, water tanks, and things of that kind; and having done so, it is at liberty, if necessary, to exceed sixty-six feet in width. [If you can find any testimony in the cause which would justify you in concluding that a width of more than sixty-six feet was necessary in the location of this road through Mr. Robinson's ground, it is a question for you. I can only say to you that I have not been able to discover it, and I recall nothing in the case at this time which leads me to entertain that belief.]

"This is all that is necessary, probably, for me to say. The question is raised here, as you will discover by the points when I come to read them, whether or not these plaintiffs are entitled to recover from this company all the land which it has taken, or whether it is only entitled to recover from this defendant the land in excess of the sixty-six feet. Whether they are entitled to recover the sixty-six feet, as it occurs to my mind, will depend upon whether or not you find that the company itself, as a company, has authorized the taking of this land. That is the first point I called your attention to; whether or not there is evidence here which justifies you in finding that the company as a corporation has acted upon this matter, and has located the road by determining this route. [If it has determined this route, then it will be entitled, in my estimation, to retain the sixty-six feet.] If it has failed as a corporation to determine that and act upon it in the way the law requires, then it would not be entitled even to retain the sixty-six feet."

(Plaintiff's points withdrawn.)

"I have nothing to do now in connection with the points except to pass upon the point of the defendant. The company asks me to say to you, that:—

"First. Under all the evidence in this case the verdict of the jury must be for the defendant. *Answer*. We cannot say that, as you have discovered in the course of my charge. Your verdict will be in accordance with the points which I have suggested to you as arising here. Whether it should be for the plaintiffs to the extent which they claim or not, will depend upon what I have already said to you relative to the location of the road.

"Take the case, gentlemen, and dispose of it."

Verdict "for the plaintiffs for the land named in the writ in excess of sixty-six feet." Judgment on the verdict.

Defendant appealed, assigning for error the portions of the charge in brackets, the answer to their point, and that the verdict was void for uncertainty, the action being for the land described in the writ, and the verdict being for a part of the premises without designating it.

John J. Pinkerton, for appellant.

John G. Johnson and *R. Jones Monaghan* (with them *C. H. Krumbhaar* and *J. Frank E. Hause*), for appellees.

May 21, 1894. MITCHELL, J. *Prima facie* the authority of the railroad company, defendant, to take land for its right of way is limited to a

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width of sixty-six feet. Any greater right must depend on the existence of one or more of the exceptional circumstances specified in the charter, and such circumstances must be shown. The learned Judge below was quite within bounds in saying to the jury that they might consider that matter, but that he recollected no evidence of any necessity for additional width. He would have been justified in telling them positively that there was no such evidence in the case. It is true that Mr. Crawford, the engineer who located the line, testifies that there was a cut on plaintiff's farm of thirteen feet, and an embankment of the same height, and that by the ordinary rule of engineering forty-nine additional feet would be required at such points. This would only justify a width of one hundred and fifteen feet, not the one hundred and forty taken, but even as to this width there was no effort to show the length of the cut, or its location. A necessary cut or embankment one thousand feet long would not justify taking the requisite additional width for the whole four thousand feet that the road runs through plaintiff's land, nor would the cut at one side of the farm justify the taking at the other. The burden of proof of the necessity both as to extent and location was upon the defendant, and was not met by any evidence in the case.

The same view applies to the other necessity claimed, that of space for stations, sidings, turnouts, etc. There was no effort to show that any particular location was made of any of the appurtenances to the line, specified in the statute as giving occasion for additional width of appropriation. In fact the substance of the whole evidence on the subject is contained in a few lines of the testimony of the engineer, "From the east end to the west end of the Robinson property we took seventy feet on each side of the centre line. . . . with the expectation of the future uses of this road. . . . If you ask me if at a level point we took seventy feet on each side of the centre line, I say we did. We do not wish to take a serrated indented line for our right of way boundary." It is very clear from this testimony that an extra width of thirty-seven feet on each side of the centre line, more than double the width the law allows, was taken, not for cuts or banks, nor for stations or sidings, etc., but for the general purposes of the road. This was in plain excess of the statutory authority.

It is not intended to interfere with the discretion of the corporation in the location of its stations, sidings, etc., nor with its right to do what good engineering requires. But the exercise of both must be in good faith for the purposes the statute permits, and the necessity, extent and location of extra appropriations for such purposes must be definitely shown. The charter limitation of sixty-six feet is mandatory, except in the cases the charter itself specifies, and it cannot be set aside or evaded at mere will. While the discretion is in the corporation, its exercise when challenged in a Court of law, must like every other right be sustained by showing the existence of the circumstances under which the charter authorizes it.

How far a railroad company may anticipate its future needs is a matter not involved in the present case. The statute limits the authority to take property for its right of way for the general uses of the road to sixty-six feet, with additional width in specified circumstances. If sixty-six feet is all that can be taken for present use, certainly no more can be taken for an anticipated future use.

The verdict in the case is defective in not defining the tract found to be properly taken, but there is no difficulty in putting it into proper form. The jury have settled all the essential facts. The testimony of the engineer was that the road was located by a central line, and the jury have found that the right of appropriation was properly exercised as to thirty-three feet on each side of such line. As to the strip thus described the jury found for the defendant, as to all outside of it, for the plaintiff.

The verdict will be so amended, and thereupon the judgment affirmed. W. M. S., Jr.

July, '93, 154. January 23, 1894.

Fidelity Insurance, Trust and Safe Deposit Company, Administrator, etc., v. Gazzam.

Jurisdiction in Orphans' Court and Common Pleas—Res adjudicata—Decree in O. C.—Effect of—Fraud—Bill in equity.

The jurisdiction of the Orphans' Court is limited by statutes, and where a matter outside of its general jurisdiction is brought within it by special circumstances, the conclusiveness of its decree is limited to the purposes for which it takes jurisdiction.

The confirmation of a first account of an executor and his discharge by the Orphans' Court is no ground for a plea to the jurisdiction of the Common Pleas upon a bill in equity filed by the administrator d. b. n. c. t. a. of testator to set aside a power of attorney given by the testator to the executor, and to compel said executor to account for moneys alleged to have been fraudulently appropriated to his own use while acting as attorney-in-fact for decedent during his lifetime.

If the question of the manner of obtaining the agreement be determined in favor of complainant, then the decree of the Orphans' Court and its extent as a conclusive settlement can receive due consideration.

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Appeal of the Fidelity Insurance, Trust and Safe Deposit Company, administrator d. b. n. c. t. a. of John Reading, deceased, from the decree of Common Pleas No. 4, dismissing its bill in equity to set aside, on the ground of fraud in the procurement, a power of attorney given by decedent to Joseph M. Gazzam, and to compel an account for money alleged to have been fraudulently appropriated by said Gazzam for his own use.

A plea was filed to the bill, to the effect that the account of the defendant as executor of the deceased had been confirmed by the Orphans' Court, and that he had been discharged as executor, and the balance in his hands had been paid over to his successor, the complainant. The cause was heard on bill and plea. The Court sustained the plea and dismissed the bill for want of jurisdiction, ARNOLD, J., filing the following opinion:—

"On March 30, 1888, John G. Reading appointed his son-in-law, Joseph M. Gazzam, his attorney in fact, to take charge of and manage his property of all kinds, and on August 28, 1888, Mr. Reading and Mr. Gazzam entered into an agreement in writing by which Mr. Gazzam agreed to pay to Mr. Reading $50,000 annually, and faithfully attend to all the business of Mr. Reading's estate. Mr. Reading agreed, in consideration of said $50,000 to be paid annually and the attention by Mr. Gazzam to his business, that Mr. Gazzam should have for his sole use and benefit all the income arising from Mr. Reading's estate. [This agreement was witnessed by Mrs. Gazzam, who was the only daughter of Mr. Reading, and principal devisee and legatee of his estate. The transaction was open, and known to every one having a present interest in the matter, or a right to knowledge thereof. No doubt Mr. Reading was weary of the cares of his large estate, and sought relief from them, but prudently provided for an ample income for himself, while the excess above his needs he kept within his own family by giving it to the husband of the only person whose welfare he had at heart.] On January 27, 1891, Mr. Reading died, having first made and published his will, dated July 22, 1887, and a codicil thereto dated November 8, 1888, both of which were probated, and his estate was distributed in accordance therewith without any question as to his testamentary capacity. [His daughter, Mrs. Gazzam, was the principal object of his care. To her he gave the income of his residuary estate for life, with remainder to her issue, and in default thereof to three charities], the Church Erection Fund of the Presbyterian Church, Lafayette College, and Lincoln University. On December 28, 1891, the account of Mr. Gazzam, as executor, was filed in the office of the Register of Wills and on July 8, 1892, an adjudication thereof was filed in the Orphans' Court. On July 16, 1892, Mr. Gazzam petitioned the Orphans' Court for his discharge, which was granted, 'upon his transferring all the securities and paying over all the moneys in his hands belonging to said estate to his successor, and upon the final confirmation of said adjudication,' which took place on July 23. Mr. Gazzam thereupon paid all the assets of the estate to his successor, the plaintiff in the present suit, and filed in the Orphans' Court a receipt therefor.

"In the meantime Mrs. Gazzam instituted proceedings to obtain a divorce from her husband. The bill was filed June 9, 1891, and a decree of divorce was entered on June 6, 1892.

"On March 15, 1893, the bill in the present suit was filed. The substantial averments of the plaintiff are that Mr. Reading, at the time of his death, was seventy-eight years old; that for a long time prior to his death he had been failing in mental and bodily health, had no intelligent comprehension of any business transaction, was very ill at the time he signed the power of attorney; that his income at the time he agreed for an allowance of $50,000 a year exceeded $100,000 a year; and that he acted without counsel and under the constraining influence of Mr. Gazzam. It is further alleged that by reason of reckless, improper, and improvident investments a loss of $300,000 was incurred. It is thereupon prayed that Mr. Gazzam be required to render an account of the income received by him under the power of attorney and agreement before mentioned.

"[I have quoted all these transactions and dates with particularity for the purpose of showing that all that was done in the management, settlement, and disposition of Mr. Reading's estate, as well during his life as after his death, was done openly and with the knowledge of every one interested at the time, and also to show that the rule of law applicable to this state of facts, as laid down by the Supreme Court in Helfenstein's Est., 135 Pa. 293, that when an account has been filed and adjudicated the decree of the Court thereon is conclusive, not only as to the matters which actually were raised, but also all which might have been raised, is, on the merits of this case, a just rule of law, and if the matter were one within our jurisdiction we would, in obedience to that rule, dismiss the bill. The power of attorney was duly acknowledged before a reputable notary; the agreement for the payment of $50,000 of income to Mr. Reading, and the retention of the remainder by Mr. Gazzam, was executed in the presence of Mrs. Gazzam, and the account of Mr. Gazzam was filed and adjudicated at a time when the relations of the parties were not such as to induce

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either to overlook the faults of the other. Every person having an interest in the estate was represented at the adjudication, and all the facts now averred were well known at the time.]

"[We are, however, of the opinion that the matter has been placed without our jurisdiction, and, consequently, will dismiss the bill for that reason.] If this bill had been filed by a person claiming against the estate, who was confronted with a deed which stood in the way of his obtaining his share of the estate, he might, before the estate had been subjected to the jurisdiction of the Orphans' Court, have filed a bill in the Common Pleas to declare the deed void. This was adjudged in Campbell's Ap., 80 Pa. 298, in which a widow's bill to set aside a marriage settlement was entertained in the Court of *nisi prius*, because it was filed there before the estate had been brought into the Orphans' Court by the executors filing their account, and the converse was decided in Dundas Est., 73 Pa. 474, in which a legatee who had assigned his legacy was sustained in his resort to the Orphans' Court, in which the account of the executor had been filed, for relief from his assignment, which he alleged was obtained by fraud. It is not necessary to repeat what has been so often said on this subject. It may be tritely said, as a summary of the decisions, that while the Orphans' Court is not a Court of equity, yet it has the powers of a Court of equity, and may inquire and determine whether a deed which stands in the way of justice is void because of fraud in obtaining it, and that when either Court first obtains jurisdiction, so as to enable it to determine such matters, its jurisdiction thereafter is exclusive of the other.

"We therefore dismiss the bill for want of jurisdiction."

The plaintiff appealed, assigning for error, (1 to 4), the portions of the above opinion in brackets; (5), the dismissal of the bill for want of jurisdiction, and (6), not overruling defendant's plea.

Richard C. Dale and *John G. Johnson*, for appellant.

1. The account filed by Gazzam cannot be treated as a final account; nor can the proceedings thereunder in the Orphans' Court be regarded as a confirmation of a final account.

Shindel's Appeal, 57 Pa. 43.
Act March 15, 1832, secs. 29, 30.
Act March 29, 1832, secs. 15, 16.
Act June 16, 1836, sec. 19.
Act May 19, 1874, sec. 6.
Act March 18, 1875, sec. 1.

If the defendant were still executor, he would be obliged to file a final account upon a mere citation averring that there were matters of charge which he had not included in his former account.

Bower's Appeal, 2 Pa. 434.
Chambers Appeal, 11 Id. 442.

Even if the account filed was a final one, the confirmation thereof does not bar the relief claimed under the bill.

Miller's Estate, 136 Pa 239.
Griffith *v.* Chew, 8 S. & R 32.
Pusey *v.* Clemson, 9 Id. 208.
Lisenbigler *v.* Gourley, 56 Pa. 166.
Simon *v.* Albright, 12 S. & R. 429
Eichelberger *v.* Morris, 6 Watts, 42.
Beckley's App., 3 Pa. 425.
Act Feb. 24, 1834, sec. 6.

That a plea of *res adjudicata* will not be sustained when there has not been a real determination of the litigated question in the prior suit is shown by the decisions in—

Haviland *v.* Fidelity Co., 108 Pa. 236.
Weigley *v.* Coffman, 144 Id. 489.

J. Levering Jones and *J. Howard Gendell* (*William S. Wallace* with them), for appellee.

The Orphans' Court has sole and exclusive jurisdiction of all claims against an executor, which were vested in his testator at and immediately before the time of his death, or which in any way arose in favor of the legatees, or estate, by his dealing with his testator, in his lifetime, or the estate during his executorship.

Eichelberger *v* Morris, 6 Watts, 42.
Simon *v.* Albright, 12 S. & R. 428.
Griffith *v.* Chew, 8 Id. 17.
Pusey *v.* Clemson, 9 Id. 204.
Beckley's Ap., 3 Pa. 425.
2 Bl. Com. 511.
Lensenbigler *v* Gourley, 56 Pa. 166.
Bowman's Ap, 62 Id. 166
2 Williams' Executors, *1180-5.
Hammett s Ap., 83 Pa. 394.
Otterson *v.* Gallagher, 88 Id. 355.

The jurisdiction of the Orphans' Court has neither been lost nor transferred to the Common Pleas by the settlement of the executor's accounts. If a proper cause for such action can be made out, the executor can still be charged in the Orphans' Court, and the remedy there remains exclusive of the Common Pleas.

Act May 19, 1874, P. L. 207.
Brook's Ap., 102 Pa. 150.
Appeal Odd Fellows' Savings Bank, 123 Id. 357.
Marshall's Est., 138 Id. 285.
Miskimins Ap., 114 Id. 530.
Mulholland's Estate, 154 Id. 491.
Watts Estate, 158 Id. 1.
George's Ap., 12 Id. 260.
Milne's Ap, 99 Id. 483.
Young's Ap., 99 Id. 74.

The opinion of the Court below upon the merits of the cause is the only conclusion that can justly be reached upon looking at all the facts appearing, not in the bill alone, but in the bill and plea together, including the records of the Orphans' Court forming a part of the plea.

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The former distinction between partial and final accounts is now at an end.

Rhoad's Ap., 39 Pa. 186.

The adjudication of the account is conclusive as to all matters actually raised (as these were, in substance), and also as to all that might have been raised.

Helfenstein's Estate, 135 Pa. 293.

And, on general principle, see—

Freeman on Judgments, third edition, sec. 178.
Smith's Leading Cases, 7 Amer. edition, 789–90, 8th edition, 921.
Henderson *v.* Henderson, 3 Hare, 115.
Beloit *v.* Morgan, 7 Wallace, 619.
Harman *v.* Auditor, 13 N. E. Rep. 161.

May 21, 1894. MITCHELL, J. The purpose of the bill is to set aside a written agreement on the ground that it was fraudulently procured by defendant while in a confidential position to a decedent of impaired strength of mind; and further, for an account of investments made and moneys collected and retained by defendant thereunder. This is a subject of general equity jurisdiction which resides in the Common Pleas, and not in the Orphans' Court. Under ordinary circumstances, therefore, the Orphans' Court would have no control over the money in the hands of the attorney in fact. But as the attorney was made also executor, it became his duty in this capacity to put into his account the balance in his hands as attorney, and only thereby did the Orphans' Court acquire any jurisdiction over that balance. To the extent that that matter was passed upon by the Orphans' Court a plea of *res adjudicata* is a good defence. This, however, is not ground for a plea to the jurisdiction of the Court, but goes only to the rights of the parties, and in no case would it sustain a dismissal of the bill for want of jurisdiction. Such dismissal was erroneous under any view of the facts.

To reach the real question in the case we must consider the exact extent of what was before the Orphans' Court, for it was dealing with a subject not within its general jurisdiction, but only brought within it by special circumstances, and to the extent made clearly necessary by those circumstances. That Court was not the proper tribunal to order the surrender and cancellation of the agreement, and was in no wise prompted to the consideration of that subject. As a fact the attorney to account, and the executor to ask the accounting, were the same person, and the latter's duty *prima facie* would appear to have been fulfilled by assuming that the agreement was valid, and receiving the balance becoming due on that assumption. That was all that was before the Court, and that is the utmost extent of the conclusiveness of its decree.

On the other hand, the gravamen of the present bill is the fraudulent character of the agreement, and the relief asked is to set it aside. That as already said is the subject of general equity jurisdiction, and belongs to the Common Pleas. The further relief by accounting for what was done under it is subordinate and incidental. Whether any such relief is to be given at all depends first and solely on the determination of the main question. If it is to be given, then the amount of it will depend on general principles applied to the evidence, and in such application the decree of the Orphans' Court and its extent as a conclusive settlement will receive due consideration.

It may well be that this unfortunate controversy is, as the learned Court below seems to have viewed it, an afterthought growing out of the changed relations of the parties interested, but the matters charged in the bill have not been adjudicated, and are therefore before the Court for determination.

Decree reversed, bill reinstated, and record remitted for further proceedings in accordance with this opinion. W. M. S., Jr.

Orphans' Court.

Jan. 1879, 110.

Winebrener's Estate.

Wills—Rule against perpetuities—Contingent gifts.

A will contained a limitation over "in case either of my said grandchildren shall die . . . . without leaving any children or the issue of any deceased child living at their death: . . . . if leaving such child or issue, all of them shall die under the age of twenty-one years, without issue:"

Held, not to violate the rule against perpetuities.

Sur exceptions to adjudication.

The auditing Judge held that the trust which the testator attempted to create was not a valid trust, and directed the share of an after born minor great-grandchild to be awarded to her guardian absolutely, as the trust must be treated as executed. The minor excepted. The terms in which the gift was made will be found in the opinion of ASHMAN, J., *infra*, sustaining the exceptions to his adjudication.

Hood Gilpin, for exceptions.
Samuel E. Cavin, contra.

June 30, 1894. ASHMAN, J. The testamentary gift was in trust to pay the income to the two grandchildren of the testator equally for their respective lives; and on their several

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deaths, in trust as to the corpus for the use of such of their children as should be living at their death, and the issue *per stirpes* of any who should be dead; and in case either of said grandchildren should die without leaving any children or issue of any deceased child living at such death, or if leaving such child or issue, all of them should die under the age of twenty-one, without issue, then the part intended for the one so dying should go to the survivor of such grandchildren.

The limitation over was construed by the auditing Judge to be upon the death of issue generally—a contingency which would have been undoubtedly too remote. But the issue intended were only those of a child who had died in the lifetime of the grandchild, and not of a then living child, the language of the will being: "In case either of my said grandchildren shall die . . . without leaving any children or the issue of any deceased child living at their death." This contingency must certainly be determined at the death of the grandchild. The alternative contingency "if leaving such child or issue, all of them shall die under the age of twenty-one years, without issue," must as certainly happen within the period of twenty-one years after the death of the grandchild. The case is, perhaps, anomalous, because it is entirely possible that the daughter of the deceased grandchild (whose share is now in dispute) may marry and have a child and die in her minority, and that the child shall also die within twenty-one years after the death of its grandparent. We shall then have representatives of two generations, both of them born after the death of the testator, and both of them dying within the time prescribed by the rule. This possibility was noted in the adjudication, but inasmuch as it must happen, if at all, within twenty-one years after the end of a life which was in being at the death of the testator, it cannot impair the validity of the limitation.

The exceptions are sustained, and the adjudication and decree of distribution are corrected accordingly. F. B. N.

Jan. 1894, 129.

Pillion's Estate.

Wills—Direction to pay debts—Statute of limitations—When commences to run—Act of June 4, 1879—Exceptions under.

Where a will directs the payment of certain debts specified in the will, the statute of limitations begins to run when the will goes into effect.

A will speaks from its date of execution where it creates a separate use trust, if the beneficial legatee be either married or in direct contemptation of marriage.

Sur exceptions to adjudication.

The facts of this case are sufficiently stated in the opinion.

George L. Crawford and *Henry C. Loughlin*, for the exceptions.

T. M. Daly, contra.

April 28, 1894. ASHMAN, J. After directing the payment of her just debts the testatrix added: "At the date of this will I owe $50 to Mrs. Deveny, $26 to John Love, and $10 to Mrs. Sullivan." She died July 31, 1892, five years after executing her will. At the audit, more than six years having elapsed from the date of the will, it was objected that the debts so admitted by the testatrix were barred by the statute. The argument was that the testatrix having fixed that time as the date of her indebtedness, evidently intended that her will should speak as of that time, and not of the time of her death. Of course the instances are many in which, notwithstanding the act of June 4, 1879, a will speaks from the date of its execution, as where it creates a separate use trust. The beneficial legatee in that case must be either married or in direct contemplation of marriage at the very time the will is executed. If, however, nothing appeared in this will beyond what we have quoted, we would still doubt the validity of the objection. Where a testator directs the executor to pay his just debts, and immediately proceeds to enumerate them, it would seem that he intends that they shall be paid at his death, whenever that may happen, because, until that event, it will be impossible for the executor to obey him. So if a testator gives a legacy which he expressly says is in payment of a debt, the legatee will take, no matter how old the debt may be when the testator dies; and this testatrix has practically given such legacies to the claimants. But it is unnecessary to discuss the question, for the reason that the testatrix has settled it herself. By the remaining clauses of the will she gave some small pecuniary legacies, and provided for the purchase of a burial lot, and she then disposed of her residuary estate "after paying debts, legacies, expenses and charges as above set forth." Here was a declaration as explicit as could well be made, that the debts which she had specifically designated, and which were the debts now in dispute, were to be paid by the executor, after the death of the testatrix. Granting that the former clause was a mere acknowledgment of a debt, which began to run at the moment it was written, the latter clause was as certainly a promise to pay, which could only run from the time when the instrument which contained it, would go into effect.

The exceptions are dismissed. F. B. N.

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WEEKLY NOTES OF CASES.

VOL. XXXV.] *FRIDAY, OCT. 12, 1894.* [No. 5.

Supreme Court.

Jan. '94, 248. March 28, 1894.

Merchants and Manufacturers' National Bank of Pittsburgh v. The William A. Baeder Glue Company and L. C. Haughey, defendants, and William H. Kern, garnishee.

Attachment execution—Fraud—Collateral security—Settlement of prosecution for embezzlement—Partner.

An attachment execution served on a garnishee within this State, while it cannot bind goods of the defendant in another State, which have been deposited with the garnishee, will when the goods have been sold by the garnishee, bind the proceeds in his possession.

While a defendant may waive his right to an account of his goods from one with whom he has deposited them, yet he cannot by such waiver, if collusively made, affect the right of his attaching creditor to require an account.

The holder of collateral securities, with power to sell them for his debt, is not bound to obtain the highest possible price for them, but he is bound to the exercise of common prudence and good faith in his management and conversion of them; and while the debtor may acquiesce in or assent to fraudulent conduct, so far as concerns himself, he cannot bind his creditors by such acquiescence or consent.

Where a partner who is acting as prosecutor of one who has embezzled money of the firm, agrees to settle the prosecution, and receives money therefor, the presumption is that the money is received on behalf of the firm, and he cannot be heard to allege that the money was a bribe to himself to betray the rights of his firm.

Appeal of Hood Gilpin, executor of Wm. H. Kern, deceased, from the judgment of the Common Pleas No. 2, of Philadelphia County, in favor of The Merchants and Manufacturers' National Bank of Pittsburgh, plaintiff in a proceeding sur attachment execution against the William A. Baeder Glue Company, defendant, and Wm. H. Kern, garnishee.

On the trial of the cause, before FELL, J., the following case appeared:—

The William A. Baeder Glue Company was composed of H. R. Kern, W. A. Baeder and L. C. Haughey. In January, 1890, the firm was indebted to W. H. Kern, father of H. R. Kern, in the sum of $12,000 for money loaned, and he had also endorsed for them to the amount of $14,721.87, for which he held paper, made or endorsed for the firm, none of which matured prior to March 21, 1890. H. R. Kern then delivered to W. H. Kern a firm note dated January 11, at thirty days, for $6,000; a note of the firm of J. D. Hall & Co., of which H. R. Kern was a member, for $3,346, to the order of the Baeder Co., dated January 20, 1890, payable in four months, and endorsed to W. H. Kern; a note of Schimpf & Richards to the order of the Baeder Co., dated January 21, 1890, at four months, for $2,500. It appeared that H. R. Kern was individually indebted in a large amount to his father. On account, March 2, 1890, Baeder and H. R. Kern delivered to W. H. Kern, as collateral security for the firm's debt, personal property, including 2,198 barrels of glue stored in New York, for some of which he had received warehouse receipts in December, 1889.

Baeder and H. R. Kern signed an agreement that the whole of the firm's indebtedness to W. H. Kern, amounting as above to $38,500, should be taken as due, whereupon W. H. Kern brought an action in New York against the Baeder Company, and on March 12, 1890, obtained judgment. Pending the action, the company withdrew its bank deposits, amounting to $4,600, and placed the money with W. H. Kern, who afterwards paid it out. At about the same time a judgment was obtained in New York by one Emil L. Bentz, an inmate of H. R. Kern's house, and guardian of his minor children. Under their judgment the property of the firm in New York was levied and sold by the sheriff, not including the above mentioned glue. About March 4, 1890, H. R. Kern went to Pittsburgh and saw his partner, L. C. Haughey, who had not made good his contribution of capital; and not informing him of the fact that W.H. Kern had commenced an action against the firm, and that judgment would be obtained within a few days and execution issued, urged Haughey to obtain money to make good his capital in the W. A. Baeder Glue Company. At this time a Miss Mary C. Raridan, a relative of Haughey, was an inmate of Haughey's home in Pittsburgh. She owned forty-four shares of the capital stock of the Indianapolis National Bank, worth about $4,400. At the solicitation of Kern and Haughey, she agreed to loan this stock to them, to be used for the purpose of obtaining money for the use of the firm, and gave them an order on a relative in Indianapolis for the stock. H. R. Kern then at once went to Indianapolis, taking Haughey with him, and by like representations obtained the forty-four shares of stock and also $14,996.18 of promissory notes of the Indianapolis Glue Company from Haughey's father. Howard R. Kern then returned from Indianap-

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olis to Philadelphia, and delivered to William H. Kern this bank stock and the promissory notes which had been obtained from Haughey's aunt and father to assist the firm, and returned to Pittsburgh, where he arrived March 10th, 1890, and entered of record two confessed judgments in favor of William H. Kern, one of them signed "The William A. Baeder Glue Company, by H. R. Kern," for $26,721.87, and the other signed by each of the three partners, "William A. Baeder, H. R. Kern, L. C. Haughey," for $26,721.87. This last-mentioned note was dated January 6th, 1890. At the same time a judgment was confessed in favor of Emil L. Bentz.

On March 26, 1890, some of the warehouse receipts were returned to the warehouse by some one claiming the glue in the name of William H. Kern, and exchanged for negotiable receipts issued in the name of William H. Nagle, and the receipts were delivered to Howard R. Kern, representing William H. Kern, and on the same day Howard R. Kern wrote to William H. Nagle, inclosing him receipts for thirteen hundred and seventy-seven barrels of glue and requesting him to indorse the receipts and return them to him at once. Later on the same day Howard R. Kern wrote another letter to one William H. Nagle, as follows:—

"DEAR BILL.—I have this day put in your name about 2,000 barrels of glue that did belong to William H. Kern, who sold them to you for 24,000, and I will sell them as your agent. I will see you on my return, but tell them you understand the affair, you paid $24,000 for this glue.

"Yours, &c.,

"H. R. KERN."

Nagle refused to have anything to do with the matter, whereupon on March 31, 1890, receipts for 2,209 barrels of glue were, at the request of W. H. Kern, issued to one James E. Salter, who it was alleged, gave his due bill therefor for $24,000. This due bill was not produced at the trial, its destruction being alleged. Salter, however, testified that he paid the $24,000 to W. H. Kern in three payments of $5,000 each, and one of $9,000. Salter then went to Howard R. Kern, and asked him to sell it for him.

On April 13, 1890, was organized the Acme Glue Company, a corporation with an authorized capital of $20,000, and cash capital of $1,000, of which company H. R. Kern was general manager, and whose stock was held as follows: Twenty-four shares by W. R. Kern, son of W. H. Kern; one each by J. B. Dolan and V. B. Dolan, former clerks of the W. A. Baeder Glue Company, and afterwards of the Acme; and 128 by E. L. Bentz, afterwards transferred without his knowledge, at the time, to S. K. Pierce, nephew of W. H. Kern, who, at the direction of William H. Kern, executed the transfer of these 128 shares of stock in blank and delivered it to Howard R. Kern.

Immediately after the incorporation of the company H. R. Kern sold the glue to the Acme, and received from Salter a commission of ten per cent. The market value of the glue was stated by L. C. Haughey to have been in March and April, 1890, $50,558, and by the firm itself, at a meeting of its creditors held March 19, 1890, to be $57,500. In April, 1890, H. R. Kern refused an offer of over $40,000 for it, made by the D. W. King Glue Company of Boston.

On March 27, 1890, an attachment execution issued at the suit of the plaintiff against the W. A. Baeder Company, defendant, and W. H. Kern, garnishee.

It also appeared that L. C. Haughey was charged with the embezzlement of the firm's money; that to relieve himself from prosecution he made a settlement, as a result of which H. R. Kern, who was prosecuting on behalf of the firm, recovered the sum of $3,850, which on July 10, 1891, his counsel paid over to W. H. Kern.

A witness, Thomas W. Barlow, Esq., was interrogated as follows:

"Q. Did you have any conversation with Mr. Howard R. Kern in reference to some Indianapolis bank stock belonging to Mrs. Raridan, and also in reference to some glue which had been alleged to have been sold to William H. Nagle? (Objected to.) A. I had but one conversation that I remember at my office. Q. When was that conversation? (Objected to.)

"Mr. TODD:—I propose to connect with letters we shall offer at or prior to the pretended sale that there had been an effort to get rid of the forty-four shares of Indianapolis bank stock that Mr. Kern said he had received, and an effort to get rid of twenty-two hundred barrels of glue through a sale to Nagle, which Nagle refused to be a party to. I propose to go further and show when this came out that Howard Kern, who was authorized by his father to act, and who had power to act in every instance, and who was his agent, as the testimony shows he was authorized by his father to act, early in January they had agreed to put in suit in another county some $11,000 or $12,000 of obligations which were not firm obligations and not a firm debt. That we have already shown enough to authorize giving in evidence the particular acts of the different parties to the transfer of this property from the creditors of the firm for the benefit of different persons.

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"The particular matter I want to show by Mr. Barlow is the custody of these letters, the fact of Howard R. Kern's interview with Mr. Barlow in which he spoke about the transfer of this stock, and how that stock came to be transferred, and where it went to, that Mr. Kern said he got as part of his debt about the 14th of January.

"Mr. Johnson objects to any conversation with Howard R. Kern concerning any Indianapolis bank stock. (Objection overruled. Exception for defendants.) Q. State what you know? A. I don't remember that Howard R. Kern brought the bank stock to the office. My recollection is Nagle brought the bank stock to the office with a promissory note, a copy of which is in that paper. (Indicating.) Q. Will you identify this? A. Two certificates of bank stock were brought to the office by Nagle with a promissory note. That promissory note had been antedated November 7th, 1889, for the sum of $4,350.

"PHILADELPHIA, Nov. 7, 1889.

"Three months after date I promise to pay to the order of William H. Nagle $4,350, at 210 North Thirty-sixth street, without defalcation. Value received.

"H. R. KERN.

"With that were two certificates of stock of the Indianapolis National Bank, and a letter—shall I read it? With the heading of William A. Baeder Glue Company, dated New York, March 14th, 1890.

"DEAR BILL:—Enclosed find note for $4,350. This will cover the bank stock I sold you. If anybody should ask you about this affair just say I owe you this amount and gave you the stock in payment, and the affair will go through.

"I am yours,

"HOWARD.

"Q. What was your interview with Howard Kern? A. My recollection is my interview was subsequent to another transaction when he came in for these letters. He came in for the letters that were brought in subsequently by Nagle with reference to the glue matter. Q. You got the other letters? A. I may be in error about that. He came in possibly for the stock. At all events he called in for whatever I had in my possession. I had the bank stock in my possession, which I proposed to deliver to him, and these letters and the promissory notes." (First assignment of error.)

The same witness also testifies as follows:—

"A. I also refused to permit Nagle to keep the warehouse receipts, and instructed him to return them to Howard R. Kern. I never had an interview with William H. Kern, nor did I ever know William A. Kern in this transaction, except as to the signature of this letter of Mr. Gilpin in reference to the stock. As I have said before, subsequently to that Mr. Nagle asked me to return the letters. I advised him not to do it. Then Howard Kern came in, and after a conversation—— Q. State what it was as near as you can recollect—the exact words if you can. A. I denounced the transaction—— (Mr. Johnson objects to the conversation.) The Court will allow you to say what was done. Q. When was the date that took place? A. It was the year afterward. Q. That would be in 1891? A. It must have been in 1891. Q. Your certificate shows? A. It was prior to this, prior to the date of this certificate—the notarial certificate of the 24th of February, 1892. We did not decide finally to return the letters until subsequent to the interview. Q. Howard Kern came over to get hold of these letters, and get them back from you? A. Yes, sir. Q. He came with William H. Nagle? (Mr. Johnson objects to any subsequent statement with Howard Kern concerning the getting of these letters.)

"MR. TODD:—I propose to show he had come with Nagle and got Nagle to try to get these papers out of his possession, knowing they were dangerous papers. (Objected to. Objection overruled. Exception for defendant.) Q. Mr. Kern and Mr. Nagle came to your office? A. Mr. Kern and Mr. Nagle came to the office. Mr. Kern urged me to return the letters to him. I declined. He became angry, and we had some unpleasant words together. I think I called him a thief, and he probably made some remark to me; I do not know what it was; I can't remember. I remember mine to him, and then he left. Q. He did not get the papers? A. He did not; not then. Q. What did he say as to the ownership of those papers—on the subject of the ownership of them—to Mr. Nagle or to you? A. He said that they were Mr. Nagle's papers; that I had no right to keep them; that Mr. Nagle wanted me to give them to him, or something of that nature." (Second assignment of error.)

William H. Nagle testified under objection as follows:—

"Q. State when it was you first had any conversation with Howard R. Kern in reference to some forty-four shares of bank stock which was in the name of, or belonged to Mrs. Raridan, of Indianapolis? (Objection to conversations with Howard R. Kern concerning the bank stock. Exception for defendant.) A. On a Sunday night, in March, 1890—I don't remember the day of the month—Mr. Howard Kern came to my house and told me the concern—the glue

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company—had failed, and that Louis Haughey had wrecked the concern, and he asked me if I would have placed in my name this bank stock —forty-four shares of bank stock. I told him I would if it was all right. He told me to go up to my counsel and have it transferred in my name. I gave it to my counsel." (Third assignment of error.)

Samuel K. Pearce was asked as follows:—

"Q. It has been testified in this case you were the owner of one hundred and twenty-eight shares in the Acme Glue Company; is that correct or not? A. I never owned any stock of the Acme Glue Company. (Objected to any questions as to the Acme Glue Company.)

"MR. TODD:—I offer it for the purpose of showing who were the stockholders of this company, and that this identical glue went from Mr. Kern, and that Howard R. Kern was the superintendent of the company, and that it is precisely Howard R. Kern in another name. (Objected to. Objection overruled. Exception for defendant.) I never owned any stock in the Acme Glue Company; it had been placed in my name without my knowledge. The certificate was brought to me by Howard R. Kern, and, at his request, after I had seen William H. Kern in regard to it, William H. Kern directed me to sign the certificate as Howard requested. I did so, and handed it back to Howard Kern. Q. When did this take place? A. I think that was in the month of March, 1891. Q. That was when you transferred this stock? A. I signed the power of attorney on the back of the certificate in blank. Q. Howard R. Kern brought it to you? A. Yes, in person. Q. When did you first learn he had stock in the Acme Company? A. That is the first knowledge I had of it. Q. Then you declined to sign the transfer? A. Until I had interviewed William H. Kern. Q. Where did that interview take place? A. In the People's Bank. Q. State what took place between you and your uncle? A. 'Uncle, Howard asked me to sign the certificate of stock in the Acme Glue Company; what shall I do about it?' He said, 'That's all right; just sign it and give it to him.'" (Fourth assignment of error.)

The same witness, being on the stand, was asked as follows:—

"Q. Did you receive any bills from anyone against the Acme Glue Company for glue? A. I received a number of communications from Howard R. Kern. Q. Have you got them there? A. I have. Q. Will you please produce them? (Same produced. Mr. Johnson objects to communications from Howard R. Kern concerning the Acme Glue Company. Objection overruled. Exception for defendant.) A. I find a communication I received from Howard R. Kern, from December 21st, 1891. It reads as follows:—

"DECEMBER 21, 1890.

"*Mr. Samuel K. Pearce, Philadelphia, Pa.*

"DEAR SIR:—I enclose you a bill which I would like you to copy in your handwriting just as it is, and send it over to New York, directed to The Acme Glue Company, 283 Pearl St., N. Y., P. O. Box 2114. I will see you later in the coming week and explain the transaction. I will be at the People's Bank the next Friday, December 26th.

"Yours,

"H. R. KERN.

"That is the first knowledge I had that any glue transaction had been made out in my name. Q. Have you the bill there? A. I have. Q. Produce it." (Fifth assignment of error.)

The defendant submitted, *inter alia*, the following points:—

"II. Though at the time the present attachment was served upon him William H. Kern held warehouse receipts for glue belonging to the Baeder Glue Company, stored in New York, such attachment did not prevent him from afterwards delivering the said glue either to said glue company, or to any member thereof, or upon order of said company to any third person. If there was such delivery there can be no recovery against Kern's estate in this proceeding for the value of such glue so delivered."

"III. If you believe that at the time the attachment execution in this case was served upon William H. Kern the twenty-one hundred and ninety-eight barrels of glue were in the city of New York, where they remained; that they had been pledged with William H. Kern by the Baeder Glue Company to cover advances by him to it, with power in him to sell at any time to repay such advances; that said glue was actually sold by him to Mr. Salter for $24,000, and that he did not receive more for said glue than $24,000, then the plaintiffs have no right to make him account to them for more than $24,000, even though Mr. Salter sold such glue for a much larger sum to the Acme Glue Company."

"IV. If the twenty-one hundred and ninety-eight barrels of glue, prior to the present attachment, were pledged with William H. Kern by the Baeder Glue Company to cover advances to it by him, with a power to sell the same in repayment, and if that glue was in the State of New York when the attachment was served, and remained there afterwards, then William H. Kern had a right to sell the same, and he is not in this proceeding, for the benefit of the plaintiff, chargeable with more than he actually received from such sale for said glue."

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"V. An attachment execution in the hands of the sheriff of Philadelphia County did not bind goods then situated in the City of New York, though title to said goods was vested in a citizen of Philadelphia. Such citizen served with such attachment execution, in case thereafter he should sell the goods would be chargeable only with what he should actually receive therefrom. Unless he sold them he was chargeable with nothing under such attachment."

"VI. Even though William H. Kern conspired with the Baeder Glue Company, or with any of the members thereof, fraudulently to conceal the title to goods belonging to such company, situated in the city of New York, he was not by reason thereof liable under an attachment execution levied in his hands by the sheriff of Philadelphia County for the value of such goods unless he sold the same thereafter, and if he did thereafter sell the same he was only liable to account for the amount actually realized by him from such sale."

These points were all refused by the Court. (Assignments seventh to eleventh.)

In the general charge the Court said, *inter alia*:—

"There are one or two matters, gentlemen, to which I should more specifically refer, and in reference to the testimony concerning them I do it only to call your attention to the real question at issue and the principle upon which that question must be decided by you. The first and most important of these is as to the amount due by the glue company to William H. Kern at the time of its failure. It is conceded that there are over $26,000 due; he obtained a judgment for over $38,000, the difference being about $12,000. The three notes in dispute, which, it is claimed by the plaintiff, were notes representing an individual indebtedness of Howard R. Kern, were" [His Honor here specified the notes.] "The real question is were these notes firm obligations? Mr. Kern himself could not make them such. If the loan was originally to him, and afterwards assumed as a firm debt by the copartner, it became binding upon the firm. They have the right to assume them. If they were not so assumed, they remained the individual debts of Howard R. Kern.

"Another question is as to the price for which the glue was sold, in March, 1890. On behalf of the plaintiff the witnesses have testified—two witnesses who were engaged in the business at Boston—testified that glue at that time was worth in large quantities about eight cents a pound; that they were offered a quantity of glue which they thought was considerably in excess of two thousand barrels; that they examined this glue and made an offer ranging from $40,000 to $45,000; that this offer was made to Mr. Cummings, who was acting for Howard R. Kern, and they had no relation at all with William H. Kern, and had never seen him in connection with it.

"Upon the part of the defence it has been shown that The Fulton and Market Bank, which held 360 barrels of this glue upon the same condition that Mr. Kern held it, sold their glue some time after Mr. Kern was said to have sold his at eight cents a pound; that at a sheriff's sale in New York City it brought four and one half cents a pound. The sale by Mr. Kern was for a little less than six cents a pound net. It was subject to the warehouse charges at that time, and was sold without the payment of any commission by him. Howard R. Kern has testified in that connection. Just before the sale of this glue he was asked by his father what it was worth. He told him it would be well sold if he got $24,000 for it. Howard R. Kern at that time represented the owners of the glue, the Baeder Glue Company, subject to the claim that William H. Kern had upon it. If he made such a statement at that time representing the firm, which was acted upon in good faith by William H. Kern, he was entirely justified in selling for that price. [In any event he was not held to the duty of obtaining the highest market price. He could not wantonly and recklessly sacrifice any property which he held as collateral, but it was his duty to use diligent effort to obtain a reasonable and fair price; if he did that, he did his whole duty in the matter. . . . .

"On the whole case, if you find that William H. Kern was a creditor of the glue company to the amount of $38,367.87; that he held securities as collateral with power to sell, and sold the glue either before or after the attachment was served upon him, for the best price reasonably to be obtained therefor; that his debt remained unpaid, or not more than fully paid, his estate is not liable in this action, and your verdict will be for the garnishees.] (Sixth assignment of error.)

"If the computation of the interest by counsel is correct, and a balance of $1,178.08 is due the Baeder Glue Company upon the adjustment of the interest account between them, for that amount, your verdict will be against them. [If the $3,850 paid by Mr. Gilpin in July, 1890, was the property of the Baeder Glue Company, that should be included in your verdict.] (Twelfth assignment of error.)

"If the glue was held by William H. Kern as collateral, and sold for less than its market value, without a reasonable effort upon his part to obtain a fair price, he is answerable to the plaintiffs for any difference between the price for which it was sold and its market value. If his real claim against the Baeder Glue Company was

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only $26,721.87, and he received, as he has testified, $39,640, he is answerable for the difference between these amounts."

Verdict for plaintiff $12,024.19, and that there was in the hands of the garnishee $15,657.18. The Court entered judgment on the verdict, and the garnishee took this appeal and filed the assignments of error as above indicated.

John G. Johnson (*Bernard Gilpin* with him), for appellant.

The acts and declarations by Howard R. Kern were not admissible to affect his father. The sole question was whether the father was justly entitled to the amount he claimed against the firm, and whether he was chargeable with a greater or less sum from the assets pledged. To render the acts of H. R. Kern admissible it was necessary first to prove a conspiracy between him and his father.

The attachment execution served on William H. Kern did not bind glue pledged with him which, at the time of the service, was, and continuously thereafter remained, in New York.

Noble *v.* Thompson Oil Co., 79 Pa. 354.
Pa. R. R. *v.* Pennock, 51 Id. 244.

The attachment execution imposed no duty on William H. Kern concerning the glue in favor of the appellee. If, therefore, he sold the same for a price less than its fair market value, he was responsible for this breach of duty or contract as pledgee, not to the appellee, but to the Baeder Glue Company.

Girard Fire Ins. Co. *v.* Field, 45 Pa. 132.
Selheimer *v.* Elder, 98 Id. 158.
Peebles *v.* Meeds, 96 Id. 154.
Furness *v.* Smith, 30 Id. 522.
Balliet *v.* Brown, 103 Id. 546.

Notwithstanding the attachment, the Baeder Glue Company, or the members thereof thereafter, were authorized to direct a delivery of the glue to any third person for any price satisfactory to William H. Kern, or with his assent, gratuitously.

The arrangement between William H. Kern and J. E. Salter, whatever its real nature, was one which was approved of by Howard R. Kern on behalf of the Baeder Glue Company, and was, therefore, not impeachable by the appellee.

With the assent of Howard R. Kern, one of the partners of the Baeder Glue Company, William H. Kern delivered the glue to Salter for the sum of $24,000. He never received a greater sum for the same, and is not liable to account for more than he actually received.

There was no evidence which justified the submission to the jury of the liability of William H. Kern to account for the $3,850 paid through Hood Gilpin.

Conceding that the money in controversy had been paid to Howard R. Kern in settlement of a prosecution which he had caused the Commonwealth to institute against Haughey for criminal conduct in embezzling moneys of the firm, this did not make the same firm assets. Kern agreed not to prosecute if a certain sum were paid him. The money was paid for an illegal consideration, and the firm itself could not have collected it from Kern.

A bargain was made by the person who had instigated the action of the Commonwealth, to withhold the necessary evidence, in consideration of payment to him. Is it competent for any Court to use its proceedings to compel the payment of such a sum, either to a firm or to those standing in its right, *i. e.*, attaching creditors?

M. Hampton Todd (*Henry C. Todd* with him), for appellees.

The evidence showed conclusively that W. H. Kern was an active conspirator in this attempt to defraud the creditors of the Baeder Company. Howard's actions were, therefore, admissible to affect W. H. Kern.

Lowe *v.* Dalrymple, 117 Pa. 564.

The effect of the attachment was to transfer an equitable title to the surplus value of the glue, to the attaching creditor.

Roig *v.* Tim, 103 Pa. 115.
Heath *v.* Page, 63 Id. 108.
Childs *v.* Digby, 24 Id. 23.
Barr *v.* King, 96 Id. 488.

The title to the glue was represented by negotiable receipts which were in Philadelphia, and the owner of them was the possessor of the property.

Heiskell *v.* F. and M. Nat. Bank, 89 Pa. 155.

The law in New York as to the effect of the indorsement and delivery of negotiable warehouse receipts and bills of lading is the same as in Pennsylvania.

Bank *v.* Kelly, 57 N. Y. 34.

As to the $3,850, the evidence establishes that a criminal prosecution had been instituted against L. C. Haughey for fraudulently appropriating the funds of the W. A. Baeder Glue Company, and that this prosecution, a misdemeanor, had been settled by L. C. Haughey paying a sum of money, of which $3,850 was paid to William H. Kern. The attempt is to claim it as payment on account of an individual debt of H. R. Kern.

Haughey was undoubtedly liable for this money in a civil proceeding. It was a firm asset, and because he paid it to get rid of a criminal prosecution does not change its character. When it was repaid to H. R. Kern's attorney it at once became a firm asset in his hands. It

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should never have been taken from the firm, and the payment was only a restoration of what had been improperly taken away. It, therefore, was not Howard R. Kern's to pay his debts with, and when it was paid to William H. Kern it must be held to have been paid in reduction of his claim against the firm.

October 1, 1894. WILLIAMS, J. The plaintiff bank was a judgment creditor of the Baeder Glue Company. It caused an attachment execution to be issued upon its judgment, and summoned William H. Kern, among others, as a garnishee. He pleaded "nulla bona," and a trial was had upon the issue so raised. The question presented by this issue and actually tried in the Court below was whether Kern was indebted to the glue company, or had in his possession any of its property for which he was liable to account. It appeared from the evidence that he had a large demand against the company, and had received property belonging to it as collateral security for this demand. The principal item of the property so received by him was a warehouse receipt for about twenty-two hundred barrels of glue stored in the city of New York. He sold the glue for twenty-four thousand dollars to one who, within a few days, sold it for thirty-two thousand dollars. Three questions were presented upon these facts: First, what was the true amount of the demand held by Kern against the glue company? Second, what amount had he received from the company in securities, or from the sale of collaterals, which was applicable to the payment of the debt due him? Third, did the sum so received by him satisfy his just demands against the company and leave a balance in his hands for which he ought to account? If so, what was the amount of such balance?

These were questions of fact to be determined by the jury upon the evidence, and the learned trial Judge submitted them in an impartial charge, and with proper instructions. The verdict is a final disposition of them. But some questions are now raised that do not seem to have figured at the trial, and are pressed with great earnestness as reasons for a reversal of this judgment. Among these is that of the power of a Court in this State to seize, or exercise jurisdiction over, property actually situated in another State. We do not understand that any such power was exercised or asserted by the Court below. There was no attempt at seizure of the glue stored in the City of New York, no service on, or notice to, the warehouseman. It was the money in the pockets of garnishee arising from the sale of collaterals held by him, and his own *bona fides* in making such sales, that the attaching creditor, standing in the shoes of his debtor, had a right to inquire into.

The glue company could, and in the light of the verdict it is proper to say that it did, waive or surrender its right to require an account from William H. Kern; but if this was collusively done it did not bind the creditors of the company. The holder of collateral securities is not bound to obtain the highest possible price for them, but he is bound to the exercise of common business prudence and of good faith in his management and conversion of them. His debtor may acquiesce in, and assent to, his fraudulent conduct for himself, but he cannot bind his creditors by such acquiescence or consent. They have a right to demand, what he ought in good conscience to demand, an account from his creditor for the collaterals placed in his hands. This disposes of the sixth, seventh, eighth, ninth, tenth and eleventh assignments of error.

The admission of the testimony of Nagle and Pearce is complained of in the third, fourth and fifth assignments. The testimony was offered as bearing upon the good faith of William H. Kern in dealing with the warehouse certificates, and as tending to show collusion between him and his son, who was an officer and stockholder in the Baeder Glue Company, for the purpose of covering the assets of the company and placing them beyond the reach of creditors. We think it was competent for this purpose and the errors assigned to its admission are overruled.

Nor can we assent to the proposition made in the ninth head of the argument for the appellant, that there was no evidence that justified the submission to the jury of the liability of William H. Kern to account for the sum of $3,850 paid through Hood Gilpin. This money was paid by L. C. Haughey to relieve himself from a criminal prosecution for the embezzlement of moneys belonging to the Baeder Glue Company. Howard R. Kern was the prosecutor, acting in behalf of the company. A settlement was made with him and the prosecution discontinued by his leave. The presumption is that what he did as prosecutor he did on behalf of the company he represented. He had no right to sacrifice the company or its just claims for his own private advantage, and if he was base enough to engage to do so, or to permit the prosecution for the embezzlement of the money of the company to be discontinued in consideration of a bribe paid to him as an individual, he ought not to be heard to allege his own turpitude. The money paid should go, where it of right ought to go, to the party whose money was embezzled and whose officer conducted the prosecution. We see no error in this record that requires us to reverse the judgment and it is now affirmed.

MITCHELL, J., dissented. H. B.

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Jan. '94, 364. April 5, 1894.

Barrett to use, etc., v. Bemelmans.

Agency—Revocation of—Notice—Landlord and tenant—Payment of rents to agent after revocation of authority.

The fact that an agent appointed to collect rent is a joint owner with his principal of the premises out of which the rent arises, does not interfere with the right of the principal to revoke the agency.

A lessee having notice that a lessor is an agent for others is bound by a notice given him by the lessor's principal of the revocation of the agency.

Several joint owners of realty agreed that A., one of their number, should act as agent for the leasing and collecting the rent of the same. A. accordingly executed a lease in his own name as trustee, without naming his principals, to B.

C., one of the joint owners, subsequently notified B. that she revoked A.'s authority as agent and directed that B. pay C.'s share of rent directly to her.

B. continued to pay to A., and C. brought action for her share of the rent against B:

Held, 1. C. had the right to revoke A.'s agency.

2. A., under the terms of the agency, acquired no interest in C.'s share of the rent.

3. When the revocation was made and notice given to B., the latter was bound to take notice of the facts.

Appeal of Simmons H. Barrett, trustee, to the use of Charles Bennett and Rebecca S. Bennett, his wife, plaintiff, from the judgment of Common Pleas No. 1, of Philadelphia County, entered in favor of defendant, E. C. Bemelmans, in an action of assumpsit.

In the Court below the facts were agreed upon in the following case stated:—

And now, December 6, 1893, it is hereby agreed by and between the attorneys for the parties to the above action respectively, that the following case be stated for the opinion of the Court, in the nature of a special verdict.

On September 16, 1890, the plaintiff, Rebecca S. Bennett, along with the other five owners of the house No. 1704 Wallace street, Philadelphia, appointed Simmons H. Barrett, one of the said owners, their agent, with powers as set forth in the following agreement:—

"We, the undersigned, owners of the premises 1704 Wallace street, do hereby appoint Simmons H. Barrett as our agent or trustee, to receive the rent of the said premises, and to appropriate the same, or so much thereof as may be necessary, to the payment of taxes, water rent, and the sums of money which may be due for the repairs upon the said premises, agreed between us to be made, and after the payment as aforesaid, to divide the surplus equally among the owners of the said premises."

This appointment was entirely voluntary on the part of all the owners, and the said Simmons H. Barrett gave no consideration whatever for said appointment.

On September 22, 1890, the said Simmons H. Barrett, acting as trustee, leased said premises to defendant for the term of one year from October 1, 1890, at the rate of $660 per annum, to be paid in equal monthly portions, in advance. The lease for said term (copy of which is hereto attached) also provided that if the defendant held over at the end of said term, the lease should continue "upon the same terms and conditions . . . for a further period of one year." No notice was given as therein provided for, and in pursuance of an agreement made some months previous to the end of the term of the said lease, the said Simmons H. Barrett, acting as trustee, leased the said premises to the defendant for a period of seven months from October 1, 1891, at the rate of $55 per month, payable in advance. A copy of this said lease is hereto attached. The defendant occupied the premises from October 1, 1891, up to and after the beginning of this suit, to wit, April 1, 1892.

On September 29, 1891, the use plaintiff, Rebecca S. Bennett, gave a written notice to the defendant that she revoked the authority of the said Simmons H. Barrett to act as her trustee, and requested the defendant to pay to the use plaintiff her share of the rent subsequently accruing, to wit, the one-sixth part of the said $55 per month. On the same day, the use plaintiff notified the said Simmons H. Barrett that she revoked his authority to act for her, as her agent or trustee, in the collection of the said rent.

Defendant was not informed and had no knowledge, prior to the receipt of said notice, that the whole or part of the title to the premises was in the plaintiff, Rebecca S. Bennett, nor had she any knowledge that the said Rebecca S. Bennett was a part owner, other than set forth in said note. The defendant had no lease, contract or agreement of any kind in reference to the lease of said premises, with any other person than Simmons H. Barrett. The only contract she ever had in reference to the said premises, was the leases hereto attached. The relation of landlord and tenant was established between the defendant and Barrett prior to the receipt of any notice from the use plaintiff, Rebecca S. Bennett. She continued to pay the whole rent to the said Simmons H. Barrett monthly, as it accrued, after the receipt of the notice of the revocation of the authority of the said Simmons H. Barrett, and paid the rent to the said Simmons H. Barrett up to the time she left the premises.

This suit was brought to recover the one-sixth of the monthly rent of $55, for the months of October, November, December, 1891, and

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January, February and March, 1892, or $9.16 for each of said months.

If the Court should be of the opinion that the use plaintiff is entitled to recover, then judgment to be entered in favor of the use plaintiff, for the full amount of her claim; but if the Court be not of that opinion, then judgment to be entered for the defendant. Costs to follow the judgment; either party reserving the right to take an appeal therein.

Both leases were made and signed by Barrett as trustee.

The COURT entered judgment for defendant on the case stated.

Plaintiff appealed, assigning for error the action of the Court.

The case was submitted on paper books.

Dimner Beeber, for appellant, cited as to power to revoke:

Hartley *v.* Minor's Ap., 53 Pa. 212.
Blackstone *v.* Buttermore, Id. 266.
Story on Agency, § 466.

As to the divisibility of a covenant to pay rent:

3 Kents Com. *469.
Rivis *v.* Watson, 5 Mees. & W. 255.
Gilbert on Rents, 172.
Reed *v.* Ward, 22 Pa. 144.
DeCoursey *v.* Guarantee Trust Co., 81 Id. 217.
Newell *v.* Gibbs, 1 W. & S. 496.
Holt *v.* Martin, 51 Pa. 499.

As to liability for payment after notice from equitable claimant:

Coffey *v.* White, 14 WEEKLY NOTES, 108.
Bentley *v.* Reading, 22 Id. 60.

Howard A. Davis, for appellee, cited, as to tenant's right to dispute title under which she held:

Holt *v.* Martin, 51 Pa. 499.
Snyder *v.* Carfrey, 54 Id. 90.

As to the point that tenant did not have to recognize an unknown landlord:

Seyfert *v.* Bean, 83 Pa. 450.
Bedford *v.* Kelly, 61 Id. 491.
Marys *v.* Anderson, 24 Id. 272.

That the trustee having an interest in the matter the power to him was irrevocable.

Hartley *v.* Minor's App. 53 Pa. 212.

July 12, 1894. WILLIAMS, J. This is an action against a tenant to recover rent. The case was here in 1893 and turned upon the sufficiency of the affidavit of defence. The affidavit set up payment of the rent in full to the plaintiff's agent or trustee by whom, and in whose name, the lease was made. This we held sufficient to prevent judgment and sent the case to trial. Barrett to use *v.* Bemelmans, 155 Pa. 204.

When the case was again reached in the Court below the facts were agreed upon and embodied in a case stated. They show that the property leased was owned by several persons among whom were Barrett and Mrs. Bennett. That an agreement was made between the several owners, that Barrett should act as agent for them in letting the house and collecting the rent; and after payment of taxes out of the moneys collected he should pay to each part owner his or her proportional part of the rent received. He accordingly made a lease to the defendant, executing it as lessor in his own name as trustee, without naming the parties for whom he acted. Mrs. Bennett subsequently revoked his agency so far as she was concerned, and gave notice of such revocation to the tenant.

This action is brought to recover her proportional share of the rent, accruing after such notice to both her agent and the tenant, and actually paid by the tenant to the agent, notwithstanding. This is made very clear by the case stated in which the fact is stated thus, "She continued to pay the whole rent to the said Simmons H. Barrett monthly, as it accrued, after the receipt of notice of the revocation of the authority of the said Simmons H. Barrett."

It will be apparent from these facts that no question of title was raised between landlord and tenant as in Bedford *v.* Kelly, 61 Pa. 491; nor any question over the power of an undisclosed principal to proceed to distrain for rent in his own name, as in Seyfert *v.* Bean, 83 Pa. 450.

The question is much more simple. It is, to whom after the notice of revocation should the tenant pay the accruing rent so far as Mrs. Bennett's share of it is concerned? The tenant knew from the lease that Barrett was acting for others, although their names were not disclosed in that instrument. Barrett knew that as to the interests of his co-tenants he was simply an agent, and that the terms of his agency gave him no interest in the subject matter that would enable him to resist a revocation as a fraud upon him.

Upon these facts we think the following propositions are beyond any question: First, Mrs. Bennett had a right to revoke the agency of Barrett whenever she pleased. Second, Barrett acquired, under the terms of his agency, no interest in the rent due to his principals other than that necessarily acquired by one authorized to collect money for another, and he had no right to object to the revocation of his authority at the will of his principals. Third, when this revocation was duly made, and notice thereof given to the tenant, the tenant was bound to take notice of the fact. No equitable or other right existed in the tenant to object to the revocation except as to acts done or rent paid before the notice was received.

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It is suggested that the fact that the plaintiff is only a part owner of the property leased, should change the rule. No case is cited, and no principle is suggested, on which such a distinction can rest. In the case of mineral leases, oil and gas leases, it often happens that many persons hold fractional interests in the rents or royalties to be paid and that these interests change hands both at private and at public sale; but the right of each part owner to act independently and to collect his own share of the rent, has never been questioned. It is suggested that Barrett was one of the several owners of the property and his interest as an owner should prevent a revocation of his agency, but as to Mrs. Bennett he is simply an agent, and what he owns as an individual can not change his duties or his powers as an agent. For his principal he collected her share of the rent and paid out of it her share of the taxes, so long as she was satisfied that he should do so. When she chose to resume her rights as an owner he could not object.

If the revocation was valid and operative between the principal and agent, it was valid as to the tenant after notice. For this reason the judgment on the case stated is now reversed and judgment is entered thereon in favor of the plaintiff for the sum of fifty-four dollars and ninety-six cents ($54.96) with costs of suit. Interest from March 1, 1892. W. M. S., Jr.

Jan. '93, 436. April 16, 1894.

Gallitzin A. Christy et al. v. John T. Christy et al.

Will—Construction of—Intention—Devise by Implication—Trust—Laches.

Where the whole tenor of a will shows that it was the intention to treat all his children equally, that intention will not be defeated by the use of inartificial words in certain clauses of the will.

A., who was the owner of lands with valuable coal measures underlying them, after providing for his widow, devised to two of his eight children, B. and C., the portions of his real estate upon which they were living at the time of his death; the devise to B. was of the farm on which she resided, "which is to be her share of my estate, and should the coal be opened on said land, or sold in a body, she to have an equal share with the other heirs;" the devise to C. was also of the land occupied by him, and immediately following the devise, the following words were used: "The mineral right is reserved. He is to pay out of his share of mineral right his note and store account."

To each of his other six children testator gave by separate items "an equal share of my whole estate," deducting particular advancements made:

Held, 1. That it was testator's intention to divide his whole estate, both surface and mineral, equally between his eight children.

2. That the devise of the farm to B. was for her full share of the surface, but she was further entitled to her full one-eighth share of the mineral estate in whatever manner it might be turned into money.

3. In like manner the devise to C. was in full for his share of the surface, but by implication he gave C. an equal share in the mineral estate by directing what should be charged against it.

The property of A., the above testator, was sold in 1879, nominally for payment of debts, but in reality to put title in one name, and was purchased by D., one of A.'s children, who executed a deed of trust agreeing to hold said land "in trust for the benefit of all the heirs of my father." . . . "said heirs are to pay an equal pro rata share in the said purchase money in the said tracts of land." D. subsequently leased the coal in 1883, and collected large royalties on the same. In 1884 B. and C. filed a bill to have D. declared a trustee for them as to two-eighths of the coal, and for an account.

Held, 1. That B. and C. were not guilty of laches in not paying to D. their share of the purchase money paid by him, as it did not appear that D. ever demanded it, and it further appeared that there was a fund in the hands of D. more than sufficient to reimburse him.

2. That B. and C. were entitled to two-eighths of the minerals, and an account as prayed for.

Appeal of Gallitzen A. Christy, and other plaintiffs, from the decree of the Common Pleas of Blair County, dismissing a bill in equity, filed by them against Dr. John T. Christy and others. The matter was referred to H. M. Baldridge, Esq., as master, and the facts as found by him were substantially as follows: Francis X. Christy, died in 1876, seized of about two thousand acres of land underlaid with valuable coal. He left to survive him a widow and eight children. His will was as follows:

In the name of God, I, Francis X. Christy, considering the uncertainty of this mortal life, and being of sound mind and memory, blessed be Almighty God for the same, do make and publish this my last will and testament, in manner and form following, (that is to say, after my just debts and funeral expenses be paid): First, I give and bequeath to my beloved wife, Elizabeth Christy, one hundred and twenty-five dollars yearly during her natural life (or as long as she remains my widow); also, to my wife Elizabeth one cow, one bureau, one bed and bedding, one table, her choice of one set of chairs, one cupboard.

Item. I give and bequeath to my daughter Agnes the farm on which she now lives, which is to be her share of my estate, and should the coal be opened on said land or sold in a body she, my daughter Agnes, to have equal share with the other heirs.

Item. I give and bequeath to my daughter Lucy Ann an equal share of my whole estate, deducting from her share the sum of six hundred and ninety-six dollars which she has already received.

Item. I give and bequeath to my daughter Sarah an equal share of my whole estate with the other heirs, deducting from her share the sum of three hundred and thirty-one dollars, which she has already received.

Item. I give and bequeath to my son John T. Christy an equal share with the other heirs of my whole estate, deducting from his share the sum of one thousand dollars, which he has already received in schooling.

Item. I give and bequeath to my son Henry an equal share with the other heirs in my whole estate, deducting

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from his share the sum of one thousand dollars, the sum he has already received in schooling. I also will that my son Henry's store account with F. J. Christy be paid out of his share of my estate.

Item. I give and bequeath to my son Gallitzin fifty acres of land, including the improvements, where he now lives. The mineral right is reserved. He is to pay out of his share of mineral right his note and store account due F. J. Christy.

Item. I give and bequeath to my son Josiah an equal share with the other heirs of my whole estate, and out of his share there must be paid a note in bank, with my signature attached, of four hundred and ten dollars; also his note and store account due F. J. Christy. I also will that after said note and store account be paid out of my son Josiah's share of my estate, the balance remaining I will to his wife and children.

Item. I give and bequeath to my son Francis an equal share with the other heirs of my whole estate. I also will that when the unsettled account between my son Francis and myself be settled that he pay the balance due me to my son John T. Christy.

Lastly. I hereby appoint my son Francis J. Christy my sole executor of this my last will and testament, hereby revoking all former wills by me made. In witness whereof I have hereunto set my hand and seal this 26th day of July, in the year of our Lord one thousand eight hundred and seventy-six.

Witness: FRANCIS X. CHRISTY.
WM. DAWSON, JAMES MCKINNEY,
SILAS ECKENRODE.

Furthermore I do not allow that my wife Elizabeth shall claim or derive the benefit of the three hundred dollar Act on my estate.

The above will was duly probated, and the executor obtained an order to sell the lands of decedent for payment of debts. The property was sold to Dr. John T. Christy, one of the testator's sons, who had executed the following paper:—

GALLITZIN, November 2d, 1878.

In consideration of love and affection for my brothers and sisters, children and heirs of Francis X. Christy, late of Gallitzin township, deceased, and for one dollar lawful money of the United States to me in hand paid, the receipt whereof is hereby acknowledged, I do hereby bind myself, my heirs, executors and assigns that should I purchase at Orphans' Court sale the hereinafter tracts of land situate in Gallitzin township, of which my father died seized, I will hold the said tracts of real estate in trust for the benefit of all the heirs of my father, the said Francis X. Christy, deceased, that is to say the interest in said tracts of which my father died seized, reserving my own interest in said tracts which I had at or before the time of my father's death, to-wit: Tract No. four (No. 4) as described in the bill of sale, containing 200 acres and allowance, being part of the Catharine Hester tract. Tract No. five (No. 5) as set forth in the said bills of sale, containing 415 acres, more or less, warranted and known as the Catharine Hester tract. Witness my hand this 2d day of November, A. D. 1878.

Said heirs are to pay an equal pro rata share in the said purchase money in the said tracts of land. In witness hereof I have hereunto set my hand.

Witness: J. T. CHRISTY,
F. M. CHRISTY. F. J. CHRISTY.

On January 30, 1883, Dr. John T. Christy leased the coal under the Catharine Hester tract to W. W. Amsbry; this lease by assignment became vested, about February or March, 1884, in the Gallitzin Coal & Coke Co., who have since paid Dr. John T. Christy as royalty for the coal mined under said lease over $40,000.

On May 3d, 1884, plaintiffs filed a Bill in Equity to have Dr. John T. Christy declared a trustee for them to the extent of two-eighths of the coal underlying said land, (Gallitzin Christy being entitled to one-eighth, and the other plaintiffs, as heirs of Mrs. Agnes Burke, being entitled to one-eighth), and naming the other defendants as lessees under Dr. Christy.

Dr. Christy filed an answer in which he denied generally that he was a trustee for plaintiffs, but failed to state specifically why he was not a trustee.

On the hearing before the master, counsel for Dr. Christy claimed that under the will of Francis X. Christy, plaintiffs had no interest in the coal under the lands bought at executor's sale by Dr. Christy, and that they were not intended to be included in, or benefited by, the agreement of November 2d, 1878, whereby Dr. Christy agreed to hold the lands bought by him for the heirs of Francis X. Christy, deceased. The master in his report decided that plaintiffs were entitled under said will to an interest in the coal under said land, but could not maintain their bill by reason of laches. The Court, LANDIS, P. J., in their opinion filed, on exceptions to the master's report, held that said plaintiffs were not entitled by the will to any interest in the coal under said lands, and made a decree dismissing plaintiffs' bill.

From this decree, the plaintiffs took this appeal, assigning for error the overruling of their exceptions, and the decree dismissing the bill.

George B. Orlady and *W. H. Sechler* (with them *Martin Bell* and *John D. Blair*), for appellants.

Daniel J. Neff, (*J. D. Hicks* with him), for appellees.

July 11, 1894. WILLIAMS, J. This case depends on the construction of the will of Francis X. Christy, the general scheme of which is somewhat obscure. He left to survive him a wife

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and eight children. He was the owner of a large body of unimproved land near the town of Gallitzin, in Blair County, which was chiefly valuable for the coal measures known to underlay it.

In preparing his will he was evidently *inops consilii*, and made use of words that, however clear they may have seemed to him, were not well chosen. He seems to have considered his lands as having a surface value and a mineral value, that should be estimated separately, and divided separately, among his children.

He made provision for his widow with which she appears to have been satisfied, and then undertook to divide his real estate equally among his eight children. But Agnes and Gallitzin, two of his children, were living on parts of the land which were improved, and the task which the testator proposed for himself was to make an equal division of his estate, and yet leave Agnes and Gallitzin in possession of their respective homes. In order to do this he gave to Agnes "the farm on which she now resides, which is to be her share of my estate," and immediately added these words: "Should the coal be opened on said land or sold in a body, she, my daughter Agnes, to have equal share with the other heirs."

Taken altogether this provision means that the farm was to be in full of her share of the surface, but that she should be entitled to her share of the mineral estate in whatever manner it might be turned into money. To Gallitzin he gave, in like manner, the farm on which he lived, adding, "the mineral right is reserved. He to pay out of his share of mineral right his note and store account due F. J. Christy."

This gift of the farm, like that to Agnes, was intended to be in full of his share of the surface. To show that it was the surface only that was to pass under this devise he reserved the mineral right in express words. But in order to secure equality of interest to each and all of his children he gave to Gallitzin by implication an equal share in the mineral estate by the words directing what should be charged up against it.

Now Agnes and Gallitzin are provided for. Each has received what is treated as an equal one-eighth of the surface, and an equal share with the others, or an equal one-eighth, of the mineral estate. What remained was to make sure that the other six should receive also their full shares; and for this purpose he gave to each "an equal share with the other heirs of my whole estate." By this he meant that these six should share equally in the surface, excluding the farms already disposed of, and equally with the others in the mineral estate. This divided the surface into eight parts, and the mineral estate into eight parts. Agnes and Gallitzin took each one-eighth part of the surface in severalty. The other six took the remainder of the surface in common. The eight took each an individual one-eighth part of the mineral estate as a tenant in common with his or her brothers and sisters.

It will be noticed that in the devise to Agnes the reservation of the mineral right appears by implication, while the gift to her of her equal share in its proceeds is in express words. On the other hand, in the devise to Gallitzin, the reservation is in express words, and the gift of an equal share in the minerals is to be gathered only by implication. There is, however, no other construction that can be given to either of these devises that will not do violence to the intention of the testator which so clearly appears throughout the will to treat his children alike, and divide his estate equally among them.

When the property was sold to J. T. Christy, executor,* and he executed a declaration of trust stating the manner in which he was to hold the title acquired by him, and that the sale was not to change the interest of anyone interested in it under his father's will, the sale became merely a mode of enabling the executor to make title to a vendee or lessee, as trustee for all the parties in interest. If he advanced money for them it does not appear that he ever asked for repayment. He now has, however, money in his hands sufficient to fully reimburse himself, and leave a balance due to each of the several parties in interest. He is asked to render an account of his receipts as trustee, and his disbursements; and no reason has yet been suggested why this should not be done. The interest of each of his brothers and sisters in the proceeds of "the mineral right" is an equal one-eighth, and an account can be easily stated.

The decree of the Court below is reversed, and the record remitted that an account may be taken as prayed for, and stated on the basis indicated in this opinion. So much of the fund as arises from the lease or sale of the surface is to be divided into six equal parts, from which Agnes and Gallitzin are excluded. So much of it as arises from royalty upon, or purchase money of, coal is to be divided into eight equal parts, one of which is to be awarded to each of the testator's children, or the legal representatives of such child or children as may now be deceased.

W. M. S., Jr.

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*The use of the word executor is doubtless a slip. By the will *F. J.* Christy was appointed executor. The reasoning or effect of the opinion is, however, in no way affected by the insertion of the word.—Rep.

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July, '93, 19. January 4, 1894.

Estate of Cornelia N. Fry.

Appeal of Elizabeth F. Ridgway.

Wills—Substitutional legacy—When the second of two legacies in the same will to the same person is considered as substitutional.

By her will made in 1873 F. directed her trustees to pay "$2000 to each of her two granddaughters M. R. and C. N." when they should reach the age of twenty-one years respectively. C. N. subsequently died. In 1878 E. N., another granddaughter, was born, and the testatrix in 1883 made a codicil to her will as follows:—

"June 16, 1883. I wish my granddaughter E. N. to have two thousand dollars from my estate (the eldest daughter of I. F. N.). I have left the same amount to M. R. I demand that this wish is carried out."

Held, that the bequest to E. N. was not substituted for the one to her deceased sister, but was a vested legacy.

Buehler and Fairlamb's Appeal, 100 Pa. 385, and Wetter's Appeal, 20 WEEKLY NOTES, 499, distinguished.

Appeal of Elizabeth F. Ridgway, daughter and one of the devisees under the will of her mother, Cornelia N. Fry, from the decree of the Orphans' Court, dismissing exceptions to and confirming the adjudication of the first and final account of the executors of the will of said Cornelia N. Fry. The account was admitted to be correct, and that Mabel Ridgway was born in 1868. Cornelia Norris was born in 1872, and died prior to the codicil.

Edith Norris was born in 1878. Mabel Ridgway and Cornelia Norris were respectively the eldest [daughters] children of the two daughters of the testatrix, Mrs. Ridgway and Mrs. Norris.

These facts were admitted at the audit.

The facts found at the adjudication were as follows:—

"The testatrix died on the twenty-seventh day of August, 1891, having first made her will, dated the seventh day of December, 1873, whereby, after giving a number of specific legacies of articles of jewelry, silverware, and household furniture, etc., she gave all the rest, residue, and remainder of her estate to the Girard Life Insurance, Annuity and Trust Company, *in trust*, during the lives of her three children, Elizabeth F. Ridgway, Isabel F. Norris, and Charles Fry, to collect and receive the rents, income, and profits thereof, and pay the same over to the said children, share and share alike, etc., and upon the death of either of them upon other trusts, etc.; and she directed her trustees to pay to her granddaughters, Mabel Ridgway and Cornelia Norris, the sum of $2000 each, when they shall each reach the age of twenty-one years respectively. By a codicil dated June 16, 1883, the testatrix said: 'I wish my granddaughter Edith Norris to have $2000 from my estate (the eldest daughter of Isabel F. Norris). I have left the same amount to Mabel Ridgway. I demand that this wish is carried out.'

"Cornelia Norris, a legatee for $2000, named in the will of the testatrix, died in her lifetime. The legacy to her has therefore lapsed.

"By the codicil to her will just recited the testatrix gave to her granddaughter, Edith Norris, $2000. By the terms of this bequest it is absolute, and according to law is due and payable within one year from the death of the testatrix. It was contended, however, that as the two legacies of $2000 each to her other two granddaughters (one of whom died, as above mentioned) were not payable until they arrived at the age of twenty-one years, that the testatrix meant that this one also should not be payable until then. She may have so meant, but of this there is no evidence, but the rule of construction is not so much what the testatrix meant, but what is the meaning of her words. This bequest is absolute in its terms, with no restriction or limitation as to the time for its payment. It is, therefore, now due and payable, and is awarded to Dr. Isaac Norris, guardian of the said Edith Norris."

Exceptions to this adjudication were filed by Mrs. Elizabeth F. Ridgway, which were dismissed, and the adjudication confirmed by a divided Court. HANNA, P. J., delivering an opinion, in which FERGUSON, J., concurred for affirmance, ASHMAN and PENROSE, JJ., dissenting.

A. T. Freedley, for appellant.

1. The decree of the Court below subverts the general scheme of disposition declared by the testatrix throughout her entire will.

The intention is to be deduced from a consideration of the entire will, including the codicil; for the will and codicil, though written on separate pieces of paper and at different times, of course constitute but one instrument and the codicil is to be read as if written in the will.

Pepper's Estate, 148 Pa. 12.
Wetter's Appeal, 20 WEEKLY NOTES, 499.
Brick's Estate, Id. 45.
Scheetz's Appeal, 82 Pa. 217.
Budd's Estate, 32 WEEKLY NOTES, 219.

2. The legacy to Edith Norris given by the codicil was merely a substitutional legacy for the bequest to Cornelia Norris in the original will which had become inoperative by reason of the death of said Cornelia Norris, and hence the said substituted legacy given by the codicil is subject to the incidents of the original legacy given by the will.

Hawkins on Wills, *306, *307.
Roper on Legacies, 586, 604.
Williams on Executors, 1296.

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Leacroft *v.* Maynard, 3 Brown's Chan. Cases, 233.
Same, 1 Vesey, Jr., 278.
Bristow *v.* Bristow, 5 Beavan, 289.
Fisher *v.* Brierley, 30 Id. 267.
Duncan *v.* Duncan, 27 Id. 392.
Shaftesbury *v.* Marlborough, 7 Simons, 237.
Overend *v.* Gurney, Id. 128.
Condict *v.* King, 13 N. J. Eq. 381.
Hammond *v.* Hammond, 2 Bland, 314.
Cordes *v.* Palmer, 6 Rich. Eq. 207.

The same principle applies where the legacy is an *additional* legacy, and it is well settled that when a legacy is given by will and an additional one by codicil, the additional one will be subject to the same conditions as the original gift unless there are express words to the contrary.

Crowder *v.* Clowes, 2 Vesey, Jr. 449.
Day *v.* Croft, 4 Beavan, 561.
Cookson *v.* Hancock, 1 Keen, 817; 2 Mylne & Craig, 606.
Warwick *v.* Hawkins, 5 De Gex & Smale, 482.
Snow *v.* Foley, 119 Mass. 102.
Tilden *v.* Tilden, 13 Gray, 108.
Thompson *v.* Churchill, 60 Vt. 371.
Barnes *v.* Hanks, 55 Id. 317.
Buehler's & Fairlamb's Appeal, 100 Pa. 385.
Wetter's Appeal, 20 WEEKLY NOTES, 499.
Phillips' Estate, 30 Id. 241.
Hollowbush's Estate, 6 Lancaster Law Rev. 109.

July 12, 1894. McCOLLUM, J. The learned auditing Judge regarded the legacy to Edith Norris as absolute and payable within one year from the death of the testatrix, and he accordingly directed that it should be paid to her guardian. Exceptions were filed to the adjudication, but upon argument and due consideration they were dismissed and it was confirmed by a divided Court. The manner in which the case was decided indicates that there was room for disagreement respecting the questions involved in it. All concede, however, that in the decision of the case the intention of the testatrix should govern, and that it must be ascertained from her will.

The legacy in question was created by a codicil made nine years and six months after the will was executed. The terms in which it was given clearly import an absolute bequest, and standing alone justify the conclusion reached by the learned auditing Judge. But it is contended that the will and codicil must be considered as one instrument, and that construed as such they show the testatrix intended the legacy to Edith Norris as a substitute for the bequest to Cornelia Norris who died in 1874, and as the gift to Cornelia was contingent upon her attaining the age of twenty-one years the gift to Edith is subject to a like contingency. In considering this contention it will be observed that there is no allusion in the codicil to a bequest to Cornelia, or to her death, nor anything whatever to indicate that the testatrix intended to annex any conditions to the legacy which she gave to Edith. The statement in the codicil that she had left the same amount to Mabel Ridgway is no qualification of the gift to Edith Norris, nor will it justify an inference that by it the testatrix meant to change in any respect the legacy she had given in the preceding sentence. There is no inaccuracy in the statement because the legacy to Mabel Ridgway was the same in amount as the legacy to Edith Norris, but the fact that it was so did not impart to the latter the qualities of the former. There is nothing in the will or codicil in the nature of an expression by the testatrix of a purpose to substitute the legacy in question for the legacy to Cornelia Norris, or to subject it to any contingency or limitation applicable to the bequest to Mabel Ridgway. A substitutional legacy is ordinarily one which is given instead or in place of a prior legacy to the same person. It has all the incidents and qualities of the precedent bequest for which it is substituted. If two legacies of equal amount are bequeathed to the same person in the same instrument, or in a will and codicil thereto, the second will be considered as substitutional unless it plainly appears that it was intended as cumulative. But there is no presumption that a legacy bequeathed in the codicil to one person is a substitute for a legacy of the same amount bequeathed in the will to another person, nor does such a presumption arise from the mere fact that the legacy given in the will lapsed by the death of the legatee nine years before the codicil was written.

Buehler and Fairlamb's Appeal, 100 Pa. 385, is cited as authority for this proposition that the legacy in question is substitutional. But we do not so regard it. In that case the testator after providing for the payment of his debts and bequeathing a portion of his estate to his widow, devised the residue to his children, and directed how the net share of each child should be ascertained. In a codicil to the will he revoked the devise to his son Robert and expressly gave his share to his wife. It was held that the mode pointed out for the ascertainment of the shares of the children was not changed by the codicil, and that Robert's wife was therefore entitled to the share her husband would have received if she had not been substituted as a legatee in his stead. The decision was in strict accordance with the expressed intention of the testator that Robert's wife should have Robert's share under the will. A resemblance between the case cited and the case at bar is not discoverable.

It is conceded that the gift to the children of the testatrix of the income of the residue of her estate was subject to the legacies which she gave to Mabel Ridgway and Cornelia Norris. The payment of these legacies was not postponed during the lives of her children. They were

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payable when the legatees respectively attained the age of twenty-one years. If both the legatees were living they would have been entitled to and would have received their legacies before this time. In that event the income bequeathed to the children would have been impaired to the same extent that it is by the adjudication complained of. In other words, the children have from the estate under this adjudication all that they could have had if Cornelia Norris had attained the age of twenty-one years, and the codicil had not been made. These matters are referred to not as affecting the construction of the codicil but as showing the intention and expectation of the testatrix at the time she made her will.

In Wetter's Appeal, 20 WEEKLY NOTES, 499, the whole scheme of the will looked to the gift of the entire income of the estate (except the interest for a short time on $2000), to the testator's widow for life, and the postponement until her death or re-marriage of all legatees. In a codicil to the will he bequeathed a legacy of $2000 in trust for a charitable purpose, and it was held that this like the other legacies was postponed during her life or widowhood. It is contended that Wetter's Appeal is decisive against the adjudication in this case. We do not think so. In that case the postponement of the legacies was for the benefit of the testator's wife who was the primary object of his bounty. It was clearly the dominating purpose of the testator to secure to her the income from his estate during her life or widowhood, without any abatement or reduction, and the postponement of the legacies was deemed necessary in order to give effect to his manifest intention and preserve the general scheme of his will. In this case we are not prepared to say that there is anything in the will, or otherwise shown, which would justify us in disregarding the plain language in which the testatrix bequeathed to Edith Norris the legacy in question.

The specifications of error are overruled.

Decree affirmed and appeal dismissed at the cost of the appellant. W. D. N.

May, '94, 20. May 31, 1894.

Commonwealth ex rel. Attorney-General v. Union Passenger Railway Co. and the Philadelphia Traction Co.

Street railways—Act of November 22, 1873—Construction of.

The Act of November 22, 1873, authorizing the Union Passenger Railway Co. to extend their routes on certain streets named, "and on such other street or streets south of Christian street, west of Twentieth street, north of Columbia avenue and east of Third street, as the Councils of the City of Philadelphia may, from time to time, permit or authorize," gives the said company the right, subject to consent of Councils, to lay and operate tracks on any street or streets south of Christian street, north of Columbia avenue, west of Twentieth and east of Third street.

Appeal of the Commonwealth from the judgment of the Common Pleas of Dauphin County, in favor of defendants in a proceeding by quo warranto against the Union Passenger Railway Company and the Philadelphia Traction Company. The case was tried without a jury by SIMONTON, P. J., who, after hearing, filed the following opinion:

"This case originated in a writ of quo warranto, issued on the suggestion of the attorney-general, requiring the respondents to show by what authority they exercise the right to construct and operate a railway track on York street between Fourth and Twentieth streets, in the City of Philadelphia, and why they should not be ousted and altogether excluded from said street. A joint and several answer was filed by the respondents, and the case was tried by the Court without a jury. From the suggestion, answer, and evidence produced on the trial, we find the facts to be as follows:

"1. The Union Passenger Railway Company of Philadelphia, one of the respondents, was incorporated by an Act of Assembly approved April 8, 1864, for the purpose of constructing and operating a street passenger railway on certain streets in the City of Philadelphia designated in said Act; and it has been authorized by several subsequent Acts of Assembly to extend its track on certain other streets in said city. These several Acts are quoted and annexed to respondents' answer, and are hereby referred to and made part of this finding.

"2. The Philadelphia Traction Company, the other respondent, was incorporated by an Act of Assembly approved June 13, 1883; but it subsequently surrendered its charter and procured letters patent under the Act of March 20, 1887, by which all its contracts theretofore entered into were ratified and confirmed; and in 1883 it entered into a contract with the Union Passenger Railway Company, under which it has since operated the lines of said company.

"3. One of the Acts of Assembly above referred to, which was approved November 22, 1873, conferred upon said Union Passenger Railway Company the following powers and authority: 'To extend their routes and lay tracks on Ellsworth street from Twenty-second street to Twenty-fifth street, on Twenty-fifth street from Ellsworth street to Christian street, on Christian street from Twenty-fifth street to Twenty-second street, on Seventh street from Oxford street to

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Columbia avenue, on Jefferson street from Seventh street to Thirty-first street, all in the City of Philadelphia; and on such other street or streets south of Christian street west of Twentieth street north of Columbia avenue and east of Third street as the Councils of the City of Philadelphia may from time to time permit or authorize to be used by said company with single or double tracks.' In conformity with said Act of Assembly the Councils of the City of Philadelphia passed an ordinance, approved by the Mayor, October 28, 1890, permitting and authorizing the said company to lay a single track on York street (which runs parallel to and north of Columbia avenue), between Fourth and Twentieth streets.

"4. Before the passage of said ordinance, the respondents had actual notice from the Citizens' Fairmount Park Street Railway Company, which was incorporated May 24, 1889, under the Street Railway Act of May 14, 1889, that it claimed the right to occupy said York street and denied respondents' right to lay a track thereon. Respondents disregarded said notice, and proceeded to construct and operate a railway track on said street, in accordance with the permission granted to them by Councils as above stated, and they claim the right to use and occupy York street and to operate a street railway thereon, under said Act of November 22, 1873, and said ordinance of October 28, 1890.

"5. Attached to the suggestion on behalf of the Commonwealth, and on file, and hereby referred to and made part of this finding, is a map of the City of Philadelphia, which shows in dark lines all the streets of said city, which were specifically to be occupied by said Union Passenger Railway Company, under the Acts herein above referred to; and attached to respondents' answer, and on file, and hereby referred to and made part of this finding, is a map which shows in heavy lines the railway tracks constructed by said Union Passenger Railway Company, under the several Acts of Assembly herein above referred to, including the Act of November 22, 1873; and in light lines the tracks laid since that date, under the authority and permission of ordinances of Councils of the City of Philadelphia.

"It is contended on behalf of the Commonwealth, and evidence was introduced at the trial intended to prove, that prior to the passage of the Act of November 22, 1873, the principal lines of railway of the respondents extended in a northeastern and southwestern direction across the City of Philadelphia, and that said Act was 'intended only to authorize the said Union Passenger Railway Company to extend the northeastern and southwestern termini of its Richmond branch further into said two quarters of the City of Philadelphia, one of which was north of Columbia avenue and east of Third street, and the other of which was south of Christian and west of Twentieth street, to enable said company to extend its railway in these directions as the city grew, and the public necessity required;' but we cannot find from the evidence that such is the fact, and we refer to the map annexed to the answer of respondents, and find that its lines of railway were as therein stated; and we also find the facts, as to the streets occupied by respondents' tracks, to be as stated in paragraphs six and seven of respondents' answer. We also find the facts to be as stated in the agreement of counsel filed with the testimony, and that the ordinances of Councils therein quoted, were passed and approved as therein stated, all which are referred to and made part of this finding.

"The controversy in this case lies within a very narrow compass. The Commonwealth challenges the right of the Union Passenger Railway Company, one of the respondents, and its lessee, the Philadelphia Traction Company, the other respondent, to lay and operate a street railway track on York street from Fourth street to Twentieth street, and respondents claim the right so to do by virtue of the Act of November 22, 1873, and the ordinance of the Councils of the City of Philadelphia, approved by the Mayor, October 28, 1890. Respondents are authorized by said Act to extend their routes on certain streets named therein, 'and on such other street or streets south of Christian street west of Twentieth street north of Columbia avenue and east of Third street as the Councils of the City of Philadelphia may from time to time permit or authorize.' It is contended on behalf of the Commonwealth that this language must be so construed as to permit tracks to be laid only on such street or streets as are at the same time south of Christian street and west of Twentieth street, or as are at the same time north of Columbia avenue and east of Third street, while respondents contend that they are authorized by the Act to lay their tracks on any street or streets south of Christian street, north of Columbia avenue, west of Twentieth street, and east of Third street.

"There is nothing so difficult to prove as a self-evident proposition, and however much it may be the duty of the Court to give the reasons on which its judgment is founded, so as at least to show the course of thought, whether logical or otherwise, which has led to the conclusion announced, cases sometimes occur in which all that can be satisfactorily done is to render a decision; and this, in our opinion, is such a case.

"It is conceded by counsel for the Commonwealth that the extent of respondents' rights depends on the interpretation to be given to the

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language of the Act of November 22, 1873, above cited, and they ask us to find its meaning doubtful and ambiguous, and then to apply the well-settled principle that 'When the charter of a railway company, or the grant of a franchise in any other form, admits of a reasonable doubt, it will be solved in favor of the public against the grantees, who will take nothing that is not given expressly, or by implication equally plain with the words;' 2 Hare's Const. Law, 660. We should not hesitate to apply this principle if we could find the language of the Act to be ambiguous or of doubtful import, but after the most careful consideration we are unable to doubt its meaning. Counsel suggest that there are three possible interpretations of the clause in question, which are thus stated in their brief: 'It might be said that the grant authorizes the occupation only of such streets as comply with all the terms of the description; that is to say, it authorizes occupation only of some street which would be south of Christian and also north of Columbia avenue and west of Twentieth and also east of Third street.

"'Another interpetation is that the grant confers authority on the railway company to lay its tracks on any street which lies south of Christian street, running east and west indefinitely, or any street or streets which lie west of Twentieth street, running north and south indefinitely, or on any streets which lie north of Columbia avenue, running east and west indefinitely, or on any streets which lie east of Third street, running north and south indefinitely.

"'The third possible construction is to read the clause in this way: 'On such other street or streets south of Christian street and west of Twentieth street, and north of Columbia avenue and east of Third street, as the Councils of the City of Philadelphia may from time to time permit or authorize.'"

"Counsel discard the first of these interpretations because it would be insensible when applied to the subject matter, for, as is said in the brief, 'It is obvious that there is no street in the City of Philadelphia which fulfils these conditions.' And they contend for the third construction suggested; but so far as we can see the only thing which makes it possible is that it can be applied to the subject-matter. And we fail to find any stopping place, either grammatical or logical, between the second construction suggested in the brief, which is the one contended for by the respondents and the construction discarded by counsel for the Commonwealth.

"We are unable to understand why, if we do not take south, west, north and east, separately, they are to be bracketed two and two. Counsel say in their brief: 'If reference is made to A, B, C and D,' what is meant is A, and B, and C and D, true; but this does not mean (A—B), and (C—D); it means either (A), and (B), and (C), and (D), or it means (A — B — C — D).

"So when the Act says south, west, north and east, it must mean either (south — west — north —east), or (south), (west), (north) and (east); but it certainly does not mean (south-west) and (north-east).

"As we have said, nothing is so difficult to prove as that which is self-evident; and we know of no way in which the clause in question could more clearly express the sense which respondents' claim and in which we understand it, except by changing the order of the points of the compass, as for instance: South of Christian street, north of Columbia avenue, west of Twentieth street, and east of Third street. This leaves the grammatical construction precisely as before, and yet no one would contend that it does not clearly express that respondents could occupy any of the streets outside of the region bounded by the four streets named. This shows that the language is not ambiguous, and that the interpretation suggested on behalf of the Commonwealth is made possible only by the fact that the points of the compass were named in their natural order.

"We have no doubt that, within proper limits, the facts as they existed when the Act of 1873 was passed may be looked at in aid of its proper interpretation; but we discover nothing in the status, shown by the evidence and exhibits, to suggest that the language of the Act is ambiguous, or to effect its natural interpretation. The theory of a diagonal extension of the respondents' lines northeast and southwest is not borne out by the facts shown on the maps, and in the testimony.

"We do not think the Act of November 22, 1873, is obnoxious to the objection interposed on behalf of the Commonwealth that contrary to one of the settled maxims of constitutional law, it delegates the power to make laws to the Councils of the City of Philadelphia. The Act is complete in itself, and does not derive its existence or its force from the action of Councils. The right of the respondents to avail themselves of the privileges conferred by the Act is simply made subject to the right of Councils to control the use and occupation of the public streets within the city.

"Several points have been presented on behalf of the Commonwealth, each of which is hereby severally refused; and in addition to declining these points, our conclusions are as follows:

"1. That the Act of Assembly of November 22, 1873, authorizes and empowers the Union Passenger Railway Company, subject to the consent of the Councils of the City of Philadelphia, to lay down and operate railway tracks on York

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street, from Fourth street to Twentieth street, in the City of Philadelphia.

"2. That judgment must be entered in favor of respondents.

"Judgment is therefore directed to be entered in favor of respondents if exceptions be not filed within the time limited by law."

From this judgment plaintiff appealed, assigning for error the refusal to find certain facts as requested, *inter alia*, that the space bounded by the streets named in the Act occupied but four square miles and the area beyond these limits is about 125 square miles; that the respondents had procured two charters for lines within the limits they now claimed to be covered by the Act of 1873, and in the conclusions of law.

John H. Sloan and *George Tucker Bispham*, (with them *William Henry Lex* and *William U. Hensel*, attorney-general), for appellant.

The grant does not authorize the company to lay its tracks on York street between Fourth and Twentieth streets because York street west of Third is not within the territorial limits covered by the Act.

The interpretation contended for by the respondent requires a forced grammatical construction.

Statutes conferring privileges to corporations are strictly construed.

1 Bl. Comm. 88.
2 Hare's Const. Law, 660.
Stormfeltz *v.* Turnpike Co., 13 Pa. 555.
Philadelphia *v.* Citizens' Pass. R. Co., 151 Pa. 128.
Endlich on Interpretation of Statutes, sec. 354.

The Act of 1873, which constitutes the defendants' grant, read in the light of the essential corporate franchises theretofore enjoyed by the Union Passenger Railway Company, must be given the meaning contended for by the Commonwealth.

United States *v.* Crawford, 6 Mackey, 319.
Endlich on Interpretation of Statutes, sec. 40.
Griffin's Case, Chase's Dec. 364.

The executive department of the State would not have granted a right to the Fairmount Co. to lay tracks on York street if the franchise was given to the Union Co. by the Act of 1873.

Packer *v.* S. & E. Railroad Co., 19 Pa. 211.

Respondents themselves have construed this Act of 1873 against their present contention by having applied for charters within the limits now claimed.

Junction Pass. Railway Co. *v.* Williamsport Pass. R. Co., 154 Pa. 116.

The authority to use these streets outside the limits comes from Councils and not directly from the Legislature, it is submitted that such authority cannot be delegated.

Cooley on Const. Lim. *116.
Mercer *v.* P., Ft. W. & C., R. Co., 36 Pa. 99.

John G. Johnson and *David W. Sellers*, (with them *M. E. Olmsted* and *Rufus E. Shapley*), for appellees.

The findings of fact by the Court are conclusive.

Commonwealth *v.* L. V. R. R. Co., 37 Leg. Int. 407.
Jamison *v.* Collins, 83 Pa. 359.
Lee *v.* Keys, 88 Id. 177.
Brown *v.* Susquehanna Boom Co., 109 Id. 70.
Gonser *v.* Smith, 115 Id. 459.
Southern Md. R. Co. *v.* Moyer, 125 Id. 509.

The words of the Act of 1873 are:—

"To extend their route and lay tracks . . . . on such other street or streets south of Christian street, west of Twentieth street, north of Columbia avenue, and east of Third streets as the Councils of the City of Philadelphia may, from time to time, permit or authorize to be used by said company with single or double tracks."

And. as if to leave no possible room for doubt as to their intention to grant all the power which these words would naturally import, the very same words are used in the title of the Act.

We submit that if these words stood alone any intelligent school boy would understand them to mean only this:—

"On such other street or streets south of Christian street, (and on such other street or streets) west of Twentieth street, (and on such other street or streets) north of Columbia avenue, and (on such other street or streets) east of Third street," etc.

July 11, 1894. PER CURIAM. This proceeding by quo warranto challenges the right of the defendants or either of them to construct and operate a street railway on York street from Fourth street to Twentieth street in the City of Philadelphia. To the joint and several answers of the defendants, a general replication was filed by the Commonwealth and the parties having agreed to dispense with trial by jury under the provisions of the Act of 1874, the learned Court received the evidence, found the facts and drew therefrom the following conclusions of law:

(1) That the Act of November 22, 1873, authorizes the Union Passenger Railway Company, subject to the consent of Councils, to lay and operate railway tracks on York street between Fourth street and Twentieth street in said city; and

(2) That judgment should be entered in favor of the defendants.

The facts so found, together with a full consideration of the questions involved, and leading up to these conclusions, are all clearly and concisely stated in the opinion of the learned Judge

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of the Court below. As will be seen therein, the defendants base their right to construct and operate the railway in question, upon said Act of November 22, 1873, and the ordinance approved October 28, 1890. In addition to the powers theretofore granted to said Union Passenger Railway Co., the first section of said Act authorizes it to extend its routes on certain specified streets in said city, "and such other street or streets south of Christian street, west of Twentieth street, north of Columbia avenue, and east of Third street as the Councils may, from time to time, permit or authorize to be used by said company with single or double tracks."

Two of said streets, Christian in the southerly and Columbia avenue in the northerly section of the city, run nearly east and west, and both are crossed at right angles by the other two, Third and Twentieth streets, while York street, the *locus quo*, is north of and parallel with Columbia avenue.

The Commonwealth's contention is that the clause above quoted was not intended to embrace any street other than those streets and parts of streets within the lines of the southwesterly angle formed by the intersection and extension of the lines of Christian and Twentieth streets, and also those within the lines of the northeasterly angle formed by the intersection and extension of the lines of Third street and Columbia avenue. If the clause had been so worded as to read "south of Christian street and west of Twentieth street, north of Columbia and east of Third street," there would be some ground for holding that streets and parts of streets, not within the lines of one or the other of said angles, were intended to be excluded; but there is nothing in the Act itself or in its title, or *dehors* both, to justify any other construction than that given by the Court below. Everything that is necessary to be said on the subject will be found in the clear, concise and exhaustive opinion of its learned Judge; and on it we affirm the judgment.

Judgment affirmed. W. M. S., Jr.

Jan. '94, 232. March 29, 1894.

Commonwealth ex rel. Cord v. Magnolia Villa Land and Improvement Co. and Equitable Trust Co.

Acts of May 24, 1887, and March 17, 1869—Bonds in attachment—Damages.

The damages allowed by the Act of May 24, 1887, when an attachment under the Act of March 17, 1869, has been quashed, dissolved or ended, cover all legal costs, fees and damage by reason of the attachment. The latter includes all damages for pecuniary loss ordinarily and naturally resulting from the seizure of the goods, such as loss of sales, interruption of business, and expenses necessarily incurred, but not indirect or consequential loss nor punitive damages for the malicious use of civil process.

In a proceeding on a bond executed in pursuance of the Act of May 24, 1887, the liability of the attaching creditor and his surety cannot be extended beyond the terms of that Act.

Appeal of the Magnolia Villa Land and Improvement Company and the Equitable Trust Company, defendants, from the judgment of the Common Pleas No. 1, of Philadelphia County, in favor of the plaintiff, in an action brought upon a bond given by them under the Act of May 24, 1887.

It appeared by the record that on May 13, 1890, an attachment under the Act of March 17, 1869, was issued by the Magnolia Villa Land and Improvement Company against Samuel S. Cord, and a bond was executed by the Company as required by the Act of May 24, 1887, with the Equitable Trust Company as surety.

This attachment was dissolved on March 19, 1891, and subsequently Cord brought this suit upon the bond so filed.

On the trial, before Biddle, J., plaintiff was interrogated as follows:—

Q. Please state whether or not you were obliged by reason of this attachment preventing the free use of personal property belonging to you in the hands of others, to borrow any money for necessary expenses of living and your business, which you would not have been obliged to borrow had not this attachment issued? Objected to. Objection overruled. Exception to defendant. (Tenth assignment of error.)

A. Yes, I was obliged to borrow money at different times.

The Court charged the jury as follows:—

"Gentlemen of the jury: In this case it appears that the Magnolia Land Company, through their appropriate officer, made an affidavit that the defendant here had embezzled certain funds belonging to them. Having made that affidavit, they had a right to go before the prothonotary and get out what in the law is called an attachment, which is served upon all people who owe money to the man that is attached; that is, anybody who owes him money can have notice of it, and they are forbidden after that from paying the money to him.

"That was done in this case, and when the case subsequently came on to be heard, that attachment was dissolved. It was in existence for nearly a year, I believe, but when it came on to be heard, the attachment was dissolved, and the object of the present suit is to recover damages for the loss which he has sustained by that attachment having been improperly issued against him.

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"Now, while the law permits this summary mode of proceeding, it also has this proviso: 'Provided that before such attachment shall issue, there shall be executed and filed with the prothonotary of the Court in which such attachment is applied for, a bond to the Commonwealth of Pennsylvania for the use of the parties interested in the penalty of at least double the amount claimed with good and sufficient surety, to be approved by one of the Judges of the said Court, conditioned that if the said plaintiff fail to prosecute such attachment with effect, or in any case such attachment be quashed, dissolved or ended, then the plaintiff or plaintiffs shall pay to the defendant or defendants in such attachment all legal costs, fees and damages which said party defendant or defendants may sustain by reason of such attachment, and which said bond shall remain in the office of the said prothonotary for the use of any party injured as aforesaid.'

"In this case before the attachment was issued, of course, the person who caused it to be issued had to enter into that bond, and that bond was filed in Court, and as the attachment was quashed and never proceeded with, then the persons who went the sureties on the bond are responsible for any damages which have been sustained in consequence of the serving of this attachment; and the only question for you in this case is what damage you think he has sustained by the improper issuing of the writ in question.

"It is very evident as we have gone along in this case, that there has been litigation of different kinds between these parties, and it has been casually and in other ways brought before you, but, gentlemen, we have nothing to do with those litigations. We have not the means of determining who is right or who is wrong. We know nothing about it. [All that comes before you is that an attachment had been issued against the man and his property tied up, and the Court has decided that that was improperly issued, and then he has a right to ask you to give him damages which you think he has sustained.]

"The parties have each given me points which they have asked me to answer.

"On behalf of the plaintiff are these points, which I affirm:—

"1. Inasmuch as the uncontradicted evidence shows that the attachment was caused to be issued by the defendant land company, and that it was dissolved, the only question for the jury to settle is how much damage Samuel S. Cord suffered by reason of that attachment.

"2. The jury should find in favor of the plaintiff for such a sum as all the evidence satisfies them that Mr. Cord was damaged by reason of the attachment.

"3. In assessing the damages the jury have a right to consider the cash expenditures of Mr. Cord made necessary by the attachment, the loss of time it caused him, and inconvenience, annoyance and extra trouble to which it subjected him.

"The defendant's points are refused, except to say that you have no right to find any damages for any loss of prospective profits.

"1. That the plaintiff has no right of action on the bond sued because the same was made payable to 'The Commonwealth of Pennsylvania,' and not to 'The Commonwealth of Pennsylvania for the use of the parties interested,' as required by the Act of 24th May, 1887, P. L. p. 198.

"2. That the parties who are the principals to this suit were also parties to a cross-suit concerning the same subject matter to June term, 1890, No. 22, in this Court, and that they agreed 'that one-half of the costs of the reference should be borne by each party and all other costs to follow the decision in the respective cases.'

"3. That this agreement materially altered the terms of the attachment bond, and that plaintiff cannot recover thereon.

"4. That in consequence of this agreement the plaintiff cannot recover for legal costs and fees on said bond.

"5. That if plaintiff can recover on said bond he is limited to damages caused to the property attached by reason of the attachment between May 13, 1890, and March 19, 1891.

"6. No damages can be recovered by the plaintiff by reason of the attachment against the assignee of the Bank of America unless the jury believes that he could have received a dividend from the assignee between May 13, 1890, and March 19, 1891, and then only for interest up to March 19, 1891, on any payment which was deferred by reason of the attachment.

"7. The plaintiff cannot recover on the following items claimed in the bill of particulars:—

"(*a*) Counsel fees.
"(*b*) Depositions.
"(*c*) Common Pleas costs.
"(*d*) Supreme Court costs.
"(*e*) Expert witness fees.
"(*f*) Other witness fees.
"(*g*) Garnishees' attorney fees.
"(*h*) Typewriting charges.
"(*i*) Compensation for plaintiff's time occupied in attachment proceedings.
"(*j*) Loss of character or business standing.
"(*k*) Loss of prospective profits.
"(*l*) Loss from borrowing money.
"(*m*) Loss from inconvenience and annoyance caused by attachment stopping money due and preventing free use of personal property,

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except to the extent of interest on any payments deferred by the attachment between May 13, 1890, and March 19, 1891.

"(*n*) Loss caused by deeds for land, life insurance policy or other private papers being in the hands of any of the garnishees and belonging to the plaintiff herein.

"8. Counsel fees cannot be recovered as disbursements or damages.

"9. Counsel fees cannot be recovered as disbursements or damages because they are not so specified in the bill of particulars.

"10. No damages can be recovered for any cause not distinctly set forth in the bill of particulars.

"11. The only damage that the plaintiff has shown by reason of the attachment consists in his having been obliged to borrow $400 and having been obliged to pay a bill of $40 for repairs to a carriage sooner than he otherwise would have been required to pay it."

(Exception to defendant to declination of defendant's points.)

The jury having returned to ask a question, the Court thereupon charged them further as follows:—

["Gentlemen of the jury: The question which you ask me is, 'Can the jury allow plaintiff damages for loss of reputation and credit in consequence of this attachment, or are we confined to the actual money damages sustained by him?'

"You can allow for the injury which anyone would be subjected to generally by the issuing of such writ. No special damages have been shown to the mercantile credit or reputation of the plaintiff in this case. Do I make myself understood by you, gentlemen? That is to say, that where an attachment has been issued, and ties up a man's property, if you consider that that mere fact injures his credit and reputation generally, you can consider that in fixing the damages. There has been no evidence of a special loss of business credit in this case, and therefore there should be no allowance for any such loss. It would be simply the general loss which the issuing of such a writ, if any, would cause the defendant."

THE SECOND JUROR: "Do we understand your Honor that we are bound simply by the actual money damages that he has sustained, or, in other words, can the jury, if they feel it to be a fact that he has been injured outside of his money loss, give damages in consequence of this attachment?"

THE COURT: "Yes, they can do that. What I said to you before was, 'In assessing the damages the jury have a right to consider the cash expenditures of Mr. Cord made necessary by the attachment, the loss of time it caused him and the inconvenience, annoyance and extra trouble to which it subjected him.'

"If you mean by credit—you cannot give him damages for injuring his business credit, because there has been no evidence that his business credit was injured, but you have a right to consider, I say, all those facts which I have stated to you. There are some things which are not susceptible of being reduced to dollars and cents; it cannot be done, although you see the force perhaps that injury has done to a man's business and character by the issuing of any such writ. That you can consider. As business men you can consider that without specially allowing anything for loss of mercantile credit."]

Verdict for plaintiff for $2000 and judgment thereon. Defendant appealed, assigning for error (1 to 9) the refusal of the Court to affirm his points; (10) the ruling in the admission of evidence above-noted and (11 and 12) the portion of the charge in brackets.

James W. M. Newlin, for plaintiff in error.

The bond standing in the name of the Commonwealth alone without the name of the party liable for costs was fatally defective.

Hoppes *v.* Houtz, 133 Pa. 34.

Counsel fees were erroneously allowed.

Stopp *v.* Smith, 71 Pa. 286.
Sensenig *v.* Parry, 113 Id. 119.

There can be no recovery on the bond for anything except pecuniary damages either to the property attached or for disbursements.

Sutherland on Damages, sec. 55.

William W. Smithers, for appellee.

Even if bond be not in accord with the Act, the defendant cannot take advantage of his own wrong.

McLuckie *v.* Williams, 12 Atl. Rep. 1.
Bennett *v.* Mulry, 26 N. Y. S. 790.

Under the Pennsylvania statute there can be no question as to the right to recover costs and fees.

In Drake on Attachment, Sections 175, 176, 177, it is said that actual damage may be properly comprehended under two heads, viz:—

1. Expenses and losses incurred by the party in making his defence to the attachment proceedings.

2. The loss occasioned by his being deprived of the use of his property during the pendency of the attachment, or by an illegal sale of it, or by injury thereto, or the loss or destruction thereof.

July 12, 1894. FELL, J. This action was upon a bond given in a proceeding under the Act of March 17, 1869, and its supplements, by which the personal property of the plaintiff was

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attached. The condition of the bond follows the language of the Act of 1869 as amended by the Act of May 24, 1887, and is: "Now the condition of this obligation is such that if the said plaintiffs shall fail to prosecute such attachment with effect, or if such attachment be quashed, dissolved or ended, the said plaintiffs shall pay to the said defendants all legal costs, fees and damages which the said defendant may sustain by reason of such attachment, then the foregoing obligation is to be void; otherwise the same shall be and remain in full force and virtue."

The attachment was issued May 13, 1890, and after hearing, dissolved March 19, 1891. Of the numerous assignments of error, it is necessary to consider only the twelfth, which must be sustained, as it was left open to the jury to find a wrong measure of damages. The recovery allowed by the Act is for all legal costs, fees and damages sustained by reason of the attachment. This would include all damages for pecuniary loss ordinarily and naturally resulting from the seizure of the goods, such as loss of sales, interruption of business and expenses necessarily incurred, but not loss that was indirect or consequential, or punitive damages recoverable for malicious use of civil process. Any suit may be said to injure to some extent the business standing of a defendant, and to cause damage; but the ordinary penalty for bringing an unfounded action is the recovery of costs, and recovery for the misuse of civil process is confined to cases of the seizure of the person or goods of the defendant.

This was the case at the time of the passage of the Act of 1869, and the only additional penalty provided by it was liability for damages, as well as for costs, sustained by reason of the attachment. The Act of 1887 gave the additional penalty of the payment of fees. A party whose goods have been attached may recover for the malicious use of civil process if the facts warrant it, but in a proceeding on the bond executed in pursuance of the requirements of the statute, the liability of the attaching creditor and his surety cannot be extended beyond its terms.

This view seems to have been entertained by the learned Judge before whom the case was tried, who submitted it to the jury in a careful and accurate charge. They returned for further instruction, and by what was doubtless an inadvertency, it was said that there could be a recovery beyond the plaintiff's pecuniary loss. It was thus left to the jury to take a wrong rule in assessing damages, and for that reason the judgment must be reversed.

The twelfth assignment of error is sustained, the judgment is reversed, and a venire de novo granted. W. M. S., Jr.

Jan. '94, 106. April 18, 1894.

Commonwealth v. Kline.

Nuisance—Public highways—Proceedings necessary for their opening—Mere plotting not sufficient for use of.

Proceedings to open are necessary before a plotted street becomes an actual highway; the mere plotting vests in the public no present right of user.

The report of the commissioners under the Act of Assembly of April 3, 1867, is notice of an intention to appropriate land covered by the plotted streets for use as highways whenever that shall become necessary; but it does not presently disturb the owner's possession or confer a right of user on the public.

Appeal of John G. Kline from the verdict, the judgment and sentence of the Quarter Sessions of Blair County, that he should pay a fine of $5 and costs of prosecution for maintaining a nuisance in erecting a building on the rear of his lot and upon a plot of ground through which an alley was located upon the plan of the City of Altoona.

The facts are stated in the opinion of the Supreme Court, *infra*. The Court charged, *inter alia*, "that the report of the commissioners under the Act of Assembly of April 3, 1867, is binding and conclusive as to the opening and dedication of the streets, lanes and alleys of the City of Altoona, and to be regarded as such without any further proceedings so far as this case is concerned." And also "We say to you, taking the Act of Assembly as it reads; taking the report of commissioners appointed by the Act, which was confirmed by the Court of Quarter Sessions and ordered to be placed upon the records of the county—we say that that was an official act authorized by law; that it determined Fifth and Sixth avenues, and Fourth and Fifth streets with the alley between them, should be opened; and just where they fixed and located the lines of those avenues, and that alley at that time, those are to be the lines now, except so far as altered by the city on Sixth or Fifth avenue, and their proceedings under some other Act." Verdict guilty and sentence accordingly.

The defendant took this appeal, and assigned as error that the Court erred in instructing the jury, that if they found the commissioners under the Act of Assembly had filed a report, upon which they designated the alley between Fifth and Sixth avenues, and Fourth and Fifth streets, and that if said alley was by said commissioners located where this small building was erected, then they would find the defendant guilty; that the Court erred in not properly submitting the question of the guilt or innocence of the defendant to the jury upon all the evidence in the

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case; and the Court erred in refusing the motion for a new trial, and in sentencing the defendant to pay a fine of $5, and ordering the sheriff to remove the building if not removed by defendant within ten days.

A. V. Dively, for appellant.

The error complained of is found in the charge of Court to the jury which occurs in several places as follows: "We say to you, gentlemen, that the *only* question here is, where is now the alley which was originally laid out by the commissioners appointed under the Act of Assembly?" We think this was manifest error not only as a matter of law, but was in fact giving binding instructions to the jury in a criminal case, and virtually taking the question of the guilt or innocence of the defendant from the jury.

Burns *v.* Commonwealth, 129 Pa. 138.

It was directing the jury to find defendant guilty because the commissioners located that alley at a point where it was obstructed by defendant, unless he, the defendant, could show that it was changed or altered by an order of Court, or by some action of Altoona's city council. It was submitted to them as the *only* question they had to pass upon, and if that fact was found to be true they need consider no further —defendant was guilty. The question as to the report of the commissioners appointed under the Act of Assembly of 1867–1868 and their powers to lay out streets, lanes and alleys, and how far such report is conclusive was raised in the Court of Common Pleas of Blair County in the case of Hutchinson *v.* City of Altoona, and was fully argued in this Court, being No. 116 of January term, 1882. When the Commonwealth offered the plot as recorded January 31, 1871, being the commissioners' report under the Acts hereinbefore recited, objection was made, but this was overruled by the Court and the plot was allowed to be read. It would be only necessary to show the error in allowing this plot, and the record of it, to be offered in evidence, and the subsequent charge of the Court instructing the jury that that was such an opening as concluded the jury from considering any further questions, when reference is had to the testimony, showing that not a house was built upon that square in January, 1871, but that it was an open commons, as it is conclusively shown by the testimony of the Commonwealth, as well as that of the defendant, and that the first house built upon that square was sixteen or seventeen years ago, which would not have been until 1876. At the time of the filing of this report by the commissioners, neither Fifth nor Sixth avenues, nor the alley between, had been opened according to law. And that there was no proceedings had in the Court of Quarter Sessions of Blair County, nor was there any action by the councils of the City of Altoona to open said alley, is not questioned. There is not a scintilla of evidence aside from the report of the commissioners that any proceedings of any kind were ever had to open this alley. The testimony of City Engineer Linton was, that it would have been impossible to have opened this alley as designated on the plot of the commissioners.

N. P. Mervine (*W. S. Hammond*, district attorney, with him), moved for non pros. for the following reasons:—

1. The entire record is not brought up to this Court. The notes of testimony furnished by the official reporter show that the official map of the City of Altoona, as well as the maps made for this case, were in evidence. They are necessary to a proper understanding of the case, but are not furnished in appellant's paper book.

2. Appellant's assignment of error violates Rule No. XXIII., in that having excepted to the charge of the Court to the jury, he does not set out in his specification that portion of the charge assigned for error *in totidem verbis*.

The Court having refused to enter a non pros., the counsel for appellee then answered the appellant as follows:—

This case arose on an indictment for nuisance tried in the Quarter Sessions of Blair County, on which John G. Kline was convicted of maintaining a nuisance in having erected a small wooden building on an open alley, which prevented the adjoining lot owners on both sides from using the same. Whether this particular alley had been previously laid out or was for the first time laid out after the report of the commissioners, does not appear in the evidence. But it is clearly shown in the official report and on the map of the city as a crooked alley, and it was shown at the trial to be now the same crooked alley. It was furthermore shown by the Commonwealth's witnesses that the alley had been opened and used as far back as twenty years, and long before Mr. Kline bought his lot which runs back to this alley. On the trial of the case the defence rested on the questioned conclusiveness of the report by the commissioners, that if they reported this alley it was not binding on Kline unless the city actually opened it on the ground. Defendant seemed to assume that the alley had not been opened because the Commonwealth did not prove that the councils had passed an ordinance requiring a petition to the Court to appoint viewers and assess damages. And further, he thought that until damages were assessed he had a right to build on it, use it and obstruct it to the exclusion of his neighbors, and then justify himself on the plea that as the alley had not been visibly viewed and

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inspected on the ground by viewers and damages assessed, he could not be disturbed in his violent and unlawful act.

The difference between the Sixteenth street case relied on by defendant's counsel and this case, is that in the first there never had been a street opened till the city asked one to be opened; in the other that an alley had been opened from the time the lots were laid out calling for this alley, and put upon the market. Deeds to purchasers of lots calling for streets or alleys are a dedication of such streets or alleys by the owner.

Schenley *v.* Commonwealth, 36 Pa. 62.
Pearl Street, 111 Id. 565.
Ferguson's Appeal, 117 Id. 427.

July 11, 1894. WILLIAMS, J. The nuisance complained of in this case was the obstruction of an alleged public alley in the City of Altoona. The conviction or acquittal of the defendant depended upon whether the alley obstructed was a public highway; and this question, as the case was tried, depended on the construction of certain provisions in the Act of Assembly under which the city was incorporated.

The twenty-first section of that Act provided for a commission of several members, with authority to employ competent engineers and draughtsman, and charged them with the duty of making a general survey of all the territory included within the city limits, and a map or plot thereof. Upon this map they were to designate the several avenues, streets, lanes, and alleys then existing on the plot of Altoona borough, and to designate "where new avenues, streets, lanes and alleys should be opened. They were directed to lay out new avenues, streets, lanes and alleys" so as to conform as nearly as possible in their courses and distances to those already existing in the borough of Altoona and the villages of London and Loganstown which were included within the city limits.

Having thus ascertained the location of existing streets and indicated where new ones should be opened, they were to return their work, with a map or plot, to the Court of Quarter Sessions of Blair County for approval. When the approval of the Court was formally made the report was to be recorded in the office of the Recorder of Deeds, and thereupon the new avenues, streets, lanes and alleys so designated and plotted were to be "deemed, taken and allowed to be, public avenues, streets, lanes and alleys of the City of Altoona and to be hereafter opened as is hereinafter directed by the provisions of this Act."

The commissioners entered upon the work assigned to them, and prepared a map of the city howing existing streets therein, and the new ones laid out by them. Their report was submitted to the Court of Quarter Sessions, approved and recorded. Among the new streets appearing on their map were Fourth and Fifth streets, and an alley extending from one of these streets to the other. The alley was without courses or distances, or any note indicating its actual location on the ground. No monument or mark of a survey appears on the surface. Lines indicating the position of the alley appear on the map, but the existence of these lines on the paper is all the evidence which the Court and jury had to show that it was ever surveyed. It does not appear that the city ever opened the alley to the public, or that any action was ever taken in the Quarter Sessions to open it.

Under this state of the evidence the Commonwealth contended, and the Court below held, that the report of the commissioners was conclusive of the question; and that the alley was a public highway which it was an indictable offence to obstruct, because it appeared, although without courses or distances or other description, on the recorded plot of the city.

This ruling is the error assigned. The twenty-first section of the Act incorporating the city of Altoona, was intended to provide the new city with a system of streets, avenues, lanes and alleys in conformity with the system already established by the borough. The old streets were to be extended, and the new ones were to be laid out with reference to them. The Act was not intended to take the opening of streets out of the hands of the city government, or to divest the Court of Quarter Sessions of its jurisdiction, but to provide the city with a general plan upon which it could work in the care of existing streets and in the opening of new ones. This is apparent from the phraseology of the section in speaking of the effect of the report of the commissioners, when it is approved and recorded, upon the new streets appearing on it. It declares that such new avenues, streets, lanes and alleys shall be "deemed, taken, and allowed to be public streets of the city," not to be thereupon opened for public travel, but "to be hereafter opened as hereinafter directed by the provisions of this Act."

It was the purpose of the draughtsman of this Act to make provision in a later section of the Act for the opening of these plotted streets when needed, but he failed to do so. The opening of these streets and alleys remains therefore under such general regulations as are applicable to cities of the third class. Until they are opened on the ground they are simply plotted streets of which the owners of the ground over which they pass must take notice. He may use his ground until the city enters upon it, but if he puts any building or structure upon it after

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the street is plotted and its route recorded, he will not be allowed to recover for its value, or for the cost of its removal.

If upon the recording of the report all the new avenues, streets, lanes and alleys became at once public highways, then the land owners were entitled to their damages, if any were sustained by them by reason of the opening of such streets; and the statute of limitations would begin to run against them from the date of the recording. They might be in the undisturbed possession of the land while the statute was running, and find themselves barred of their right of action long before their actual possession was disturbed.

Again, if the report operated as an opening to public use, interest would begin to run against the city upon the damages sustained by the land owner from the date of the recording of the report. But interest begins to run only from the date of the actual taking: Weiss *v.* The Borough of Bethlehem, 136 Pa. 294. The mere plotting of a street vests in the public no right of user. Proceedings to open are necessary before a plotted street becomes an actual highway: Commonwealth *v.* The Railroad Company, 135 Pa. 256.

The report of the commissioners was notice of an intention to appropriate the land covered by the plotted streets for use as highways whenever that should become necessary; but it did not presently disturb the owner's possession or confer a right of user on the public.

If that is all the proof of actual appropriation by the city which the Commonwealth has to offer, it is not enough, and the defendant is entitled to an instruction in his favor. The position that because the city took land from the defendant at one end of his lot he may enclose against the public at the other end is of course untenable. The learned Judge was quite right in his instruction to the jury, except as to the effect of the recorded report of the Commissioners. In this he was mistaken.

The judgment is reversed and a venire facias de novo awarded. W. C. S.

July '93, 72. April 4, 1894.

Commonwealth v. Werntz.

Assignments of error—Supreme Court—Evidence—Res gestae—Criminal law—Court's charge.

Assignments of error in the admission or rejection of testimony must set out so much of the evidence as is essential to a clear comprehension of the offer and the ruling of the Court, and, if the Court has admitted the testimony which is objected to, as much of it as may show the injury to the party who excepts. To put such matter in the bill of exceptions or in the argument in the paper book does not fulfil these requirements.

In a trial of an indictment for murder by stabbing, the defence was that the killing was done by another, a negro in the employ of the defendant. One witness testified that while he was outside of the enclosure where the stabbing was done he heard the voice of the murdered man say, "the coon did it;" and that when the injured man was carried to a place across a lot from the place where he was wounded he repeated the words. The witness was then asked whether, whilst the wounded man was lying on the floor of the shop where his wounds were dressed, he made a similar statement. Objected to, and the objection sustained.

Held, to be error, for if the declarations were made so soon after the occurrence as to exclude the possibility of premeditation, and present a reasonable presumption of a free expression of thought, they are part of the *res gestae.*

Witnesses for the Commonwealth testified that the defendant was the only person in the assemblage in which the stabbing took place who had a knife, the defence offered to prove that another person in the same assemblage received injuries from a knife about the same time the deceased was stabbed, and when the defendant was not present.

This offer was rejected:

Held, to be error.

A witness of the Commonwealth testified that he saw the defendant stab the deceased, and the defence offered to show that immediately after the fight this witness had made statements contrary to and inconsistent with his testimony in Court. This offer was rejected:

Held, such rejection was error.

The Court said, *inter alia*, in refusing to discharge the jury, that to so do, "would be a wrong and defeat the ends of justice:"

Held, to be improper, for the jury might regard it as a binding instruction to convict.

The Court charged, in reference to the declarations of the injured man as to who had hurt him, "Whatever relevancy they may have as affecting the general credibility of some of the witnesses, yet they would not be of potent force in the case if you should expressly find from the other evidence affirmatively that no colored man was in the room at the time, or could have inflicted the wound:"

Held, to be error.

Appeal of William B. Werntz, from the judgment and sentence of the Oyer and Terminer of Philadelphia County, entered on a verdict of guilty on an indictment for murder.

The facts as they appeared at the trial were that Thomas P. Gallagher was killed on the evening of January 4, 1893, in a brawl which occurred in a "shanty" in the rear of premises at the corner of Lancaster and Wyalusing avenues, in the City of Philadelphia, during a primary election of the Republican party. The defendant was admittedly present. Three witnesses for the Commonwealth testified to seeing the defendant stab Gallagher. Defendant denied doing the stabbing, and offered to prove statements of the Commonwealth's witnesses

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made about the time of the act inconsistent with the evidence they gave at the trial. These offers were overruled by the Court, and these rulings were made subjects of exceptions and assignments of error.

The jury requested the Court to discharge them, having been unable to arrive at an agreement after deliberating some hours; this the Court, GORDON, J., refused, saying:—

"I received your communication, in which you state that you have been as yet unable to unite upon a verdict, and ask that I should discharge you from further consideration of the case. I have sent for you to explain why I cannot do that. The bill charges the offence of murder, and therefore charges that crime to which in one of its degrees the penalty attached is death. The defendant, when he was put upon trial on that bill of indictment was from that moment in jeopardy of life and limb, and under our Constitution he cannot twice be put in that position for the same offence. You are the first and last jury that can make this inquiry. In this respect the offence of murder is exceptional, for this rule does not apply to other crimes, and therefore it is obligatory upon the jury to agree upon a verdict in this case. I have no right to discharge you. I have no right to put this case in such a position that the defendant cannot again be tried for this offence. I have no such authority that I know of. I have explained to you at this length why I will not discharge you. I do not mean to say that I have not the physicial power to discharge you, but I know if I did I would do a wrong and defeat the ends of justice. As I have said this is the only kind of criminal prosecution to which this rule applies. For all other crimes there may be repeated retrials, but for this one a verdict must be reached."

Mr. Cavin, of counsel for the defendant, excepted to this instruction from the Court and the exception was noted.

The jury then retired for further consideration.

Verdict guilty of manslaughter, with a recommendation to mercy. A motion for a new trial having been overruled, the defendant was sentenced to a term of six years' imprisonment.

The defendant appealed, assigning errors, *inter alia*, as follows: —

(1) The learned Judge erred first in permitting the Commonwealth to offer testimony-in-chief to prove that a certain colored man, a servant of Dr. Werntz, when urged to go in the place where the fight was going on, was stopped by the witness and prevented from going inside, and was actually outside of the place where the fight occurred and the murder took place. (2) In permitting the Commonwealth to offer testimony-in-chief to show by one of the witnesses, a conversation that took place between the said colored man and another witness on the part of the Commonwealth, the defendant not being present or within hearing of said conversation. (3) In permitting the Commonwealth to offer testimony-in-chief to show that no colored man was inside the shed where the fight took place and the murder was committed. (4) In refusing to permit the defendant to prove that one Edward J. Gleason, a police officer, went in to quell the disturbance that resulted in the murder, received a stab at that time and place, not inflicted by the defendant. (5) In permitting the Commonwealth to cross-examine the said Edward J. Gleason, the police officer, upon the alleged conversation that took place between the said police officer and the colored man, a servant of the defendant, not in the presence of the defendant. (10) That the learned Judge erred in his charge to the jury in the use of the following language: "Upon the subject of these alleged declarations let me say that they are important or unimportant, accordingly as you shall find the main fact to which they refer. That is to say, if you shall find from the evidence that the wound was not inflicted upon Gallagher by a colored man or could not have been, then the erroneous declarations or assertions of belief by anybody that it was so inflicted becomes of no effect upon the main question. Whatever relevancy they may have as affecting the general credibility of some of the witnesses, yet they would not be of potent force in the case if you should expressly find from the other evidence in the case affirmatively that no colored man was in the room at the time or could have inflicted the wound. In other words, the judgment, or opinion, or statement by anyone that a 'nigger' did the deed is of no avail if you find from the other evidence that a nigger did not do the deed or could not have done it." (11) In his final charge to the jury in answer to their unanimous request to be discharged, in his use of the following language: "In this respect the offence of murder is exceptional, for this rule does not apply to other crimes, and therefore it is obligatory upon the jury to agree upon a verdict in this case. I have no right to discharge you. I have no right to put this case in such a position that the defendant cannot again be tried for this offence. I have no such authority that I know of. I have explained to you at this length why I will not discharge you. I do not mean to say that I have not the physical power to discharge you, but I know if I did I would do a wrong and defeat the ends of justice."

Samuel E. Cavin and *Charles F. Warwick* (*George F. Munce* with them), for appellant.

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As to admissibility of the rejected evidence cited:

Taylor on Evidence, pp. 1, 223; Wharton Cr. Ev. 9th Edition, 262, 482 and 492; 1 Greenleaf Ev., sec. 449.
Snyder *v.* Commonwealth, 85 Pa. 519.
Kidder *v.* Lovell, 14 Id. 214.
Hadley *v.* Carter, 8 N. H. 40.
Com. *v.* O'Mara, 75 Pa. 429.
Com. *v.* Watson, 95 Id. 425.
Elkins *v.* McKean, 79 Id. 494.
Cattison *v.* Cattison, 22 Id. 275.
Tompkins *v.* Saltmarsh, 14 S. & R. 275.
Deardorf *v.* Hildebrand, 2 R. 226.

George S. Graham, district attorney, for appellee.

May 21, 1894. MITCHELL, J. The assignments of error in this case are in entire disregard of our rules, which are plain, specific and mandatory. The assignments are the pleadings in this Court, and are the only part of the case that remains of record here after the remittitur to the Court below. They should therefore be self-explanatory and self-sustaining, giving in each assignment separately, the offer with so much of the preceding or accompanying evidence as is necessary to the proper understanding of the offer, the ruling of the Court upon it, and if testimony objected to be admitted, so much of it as may suffice to show why it was injurious to the party excepting. The neglect of these requirements is not cured by putting the necessary matter in the bill of exceptions or elsewhere in the record or the paper book. It belongs here, whether it appear again elsewhere or not. It ought not to be necessary for us to repeat this so often as we are called upon to do. The Court is always reluctant to deprive a party of a hearing in a serious criminal case, upon technical grounds, but counsel who presume on such reluctance by disregarding the rules should understand that they do so at great risk to their clients. In the present case only the gravity of the crime charged induces us to forego the enforcement of the rule that assignments not properly made will be disregarded.

The case is peculiar in the respect that it turns almost entirely on the credibility of the witnesses. On the part of the Commonwealth the averment is of a killing by the prisoner in plain sight of the witnesses, and their testimony as to it is direct and positive. Nothing is left to inference or deductions from circumstantial evidence. On the other hand the denial is equally direct, explicit and emphatic, and the defence charges rank perjury, and supports the charge by direct and positive testimony as to declarations made by the Commonwealth's witnesses at the time of the occurrence, absolutely irreconcilable with their testimony at the trial.

In this position of the case the defence offered to prove declarations made by the deceased as to who did the stabbing. The evidence was excluded as too remote in time or place, or both, to form part of the *res gestae*. These declarations were by the person best qualified to know the facts, and with the least inducement to distort them in any way. It is manifest that unless too remote they were not only admissible but were of the very highest importance in the case. No fixed measure of time or distance from the main occurrence, can be established as a rule to determine what shall be part of the *res gestae*. Each case must necessarily depend on its own circumstances to determine whether the facts offered are really part of the same continuous transaction. In the notable case of Hunter *v.* State, 40 N. J. Law, 495, 538, C. J. BEASLEY adopts the definition of Wharton, Evidence Sec. 259, that "the *res gestae* are the circumstances which are the undesigned incidents of the litigated act, which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. . . . . Their sole distinguishing feature is that they should be the necessary incidents of the litigated act; necessary in this sense, that they are part of the immediate preparations for, or emanations of such act, and are not produced by the calculated policy of the actors." And with regard to declarations, the rule is well stated in 21 Am. and Eng. Ency. of Law, 102, that if they "are made under such circumstances as will raise the reasonable presumption that they are the spontaneous utterances of thought created by or springing out of the transaction itself, and so soon thereafter as to exclude the presumption that they are the result of premeditation and design, they will be admissible as part of the *res gestae*."

Tried by either of these tests the evidence offered was admissible. The most specific offer was in the case of Dr. Birney. This witness was the police surgeon of the district, was at the polls and saw part at least of the occurrence. He testified that while he was at the door outside of the shed in which the fight took place, he heard a voice inside, which he recognized as that of Gallagher, the injured man, saying "the coon did it;" that when Gallagher was brought out of the shed he repeated the same thing; and that witness followed him to the barber shop where he was carried, on the other side of the street and across a lot, and there dressed his wound. Witness was then asked whether Gallagher while lying on the floor of the shop had made the same or a similar declaration. This was excluded as too remote. The interval of time from the stabbing and the distance of the barber shop from the shed, do not appear with

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exactness, nor are they material, for it is apparent that they were not great, and that the continuity of the events was not broken. The declarations were by the party best informed and most interested, and were made at a time and place, to a person, and under circumstances, which effectually exclude the presumption that they were the result of premeditation and design. If such declarations were in fact made by Gallagher, they were the most material evidence in the case, and should have been admitted. The defence renewed the same offer in connection with other witnesses. It was error to exclude it.

There were some other errors of less importance which, as the case must go back for retrial, should be noticed.

The offer to prove that police officer Gleason received a stab or had his clothes cut in the room at that time, but while the defendant was not there, should have been admitted. The testimony of the Commonwealth's witnesses was to the effect that the prisoner was the only person there who had a knife, and the testimony offered tended to show the contrary.

The testimony of Franks as to declarations by Michael Farrell when he came out of the shed should have been admitted. Farrell was one of the three witnesses for the Commonwealth, on whose veracity the whole case rested. The offer was to show that immediately after the occurrence, before he had time for premeditation or design, he had made statements entirely inconsistent with his testimony at the trial. The offer tended directly to impeach his credibility, and therefore was not only admissible but important.

The language of the charge quoted in the tenth assignment of error, was not happily chosen. The expression, "whatever relevancy they (the declarations as to who did the stabbing) may have as affecting the general credibility of some of the witnesses, yet they would not be of potent force in the case if you should expressly find from the other evidence affirmatively that no colored man was in the room at the time or could have inflicted the wound," tended to divert the minds of the jury from the weight of the declarations on the credibility of witnesses for the Commonwealth, which was the pinch of the case. As already said, there was nothing left to inference or circumstantial evidence. If the Commonwealth's witnesses were to be believed, the prisoner's guilt was directly and conclusively proved. But if it were shown that at the time of the occurrence they had made declarations which required the jury to disbelieve, or even to seriously doubt their testimony at the trial, then there was no case at all against the prisoner. The influence of the alleged declarations on the credibility of the witnesses was their principal importance.

So also the language in the eleventh assignment, in refusing to discharge the jury, that to do so, "would do a wrong and defeat the ends of justice," while proper enough to the legal understanding, was likely to be taken by the jury as a strong, if not a binding, direction to them that it was their duty to convict the prisoner.

Judgment reversed, and venire de novo awarded.

W. D. N.

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WEEKLY NOTES OF CASES.

VOL. XXXV.] *FRIDAY, OCT. 19, 1894.* [No. 6.

Supreme Court.

July, '94, 90. May 31, 1894.

Commonwealth v. Vrooman.

Constitutional law—Act of February 4, 1870, P. L. 14—Insurance—Police power—Fourteenth Amendment to Constitution of United States.

The business of insurance against loss by fire is, by reason of its magnitude, its importance to property owners and the nature of the business, a proper subject for the police power of the State.

The Act of February 4, 1870, P. L. 14, prohibiting any person from issuing a policy or making a contract of indemnity against loss by fire, without authority expressly conferred by a charter, is a valid exercise of the police power. It does not prohibit, but regulates, the business; it excludes no one from exercising it, but prescribes a reasonable preliminary qualification, necessary for all alike, to entitle them to enter into the business, and secures adequate capital at the beginning and State supervision during the continuance of the business.

[STERRETT, C. J., GREEN and DEAN, JJ., dissented.]

The fourteenth amendment of the Federal Constitution is aimed at discrimination by the States against persons upon whom the United States have conferred citizenship, and is intended to protect against hostile State legislation privileges and immunities of citizens of the United States as distinguished from the privileges and immunities of the citizens of the States; as the Act of February 4, 1870, makes no distinction between the citizens of this State and those of any other, or between classes of persons, it is not violative of the fourteenth amendment.

Appeal of the Commonwealth of Pennsylvania from the judgment of the Quarter Sessions of Philadelphia, in favor of Samuel B. Vrooman, defendant, entered upon a special verdict.

The defendant was indicted for unlawfully issuing a policy of insurance. Plea, "Not guilty."

The jury returned the following special verdict:—

"And now, to wit, March 20, 1894, the jury impanelled and duly sworn to try the issue joined in above case between the Commonwealth of Pennsylvania and Samuel B. Vrooman, the defendant, find the following facts and present the same as a special verdict in the case:

"The defendant acting for himself, and as attorney-in-fact for J. K. Cuming, R. H. Foerderer, B. J. Woodward, C. A. Furbush and J. Gibson McIlvain, did sign and issue on the twelfth day of March, Anno Domini one thousand eight hundred and ninety-four (1894), a certain policy of insurance and contract of guarantee against loss by fire in the sum of one thousand dollars on the household furniture of James G. Kimball, located and being in the County of Philadelphia and State of Pennsylvania, without authority expressly conferred by a charter of incorporation given according to law April 12, 1894."

The Court, BIDDLE, J., entered judgment upon the verdict for defendant, and delivered the following opinion:—

"The Act of February 4, 1870, P. L. 14, entitled 'An Act to prevent the issue of unauthorized policies of insurance,' provides as follows:

"'Section 1. That it shall be unlawful for any person, partnership or association, to issue, sign, seal, or in any manner execute any policy of insurance, contract or guaranty, against loss by fire or lightning, without authority expressly conferred by a charter of incorporation, given according to law; and every such policy, contract or guaranty, hereafter made, executed or issued, shall be void.

"'Section 2. That any person offending against the provisions of this Act, or any person who shall make, execute or issue any policy of insurance, contract or guaranty, against loss by fire or lightning, without being so authorized by law, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall pay a fine, not exceeding two hundred dollars, to the Commonwealth, and the costs of prosecution; one-half of said fine shall be for the use of the informer: Provided, That nothing herein contained shall apply to any insurance company authorized by the laws of any other State to issue policies and effect insurance against loss by fire or lightning, which shall have complied with the laws of this Commonwealth with respect to foreign insurance companies."

"The question raised here is whether that Act is constitutional.

"It is not denied that the Legislature has full power to regulate and control this whole subject, and to require under its police power such supervision as will effectually protect the public. But it is contended that they have no right to forbid under heavy penalties any person, partnership or association from performing a harmless act while such power is freely granted to corporations.

"The privilege to insure is undoubtedly of advantage to the community, and is so treated in all our legislation. Originally it was entirely in the hands of individual underwriters, and certainly there is no greater instance of the en-

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croachment of corporate power than this, where they have not only acquired all the rights of persons, partnerships and associations, but have absolutely divested the latter from the power of exercising them. And even foreign corporations are allowed to engage in a business denied to our own citizens. That no citizen can agree to indemnify another against loss by fire, is certainly a most startling proposition. The most odious species of monopoly is where a government grants to a body of men any particular trade or business. If the power exists the Legislature could grant to one corporation the exclusive right to sell dry goods, inflicting penalties upon anyone who interfered with it, and thus destroy that free competition which is the life of all healthy trade.

"There can be no doubt that the Commonwealth may prohibit everyone from engaging in a trade which is deleterious to the community, and it was on this ground that the Slaughter House Cases, 16 Wall. 36, and the Oleomargarine Cases, in Powell *v.* Penna., 127 U. S. 678, were upheld by the Supreme Court of the United States. The State may also prohibit certain kinds of business by individuals, because the public convenience demands that they should be carried on by the agents of the government. The carrying of the mails and the supply of gas and water under the public streets are instances of this. See New Orleans Gas Company *v.* Louisiana Light Company, 115 U. S. 650; New Orleans Water Works Company *v.* Rivers, 115 U. S. 674. But the business engaged in must be shown either by the common law or by appropriate legislation to be deleterious or from necessity governmental. And we do not think a case can be found in which a State law granting a monopoly or forbidding a business was not founded on some necessity, either moral or governmental.

"In the Act in question, there is nothing showing that insurance issued by individuals is in any way directly or indirectly injurious. The very Act itself only forbids contracts of indemnity against "fire and lightning," while policies of insurance on lives, accidents, by way of guaranty, marine, against storms, tornadoes and explosions, are left free to everyone, so that it must be something prejudicial to the community, in individuals entering into contracts against loss by fire and lightning as opposed to other contracts of insurance. What that can be, it is difficult to imagine. If carried to its legitimate result, it would probably prevent a citizen from erecting a lightning rod for a neighbor, as being a guaranty against loss from lightning.

"In Dent *v.* West Va., 129 U. S. 114, Justice FIELD says: 'It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition. This right may, in many respects, be considered as a distinguishing feature of our republican institutions. Here, all vocations are open to every one on like condition. All may be pursued as sources of livelihood, some requiring years of study, and great learning for their successful prosecution. The interest, or, as it is sometimes termed, the estate acquired in them, that is, the right to continue their prosecution, is often of great value to the professors, and cannot be taken from them any more than their real or personal property can be thus taken.'

"It would seem, therefore, that this law is obnoxious to the fourteenth amendment of the Constitution of the United States, 'that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor deny to any person within its jurisdiction, the equal protection of the laws.' It also, we think, comes under the ban of our own Constitution. The first section of the first article of the 'Bill of rights' declares, 'that all men are born equally free and independent, and have certain inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and pursuing their own happiness.'

"In Illinois (see Frorer *v.* People, 141 Ill. 171), the Act declaring that, 'it shall be unlawful for any person, company, corporation or association now engaged, or hereafter to be engaged in any mining or manufacturing business in this State to engage in or be interested, directly or indirectly, in keeping a truck store or in controlling any store, shop or scheme for the furnishing supplies, tools, clothing, provisions or groceries, to his, its or their employés while so engaged in mining or manufacturing,' and imposing a penalty for the violation of the Act, without placing similar restrictions upon employés engaged in other kinds of business, was held unconstitutional as 'depriving persons of property without due process of law,' the Court saying, 'it is impossible under that power (the police power) that what is lawful if done by A., if done by B., can be a misdemeanor, the circumstances and conditions being the same.' In Godcharles & Co. *v.* Wigeman, 113 Pa. 431, the Act of June 29, 1881, commonly known as the 'Store Order Act' (P. L. 147), was denounced by our Supreme Court as 'an attempt by the Legislature to do what in this country cannot be done, that is, to prevent persons who are *sui juris* from making their own contracts.'

"The insurance against loss by fire is a mere contract of indemnity, and the Legislature has

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no right, we think, to deprive or restrain a citizen from obtaining it from persons, partnerships or associations, and to compel him to secure it alone from an artificial body, the members of which are not personally liable for its obligations. Neither have they the right to make it a crime in him to sign a bond of indemnity for the protection of his neighbor if they allow it to be done by a corporation.

"We have not attempted to make an exhaustive examination of its subject, but have desired, in giving judgment for the defendant in this case, to indicate the line of thought which has induced us to do so."

The Commonwealth took this appeal, assigning as error that the Court held that the Act of February 4, 1870, P. L. 14, was unconstitutional, and in entering judgment for defendant.

W. U. Hensel, attorney-general, (with him *Geo. S. Graham*, district attorney, and *James A. Stranahan*, deputy attorney-general), for appellant.

The Act of 1870 has made the business of insurance a franchise. While at common law the right to insure was a private right, a State may at any time declare any business to be a franchise, open, of course, to all citizens upon the same conditions.

California *v.* Pacific Ry. Co , 127 U. S. 40.
Att'y Gen. *v.* Utica Ins. Co., 2 John Ch. 371.
Same *v.* Same, 15 Johns. 358.

The Act may also be sustained as a police regulation.

Burdick *v.* People, 36 N. E. Rep. 948.
Slaughter House Cases, 16 Wall. 36.

The State derives its support in part from the taxation of the franchise it has created.

Act June 1, 1889, P. L. 433.

The State may, for revenue purposes, lay hold of some particular traffic as a franchise, and though it must grant the exercise of it to all its citizens who may comply with the conditions, on like terms, it may certainly prescribe that before they exercise it they must associate themselves together in a corporate capacity so that persons doing business with them may have the advantages of corporate succession, of equal claim upon the assets of the corporation, and of the visitation of the Commonwealth.

John G. Johnson, for appellee.

Property within the meaning of the Constitution includes contracts necessary for its enjoyment, protection, use and disposition.

Braceville Coal Co. *v.* People, 35 N. E. Rep. 62.
Frorer *v* The People, 31 Id. 397.
State *v.* Peel Splint Coal Co., 36 W. Va. 802.
Com'th *v.* Perry, 155 Mass. 117.
Hare on Const Law, 357.
People *v.* Gillson, 109 N. Y. 389.

The Act of 1870 is not a valid exercise of the police power; that power extends to the protection of lives, liberty, limbs, health, comfort and quiet of all persons, and the protection of all property within this State.

No protection of public health or morals, and no public purpose, can be furthered by legislative discriminations in the matter of the persons authorized to do certain acts, certainly not where such discriminations do not involve regulations, but an absolute prohibition. If corporations can be permitted to do a business which is forbidden to individuals, why may there not be discriminations between corporations themselves, or even between individuals?

If it be competent to forbid individuals to transact the business of insurance, why is it not also competent for the Legislature to forbid them from transacting the business of loaning money, or of manufacturing, or of selling? The constitutional right of every man to use his person and property at his pleasure, provided he does not improperly injure his neighbors, or the Commonwealth, could be entirely destroyed by legislative enactments preventing him from the pursuit first of one, and then of another, avocation, until he would be debarred from all.

Individuals may not engage in the business of constructing, and operating, railroads or turnpikes, because this involves the exercise of the right of eminent domain. At common law, however, they may manufacture, may sell, and may contract. How can the exercise of the police power justify the Legislature in prohibiting them from doing such things?

The Act of 1870 is defective in that its title does not disclose its purpose, viz., to prevent the transaction, by individuals, of a business ordinarily done by them. How is such purpose of exclusion intimated by an announcement of one "to prevent the issue of unauthorized policies of insurance"? The Act is meant not to prevent what is unauthorized but to destroy the authority. The title intimates an intent to prevent what is already without authorization.

October 1, 1894. WILLIAMS, J. This case raises a question of constitutional law that does not seem to have been decided by the Courts of this State. The facts are, that in 1870 the Legislature passed and the Governor approved an Act, entitled "An Act to prevent the issue of unauthorized policies of insurance." Section first made it unlawful for any person, partnership or association, to issue any policy of insurance against fire without authority to do so, expressly conferred by a charter of incorporation given according to law; and declared all policies issued without such authority to be void. The second section made it a misdemeanor to

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issue a policy of insurance against loss by fire without the authority required by the first section.

The special verdict rendered in this case finds that the defendant did violate the Act of 1870, by making and issuing for himself and others a policy against loss by fire in the year 1894, without having obtained a charter of incorporation authorizing the making of such insurance.

Upon this verdict, the learned Judge of the Court below entered a judgment in favor of the defendant, holding that the Act of 1870 was void, because in violation of the Constitution of the United States and of this State. The Commonwealth appeals. A single question is thus presented, viz., does the Act of 1870 violate the Constitution of either the United States or this State? The learned Judge held that the fourteenth amendment to the Constitution of the United States was infringed by the Act of 1870. This amendment declares that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deny to any within its jurisdiction the equal protection of the laws."

The purpose and effect of this amendment have been discussed and declared by the United States Courts in many cases, and there ought to be no doubt upon the subject at this time. It was aimed at discriminations made or attempted by the laws of any of the States against persons upon whom the laws of the United States conferred the rights and privileges of citizenship. Such discriminations, whether directed against persons of a particular race or color, resident within the State, or against persons resident in other States, are forbidden by the fourteenth amendment. But the proper exercise of the police power by the several States is not within the intent or the letter of the amendment. Powell *v.* Pennsylvania, 127 U. S. 678. On the other hand, its purpose was declared in the Slaughter House Cases, 16 Wall. 36, to be, to protect, "against the hostile legislasion of the States, the privileges and immunites of citizens of the United States as distinguished from the privileges and immunities of citizens of the States."

The Act of 1870 strikes at no privilege of citizenship of the United States as distinguished from the privileges of citizenship of Pennsylvania. It does not attempt to draw a line between citizens of this State and citizens of other States. It is, therefore, in no sense a violation of the fourteenth amendment of the Constitution of the United States, and this branch of the discussion may be properly dropped at this point, and our attention confined to the other, viz., is the Act of 1870 a violation of the first section of the Bill of Rights in the Constitution of this State?

That section affirms, that "All men are born equally free and independent, and have certain inherent and inalienable rights, among which are those of . . . . acquiring, possessing and protecting property and reputation." The methods by which this right to acquire property is asserted and exercised are, however, and have been since organized government began among men, subject to regulation by law. The power of government thus brought into service is known as the police power. If the Act of 1870 is a valid exercise of the police power then no constitutional right is invaded, but the mode in which the right guaranteed by the first section of the Bill of Rights may be exercised consistently with the best good of the greatest number, is regulated and prescribed.

The general character of the police power is well understood, although neither the text books nor decided cases have yet given us an adequate definition of it. Little more has been attempted by the Courts of this country, than to determine that a particular subject does or does not fall within the range of this power. An illustration is afforded by the Beer Company *v.* Massachusetts, 97 U. S. 25, in which this language was used: "However difficult it may be to render a satisfactory definition of it (the police power) there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals." Blackstone, in his "Commentaries," vol. 4, p. 162, describes this power as the power of "public police and economy," by which the internal regulation and good order of the State is secured, and individual citizens, like the members of a well-ordered family, are made to conform their conduct to the rules of propriety, good neighborhood and good manners. It is, therefore, a power inherent in all forms of government. Its exercise may be limited by the frame or constitution of a particular government, but its natural limitations, in the absence of a written Constitution, are found in the situation and necessities of the State, and these must be judged of in the first instance by the government itself. It corresponds to the right of self-preservation in the individual. When the dangers that threaten the State come from without, the right of self-preservation is exercised in gathering armies and the means of public defence. When the dangers arise within the State, self-preservation requires their suppression. This is accomplished by the exercise of the police power which deals with all forms of disorder, and provides for the public welfare, and the protection of citizens against the violence and the fraudulent conduct of each other.

Now, the question whether any particular subject is so related to the public good as to justify

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the exercise of this power in its control, is one for the determination, in the first instance, of the law-making branch of the government. In disposing of it, the Legislature is subject to no limitations except such as the Constitution of the State may impose. Within the lines set by constitutional provisions the power of the Legislature is practically absolute; but if it is alleged that a given police regulation violates the fundamental law, a question is raised for the determination of the Courts, whose duty it is to apply the constitutional tests and adjudge the law to be void if it is in conflict with them. In this case, we are to apply the first section of the Bill of Rights to the Act of 1870, in order to determine whether it can be enforced. If the Act denies the inherent and inalienable right of the citizen to acquire, possess and protect property, which is asserted by this section of the Bill of Rights, then the judgment of the Court below was right, and this appeal should be dismissed; but if this right is not denied, and the effect of the Act of 1870 is merely to regulate its exercise, then the judgment should be reversed, and the defendant should suffer the penalty of the law he has disregarded.

Before entering upon this question three preliminary observations should be made: First, we must remember that the legal presumption is in favor of the constitutionality of the Act because it expresses the judgment of the legislative branch of the government upon that question. The Legislature has considered the question and passed upon it and this makes a *prima facie* case in favor of the law. We observe in the next place that this question is to be considered upon the state of the law as it is when the question is raised. Since 1870 the Constitution of the State has been remodelled and many of its new provisions have been enforced by suitable legislation. Our question is not, therefore, whether the Act of 1870 was valid under the Constitution as it then stood, but whether it was valid when its provisions were invoked against the defendant in 1894. Our third observation is that the question is not controlled by common law maxims. The police power must necessarily enlarge its range as business expands and society develops. The proper office of statutes is to remedy the defects and modify the operation of common law rules to meet changed conditions in society and increased volume and improved methods in business.

We come now to inquire whether the business of insurance against loss by fire, is, at the present time a proper subject for the exercise of the police power of the State? In examining this question it is important to know something about the magnitude of the business. The report of the insurance commissioner, appointed under the laws of the State, covering the transactions of the year 1892, shows that risks were written in Pennsylvania during that year as follows:—

By stock companies of Pennsylvania amounting to . .	$286,584,023
By stock companies of other States, ...	412,489,251
By stock U. S. branches foreign companies, . . .	248,407,450
By mutual companies of Pennsylvania, . . .	137,328,820
	$1,084,809,544

making the enormous total of one billion and nearly eighty-five millions of dollars.

The losses paid in the same year, as shown by the same report, amounted to nearly seven and one-quarter millions of dollars. The total capital employed in the business of fire insurance in this State during the year was nearly two hundred and sixteen and one-half millions of dollars. The premiums paid by the insured fell a little short of twelve millions of dollars.

Let us consider next the nature of the business. It is not like the sale of commodities for a present equivalent in value, but it is the purchase of indemnity against the risk of loss by fire that may happen at any time, and may not happen at all. The conditions necessary to the business of insurance are: *a*, the existence of a known danger to which all property owners are exposed, and against which they can not effectually protect themselves; *b*, the strong probability that loss from this danger will fall upon but few of those who are exposed to it; *c*, the certainty that when the loss happens it will fall so heavily on those to whom it comes as to make pecuniary indemnity a matter of great importance; *d*, some knowledge of the relative value of the property annually destroyed by fire to serve as a basis for calculating the risk assumed by the insurer, and the amount of premium required to enable the insurer to meet losses and expenses, and secure a fair return for the capital employed.

In view of the magnitude and the nature of the insurance business it is apparent that the public is largely interested in all that relates to it. The security of policy holders requires, first, permanency in the custodian of the funds gathered from them, and on which their indemnity, in case of loss, depends; second, an honest and competent administration of these funds; third, restraint against the division of the profits of the business whenever such division would injuriously affect the security of policy holders.

How are these safeguards to be obtained? There is but one way in which they can be obtained, and that is by means of general laws regulating the insurance business.

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Corporations derive their existence from the State, and hold their franchises subject to legislative control. They are subject to the visitatorial power of the Commonwealth, and they may be, and are in fact, required to lay open before the several departments of State government, and before the public, the character and extent of their business, the profits realized, the dividends declared, and the investments made. The legality and business value of the methods, the economy and financial strength of the management, and the value of the security provided for the holders of policies in any given company, are therefore subjects upon which the proper State officers may be thoroughly informed, and which the public may investigate at will. Private individuals are not subject to the same visitatorial power. They can not ordinarily be compelled to disclose their business methods, their financial condition, or the character of their investments. They can not be restricted in the use of either their capital or their profits as corporations may be. Those who deal with them must trust more to their personal integrity than the common experience shows to be safe. The State can compel a fair measure of fidelity in the management of these vast sums, and provide for the safety of the insured when, and only when, the business is in the hands of corporations.

In the next place it is important to consider what may be described as the trend of modern legislation on this subject. The States of the Union have severally entered upon legislation regulating insurance. In each an insurance department of the State government has been organized. A general supervision and control of insurance companies has been assumed by the States, and exercised through the insurance department.

In our own State this system of legislation began as early as 1810, and it has grown in bulk and importance with the growth of business and the development of the resources of the State. It fixes the minimum of actual capital necessary to the organization of a corporation for insurance against fire, on the stock plan, at one hundred thousand dollars. It provides for a reserve fund for the security of policy holders. It prohibits the division of profits in dividends to the injury of the reserve fund. It regulates the form of policy, and requires the application to be attached to, or made part of, the policy. It requires each company to submit detailed statements of the business done, of its assets and liabilities, and to show its financial condition. It requires companies organized under the laws of other States or countries to make certain deposits in this State to secure those who are insured by them, and to appoint some suitable agent on whom process may be served in actions brought against them. These regulations have been made from time to time as their importance has been felt by the public. They are all easy of enforcement against corporations. Some of them cannot be enforced against private persons or partnerships. As matter of fact the business has for many years been left to the corporations, and regulations made to affect corporations have therefore met fully the public need.

At this time, however, private capital is seeking employment in this field, and it signalizes its entry upon the field by a denial of the power of the State over it. This question has been raised by the corporations of other States, but I recall no case in which it has been raised by individuals. In Doyle *v.* The Continental Insurance Company, 94 U. S. 535, the Supreme Court of the United States stated the general rule thus, "A State has the right to impose conditions not in conflict with the Constitution of the United States on the doing of insurance business within its territory by an insurance company chartered by another State, or to exclude it altogether."

It would seem to follow logically that the State might require all persons desiring to enter upon the business to comply with the same conditions and, if necessary, to obtain a charter of incorporation in order to such compliance.

An effort is made to distinguish between regulation and prohibition, and to hold that the Act of 1870 is a prohibition operating upon all natural persons for the benefit of corporations who are thus given an oppressive monopoly of the business of insurance against fire. But the prohibition is only such as is necessary to give effect to the regulation which the Act prescribes. The Act implies a declaration by the Legislature that the business of insurance against fire affects so many persons, and involves such large sums of money, as to make it necessary for the public protection that it be subjected to the supervision and control of the government; that the supervision required is such as private persons cannot be compelled to submit their business conduct to; and then expressly declares that all persons desiring to embark in the business must procure a charter of incorporation for that purpose because corporations are subject to the supervision and control of the State that creates them. This is regulative. It directs the business into the only channel that admits the necessary measure of control, and it necessarily prohibits the business outside that channel.

The traffic in intoxicating drinks is regulated by law; but the regulation prohibits absolutely all persons from engaging in it unless they have first secured the permission of the State by obtaining a license under the law. Here, as in the Act of 1870, we find permission to those who comply with the regulation, and prohibition

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to those who do not. The practice of medicine, the sale of drugs, and many other sorts of businesses are regulated by law; but the regulation would be without effect if it did not include a prohibition directed against those not qualified, and enforce it with suitable penalties. The police power of a State may be exerted for the complete or the partial control of a given business. It may prohibit it absolutely to all persons for the purpose of suppression. It may permit it to some persons and under certain restrictions in order to secure control over it and hold it within proper bounds, Stone *v.* Mississippi, 101 U. S. 814. The Sunday laws, the laws against gambling, against lotteries, against disorderly houses, the sale of liquors, the sale of oleomargarine, the sale of drugs, and many similar laws afford instances of the exercise of the police power for the complete suppression of a given line of employment, or for its restriction and control.

The Act of 1870 belongs to the latter class. It does not prohibit the business of insurance but regulates it. It says to all persons interested, "If you wish to embark in this business you must secure a charter of incorporation so as to subject your business to the visitatorial power of the State. If you will not do this you must not engage in insurance against fire at all." This is not prohibition of the business, for the business is distinctly authorized. It is an effort to bring it under State supervision and control, by requiring all who wish to enter the business to put themselves in a position where the insurance legislation of the State will reach them, and the Insurance Department of the State can supervise their business, and compel observance of the law.

Without going further into the discussion, we may now state our conclusions applicable to the case before us.

First. The business of insurance against loss by fire is, by reason of its magnitude, its importance to property owners, and the nature of the business, a proper subject for the exercise of the police power of the State.

Second. The Act of 1870 is a valid exercise of the police power. It does not prohibit but regulates the business. It excludes no one from engaging in it, but prescribes the preliminary qualification necessary for all alike, to entitle them to enter the business.

Third. The qualification is reasonable. It is open to all under general laws. It is not burdensome. Its only effect is to secure adequate capital at the beginning, and State supervision during the continuance of the business.

Fourth. Upon the special verdict judgment should have been entered in favor of the Commonwealth, and sentence should have been pronounced under the Act of 1870. That this may now be done the judgment is reversed, the record remitted, and a procedendo awarded.

Eo die. DEAN, J., dissenting. The Act of 4th February, 1870, declares it to be a misdemeanor for any person to issue a policy of insurance against loss by fire or lightning, without authority being expressly conferred so to do, by a charter of incorporation issued according to law.

The defendant, on 12th March, 1894, issued a policy to James G. Kimball in the sum of $1,000, indemnifying him against loss by fire on his household furniture contained in his dwelling house in Philadelphia, without authority expressly conferred by an act of incorporation. For so doing, he was indicted and tried March 20, 1894. There was no dispute as to the facts, and the jury, in a special verdict, found them as stated. The Court, being of opinion the Act was unconstitutional, entered judgment on the verdict for defendant, and thereupon the Commonwealth appealed.

Unquestionably, the Legislature has the authority to enact any law not in conflict with the Constitution of the State or the United States. The right to limit the transaction of the business of fire insurance to incorporated associations, is not, in express terms, forbidden. But the right of natural persons to make contracts of indemnity against loss by fire or shipwreck was, for centuries, before the adoption of the Constitution, a common law right. All the authorities, without a single exception, hold, that under the constitutional right to acquire, possess and protect property, there is, necessarily, included the right to make reasonable contracts concerning it, which contracts are protected by the Constitution.

In this, all agree. And all agree, further, that the Legislature may, in the exercise of its police power, absolutely forbid contracts which are inimical to public interests; and, second, may adopt suitable regulations of contracts for the protection of the public.

The business of fire insurance being one which, from its nature, involves contracts with large numbers of persons in all parts of the Commonwealth, who have not the opportunities of gaining the information necessary to intelligent bargaining, for their better security, the Legislature may make such regulations, as will protect them against fraud or imposition. It may require that all who desire to transact business with the public shall take out a license, shall make frequent reports of their financial condition; have fixed places of business where service of process can be had on them; that they shall deposit with the treasurer or other officer of the

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Commonwealth, bonds or other securities, in sufficient amount to guarantee those with whom they contract, against loss. And, generally, may make all reasonable rules for the regulation of such business. But can the Legislature absolutely forbid the making of such a contract by individuals, and confer on corporations a monopoly of such business?

Is the business of fire insurance deleterious to the public? If so, the Legislature may absolutely prohibit it. But no one contends that it is. On the contrary, it is admitted it is to the advantage of the public. The Legislature admits this by expressly authorizing artificial persons to conduct it. If such contracts be not injurious to the public, and may not be altogether prohibited, then where is the authority to prohibit one class, natural persons, from entering into them, and especially empowering another and numerically a very much smaller class, artificial persons, to make them? In so doing, the State grants a monopoly in a particular business to a particular class.

As is said in substance in the Slaughter House Cases, 16 Wall. 102; 19th Pickering, 54; 13th Allen, 372; and many other cases, "All such grants relating to any known trade or manufacture, have been held by all the Judges of England, to be void at common law, as destroying the freedom of trade, discouraging labor and industry, restraining persons from getting an honest livelihood, and putting it in the power of the grantees to enhance the price of commodities."

A contract of indemnity against loss by fire, being a common law right, it cannot, by legislative grant, be monopolized by a small class, unless it has become of such public concern as requires its exercise by the State or by a corporation to whom the State's power is immediately delegated. It may be admitted, that the business of constructing and operating public highways for the carriage of goods and travelers, is exclusively in the State, and is of such immediate public interest, that it can be transacted only by the State and such corporations as the State may specially authorize. But, to carry on this business at all, involves a right of eminent domain, which the State alone can exercise or grant, and therefore it ought not to be exercised by private individuals. There is not, and never was, a right in the individual to take private property for the construction and operation of a public highway, on which to conduct for profit the business of transportation; but there never was a time that the individual had not the right to make a contract to indemnify his fellow against loss by fire. This Act is not obnoxious to the Constitution not because it authorizes corporations to insure against fire, but because it prohibits individuals doing a like business. It grants a monopoly of a particular business to a particular class; prohibits all others from engaging in it. This the Legislature may, in the exercise of its police power, in some cases, do. It may declare that females shall not be employed in some avocations; that children under a certain age shall not be employed in mines or factories; that none but men of good repute shall sell liquor by retail; and the wisdom of such legislation is not a question which the Courts can consider; for it is adapted to promote the health, morals and good order of the public.

That in some of the States, the Legislature has restricted the business of banking to corporations, has no analogy to the case in hand. The banking intended to be restricted by the New York Act, was issuing of notes, receiving of deposits and discounting. In People *v.* Utica Ins. Co., 15 Johns, 358, and Bristol *v.* Barker, 14 Johns, 205, it was held that the Act was only a restraining and regulating Act, applying to associations of individuals; that as to them, to do a banking business they must have corporate authority. That an individual was not prohibited from doing a banking business, except as to issuing bank notes. It has always been held to be within the police power of the Legislature, to restrict the issuing of notes intended to pass as money, to corporations. It is a matter which concerns the entire public, who have no opportunity in the hurry of every-day business transactions of life, to ascertain the value of the promise which is tendered as money. But in a contract of indemnity, why should not the citizen make his contract when and where the price and security suits him best? Why should the Legislature take from the whole people their common law right of contract for insurance, and grant it to a particular class? Where is there the semblance of the constitutional exercise of the police power in this? Under the Corporation Act of 1874, and supplements, corporations for almost every business are authorized, such as supplying ice, printing and publishing, conducting hotels, drove-yards, livery-stables, lumbering, quarrying, mining, brewing, distilling, improvement and sale of real estate. In fact, almost every kind of business can be transacted by incorporated companies. All concern the public. If this Act be constitutional, the Legislature can prohibit the transaction of any business, not conducted by corporations under the Act of 1874, and under the pain of imprisonment forbid the individual engaging in any business whatever.

It is paternalism to assume, that citizens are incapable of prudently contracting with reference to their property without an express grant of the State in the shape of corporate franchise,

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to one of the contracting parties. It is an assumption that the citizen is a child, needing the tutelage and protection of the Legislature in the ordinary affairs of business life. Or else, it is a species of tyranny in government like that of Turkey, where the rights to produce, manufacture and trade, are all the subject of grant from the Sultan.

If the exercise of the right of contract to indemnify be injurious to the public, then it ought to be prohibited; if beneficial, it ought not to be monopolized by a few..

The rule to be educed from Budd *v.* New York, 143 U. S., 528, the Elevator Cases; the Sinking Fund Cases, 99 U. S., 700, and all the cases where the police power of the State is discussed, is, that while a business affected by a public interest may be regulated, yet when not inimical to the health, morals or safety of the people it cannot be prohibited. I do not think an exclusive grant like this, to a class is regulation; that is prohibition of all others, and is therefore unconstitutional.

The judgment in my opinion should be affirmed, and the appeal dismissed.

STERRETT, C. J., and GREEN, J., concurred in this dissent. H. B.

Jan. '93, 290, 307. Mar. 28, 1893, Jan. 24, 1894.

White's Estate.

Appeal of W. R. White and J. Henry Hentz.

Appeal of W. W. Buckley.

Jurisdiction—Orphans' Court—Effect of decree—Condition.

The conclusive character of a judgment or decree depends not only on the theoretical jurisdiction of the Court pronouncing it, but upon actual jurisdiction over the persons whose rights are the subject of investigation. Unless a Court has the parties before it, by appearance or service of process, it cannot bind them by its adjudication.

A testator left the bulk of his estate to his four children, and a legacy, coupled with a condition, to an infant grand child. The executors stated an account; the four children asked its reference to an auditor, who, on being appointed, not only passed upon the account but held that the legacy to the grandchild had been forfeited. The grandchild was not represented and had no notice of the proceedings; the report was confirmed without objection:

Held, the grandchild was in no way concluded by the confirmation.

A. left a legacy to his grandchild, W., and provided that if "any attempt at law or otherwise" were made during the minority of W. to withdraw him from the charge of A.'s executors by W.'s father X., or other person, the legacy should be revoked. X. wrote demanding the surrender of his son, and threatening legal proceedings. The executors, of whom one was also the child's guardian, and the husband of a residuary legatee, and another was a residuary legatee, gave him up without contest:

Held, W. did not thereby lose his legacy, as by "attempt" the testator did not mean any unsuccessful attempt to withdraw the child from the executor; and a surrender as the result of a correspondence was evidently not within his contemplation, and the executors could not by their surrender of him deprive the child of his legacy.

A. left to B. a sum in trust to pay over the income, or so much of it "as my executors may deem sufficient to maintain and educate my grandson, W. . . . until he shall arrive at the age of twenty-five years," and after that time to pay the income directly to W. for life, with a limitation over to his children:

Held, that W. could not recover any unexpended income which accrued before he reached the age of twenty-five, but the same passed to the residuary legatees of A.'s will.

Appeals of William R. White and J. Henry Hentz, for themselves and as surviving executors of William R. White, deceased, and of William White Buckley, from the decree of the Orphans' Court of Philadelphia County.

The proceedings in this case began by the presentation of a petition by William White Buckley, setting out that his grandfather, William R. White, died in 1868, leaving a will dated June 29, 1868, and codicil dated August 25, 1868, upon which letters testamentary were duly issued to H. P. Borie, W. R. White and J. H. Hentz.

That among other provisions, the said will contained the following:—

"Item. I give and bequeath unto any one of the life insurance, annuity and trust companies of the City of Philadelphia, to be designated by my executors, the sum of fifty thousand dollars, or such securities out of my estate as may equal that amount in value, and which said sum orsecurities as my executors may determine, with full power on the part of said company to invest the sum and to change the same or the said investment from time to time as they may deem advisable, and in trust out of the annual income and proceeds of said investment to pay over unto either of my executors, or unto such persons as they may order and direct from time to time so much of the same as my said executors may deem sufficient to maintain and educate my grandson, William Buckley (son of my deceased daughter), suitably to his relationship to me until he shall arrive at the age of twenty-five years, and on and after his arrival at that age, then to pay over unto him the said annual income and proceeds of said investment during his natural life, and after his death, should he leave lawful issue, then in trust to pay over to such issue the whole of the principal and whatever increase thereto there may be, the charges and expenses of the execution of this trust being always first deducted, and I direct that the said

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income to be paid to my said grandson shall not be subject to any debt or obligation he may contract, nor shall he have the power to assign, mortgage or encumber the same in any manner or way whatsoever, but the same shall be paid into his own hands as it may accrue and become payable. But should my grandson die without leaving any lawful issue, then, and in such a case, I direct the principal and all unpaid income accruing from said investment, shall be divided among my four children, M. Clementina Borie, Henry C. White, William R. White, and C. Brooke White, share and share alike, and to whom I give and bequeath in such case, the same."

That the codicil referred to was as follows:—

"Whereas by the said will and testament I have bequeathed unto such one of the life insurance and trust companies of the City of Philadelphia as may be designated by my executors the sum of fifty thousand dollars, in trust; that such trust company should, after deducting all expenses of executing the said trusts, pay over the net income thereof unto my executors during the lifetime of my grandson, William W. Buckley, and after his decease to pay over the principal, with all accumulations thereto, to my said executors, to be by them disposed of as I have in my said will directed, to employ so much of the said income as they may deem proper to receive and appropriate as they, or the survivors of them, consider proper to clothe and educate my said grandson suitably to his relation to me, now I do, confirming hereby all the directions relative to the said sum of fifty thousand dollars, do further order and direct that should any attempt be made at law, or otherwise, during the minority of my said grandson, to withdraw his person from the charge or custody of my said executors by his father or any other person, then, and in such a case, I hereby direct my executors to suspend all further payments aforesaid, and in such case I hereby revoke all provisions for such grandson by my said will."

That petitioner was informed that some proceedings in the nature of accounts and audits thereon were had in the Register's office and Orphans' Court in the City of Philadelphia, by the executors and their counsel, but the petitioner was not a party thereto, nor affected by said proceedings.

That the petitioner arrived at the age of twenty-five years on the twenty-fifth day of July, 1891, and was a resident of the City of Lawrence, in the County of Douglass, in the State of Kansas.

And that the petitioner had not received the moneys to which he was entitled under the will. The prayer was for a citation on the executors to file an account, and show cause why they should not pay to the petitioner the interest and income accruing from the sum of $50,000 directed by the will to be invested for his benefit, from and after July 25, 1891.

A supplemental petition set forth that the testator died October 23, 1868; that on October 31, 1868, W. R. White presented a petition for the appointment of a guardian of the person of W. W. Buckley, then two years old, and without revealing the fact that H. P. Borie was an executor of the will, suggested him as such guardian; that no motion was made for the appointment of a guardian of the estate, and an affidavit was filed that the father of the minor was not a fit person to be entrusted with his custody; that the Court appointed H. P. Borie guardian of the person of the minor, no guardian of the estate was ever appointed, nor was any trust company ever selected as trustee for him; that in November, 1868, the father of the minor demanded the surrender of the child and the executors gave him up; that on May 24, 1870, the executors filed an account, drawn by James W. Paul, Esq., which on request was referred to him as auditor, Mr. Paul being also counsel for all the residuary legatees; that the account made no mention of the $50,000 legacy to W. W. Buckley, but the auditor's report declared a revocation of the legacy; that the petitioner had no notice of these proceedings and the report was confirmed; that a second report was filed in 1876 and was confirmed by agreement without audit, on the request of the same parties who had requested an auditor upon the first account; that the proceedings with respect to both accounts were *ex parte* so far as concerned W. W. Buckley; that the petitioner had no knowledge that any proceedings had ever been had purporting to affect his rights until the year 1891; that he reached the age of twenty-five on July 25, 1891, when he at once took steps to ascertain his rights.

William R. White and J. H. Hentz, surviving executors, filed an answer in which they denied that petitioner was interested in any way in the estate of the said decedent, or entitled to receive any sums of money therefrom; averred that their accounts were duly filed, settled and confirmed, and distribution awarded, and that distribution was duly made in accordance with said settlement and confirmation, in the years 1870 and 1876; that there were no moneys not heretofore accounted for, for which there is any liability on their part at the present time, to account, saving certain sums set forth in an exhibit, all of which were distributed to the parties entitled, in accordance with the adjudication of the Court; denied that there was any false or fraudulent statement by them to the Court, with reference to said accounts, or the reports made

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thereon, or that the said report and confirmation by the Court thereof, and order of settlement and distribution, were induced by any false or fraudulent statements of any sort or kind by them; set up that they were advised by counsel and therefore averred that in consequence of the confirmation by your honorable Court of the report of the auditor, deciding that the sum of fifty thousand dollars passed to the residuary legatees by virtue of the conduct of petitioner's father, and awarding that sum to the distributees of the will of William R. White, and of the payment of said sum thus awarded to the parties to whom the same was decreed to be due, and the lapse of time which has occurred, the petitioner was forever barred of any right at the present time to contest said report, award, confirmation and payment; and that they were further advised by counsel and therefore averred that by reason of the facts set forth in said petition, and of the will of William R. White, conditionally bequeathing to the petitioner the sum of fifty thousand dollars, he had no claim to said legacy, and that were the matter one that could now be considered by the Court, it must be decreed that he has no interest in said conditional legacy, but the same failed under the terms of the will of William R. White, by reason of the conduct of his father in removing petitioner, during his minority, from the control of the executors under said will.

Testimony was taken, and after argument the Court held, (HANNA, P. J., delivering the opinion), that the prayer of the petitioner cannot be granted, because it was too late for a bill of review, and that the only possible remedy was an application to vacate the decree based upon and confirmation of the auditor's report on the ground of fraud, and for an order of restitution from the residuary legatees of the money alleged to have been improperly awarded to them, and gave leave to amend the petition so as to bring in the proper parties in whose favor and against whom a decree based upon such an application could be made. See 31 WEEKLY NOTES, 159. The petition was accordingly amended as to its prayer, and Geo. R. Van Dusen, guardian *ad litem* of the minor children of W. W. Buckley; James W. Paul, surviving executor and trustee under the will of H. P. Borie, deceased; William R. White, M. Clementina Borie, and Henry C. White, residuary legatees under the will of W. R. White, deceased, and W. R. White, M. C. Borie, and the Pennsylvania Company, trustees, residuary legatees under the will of C. Brooke White, a residuary legatee under the said will of W. R. White, deceased, were made parties.

Answers were filed, and further testimony having been taken, the case came on for argument, and was decided by the Court in an opinion by PENROSE, J., as follows:—

"Conditions subsequent divesting interests previously vested, and in this respect partaking of the nature of forfeitures, are not looked upon with favor by the law. They are to be construed with the utmost strictness. If illegal or impossible to be performed they are void and the estates to which they are annexed are absolute. If in restraint of rights encouraged or enjoined by the policy of the law they are considered as *in terrorem*, or intended to operate merely through the beneficiary's fear of the consequences, and without effect, unless coupled with a limitation of the estate or interest to another person in case of breach; and a residuary clause in the will does not in such cases obviate the necessity for a limitation over—there must be at least a provision, expressed or by necessary implication, that the forfeited interest shall fall into or become part of the residue. All of this is elementary law, illustrated by many decisions in Pennsylvania (McIlvaine *v.* Gethen, 3 Whart. 575; Chew's Ap., 9 Wright, 228; Hoopes *v.* Dundas, 10 Barr, 75; Mickey's Ap., 10 Wright, 337, etc., etc., etc.)

"There seems to have been a substantial reason, though we have not found it referred to by the authorities, for the doctrine that a residuary clause could not operate as a limitation over in cases of conditions subsequent. A gift of a residue carries with it only such things as the testator has not already made a valid disposition of; and a vested legacy subject to a condition subsequent is validly disposed of, and a right to defeat it for breach of condition, at common law, could only be exercised by the heirs or personal representatives of the testator. Such a right was not assignable, by deed or will, and, in case of real estate, did not, prior to the Act of 32 Henry VIII., even follow a reversion. 'Nothing in action, entry or re-entry,' it is said by Lord COKE, 'can be granted over,' (Co. Lit., 214 b): 'and the reason hereof is for avoiding maintenance, suppression of right, and stirring up of suits.' As a necessary consequence, until proceeding was had by the heir, etc., the estate of the donee or legatee continued even after breach. If, however, the will provided that in the event of breach of condition the estate or interest to which it was annexed should pass to another person, then, 'in order to protect the interests of the party to whom the ulterior limitation was thus made,' the original gift, in case of breach, terminated *ipso facto*. (Wheeler *v.* Bingham, 3 Atk. 367; Stratton *v.* Grymes, 2 Vernon, 357; Cleaver *v.* Spurling, 2 P. Wms. 528; McIlvaine *v.* Gethen, *supra*.)

"A principle once adopted as a rule of property will be adhered to, though the reasons upon

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which it was founded have, as in the rule in Shelly's case, long since become obsolete or ceased to exist. (See Menges *v.* Dentler, 9 Casey, 495.)

"It is true that in an English case, *In re* Dickson's Trust, 1 Simon, 37, decided in 1850, it was held by the Vice-Chancellor, Lord CRANWORTH, that when no question of policy of the law was involved the absence of a limitation over would not prevent a condition subsequent from being effective. Whether the Courts of Pennsylvania will adopt the views so expressed remains to be seen. In Hoopes *v.* Dundas, 10 Barr, 78, Judge GIBSON thus referred to the decision of Lord COTTENHAM in Grace *v.* Webb, 12 Jurist, 987: 'The whole case exhibits a determination at any sacrifice of precedent to get away from the doctrine of civil law, though the facts before him were pregnant with proofs of its superiority in this particular. . . . . But as a precedent, the decree of the lord-chancellor binds us no more than the opposite decree of the vice-chancellor; and fortunately we are bound by neither. We are not going to overturn our own decisions here, because it has pleased the chancellor to overturn the old decisions there.' And Judge THOMPSON, in Chew's Ap., *supra*, refers to *In re* Dickson's Trust as 'changing what seemed to be the settled law;' his opinion that it was not to be followed being shown in the subsequent case of Mickey's Appeal, 10 Wright, 341, by his assertion that conditions subsequent, of any kind, 'without a limitation over in case of forfeiture would not be sufficient to divest the legacy.' *In re* Dickson's Trust is thus altogether ignored by him. But even Lord CRANWORTH concedes that a condition in partial restraint of marriage, a condition against disputing the will of the testator, a condition interfering with the right of alienation or liability to creditors in bankruptcy, will be 'considered as *conditio rei non licitæ*, and so treated as a mere clause *in terrorem*, unless when there has been a gift over on the condition being broken;' such conditions, he says, having 'been considered, whether justly or not it is unnecessary to inquire, as contrary to the policy, or according to the language of Touchstone, p. 132, "against the liberty of the law."'

"It is not, and cannot be denied in the case now before us, that the interest given to the petitioner by the will of the testator, his grandfather, was a vested one, taking effect, under the authorities (Flickwir's Est., 21 Crumr. 374), from the date of the death. The residuary legatees were the four children of the testator, each of whom, as such, became entitled to not less than $100,000. The grandson, who was the only child of a deceased daughter, was provided for as follows: 'I give and bequeath unto any one of the life insurance, annuity and trust companies of the city of Philadelphia, to be designated by my executors, the sum of $50,000, or such securities out of my estate as may equal that amount in value, ... in trust out of the annual income and proceeds . . . . to pay over unto either of my executors, or unto such persons as they may order and direct from time to time, so much of the same as my said executors may deem sufficient to maintain and educate my grandson, William Buckley (son of my deceased daughter), suitably to his relationship to me, until he shall arrive at the age of twenty-five years, and on and after his arrival at that age, then to pay over to him the said annual income and proceeds of said investment during his natural life, and after his death, should he leave lawful issue, then in trust to pay over to such issue the whole of the principal and whatever increase there may be, the charges and expenses of this trust being always first deducted, and I direct that the said income to be paid to my said grandson shall not be subject to any debt or obligation he may contract, nor shall he have the power to assign . . . . the same in any manner whatever, but the same shall be paid into his own hands as it may accrue and become payable. But should my grandson die without leaving any lawful issue, then, and in such case, I direct the principal and all unpaid income arising from said investment shall be divided among my four children, M. Clementina Borie, Henry C. White, William R. White, and C. Brooke White, share and share alike, to whom I give and bequeath in such case the same.'

"Two months after the date of the will a codicil was executed (August 25, 1868), which was as follows: 'I, William R. White, do make this codicil to my last will and testament. Whereas, by said will and testament, I bequeathed unto such one of the life insurance and trust companies of the City of Philadelphia as may be designated by my executors, the sum of $50,000 in trust, that such trust company should, after deducting all expenses of executing the same trusts, pay over the net income thereof unto my executors during the lifetime of my grandson, William W. Buckley, and after his decease, so pay over the principal, with all accumulations thereto, to my said executors, to be by them disposed of as I have in my said will directed, to employ so much of the said income as they may deem proper, to receive and appropriate as they, or the survivors of them, consider proper to clothe and educate my said grandson suitably to his relation to me; now, I do, confirming hereby all the directions relative to said sum of $50,000, further order and direct, that should any attempt be made at law or otherwise, during the minority of my said grandson, to withdraw his

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person from the charge and custody of my said executors by his father, or any other person, then, and in such a case, I hereby direct my executors to suspend all further payments aforesaid, and in such case I hereby revoke all provisions for such grandson by my said will.'

"The testator died October 23, 1868. The grandson, whose mother had died about a year before, was then a child of two years of age, living with his aunt, Mrs. Borie, who had taken him some months after his mother's death. His father, George D. Buckley, had been arrested in the spring of that year on the charge of obtaining goods under false pretences, and having been convicted, was, when the testator died, in the county jail of Berks County. Mr. Borie, though an executor, was appointed guardian of the person of the grandson, October 31, 1868, upon the petition of one of the residuary legatees, accompanied by an affidavit stating the facts with regard to the father (the provisions of the Act of Assembly prohibiting the appointment of an executor as guardian of a minor having an interest in the estate under his charge having apparently been overlooked by counsel, and the attention of the Court not having been called to the fact of the disqualification).

"The father was liberated in November, 1868, and immediately came to Philadelphia for the purpose of obtaining the custody of his child. Being denied access to the house of the aunt, he attempted to take him from a servant in whose charge he found him at the house of another relative; and not being successful in this, he employed the late Thomas E. McElroy, Esq., to take such steps as the exigencies of the case might demand. Mr. McElroy wrote a letter to Mr. Borie, November 23, 1868, in which, after asserting that he was 'unlawfully detaining' the child from the custody of the father, it was added, if possession was not voluntarily surrendered, 'immediate application to determine the matter will be made to the Court.' In reply to this letter, counsel for the executors called upon Mr. McElroy, and, after finding that the father, notwithstanding the provisions of the codicil, was unwilling to be separated from his boy, prepared a letter to be signed by him, addressed to Mr. Borie as 'executor' (Mr. McElroy's communication having been with him as an individual), asking him to designate a time and place for giving up the child. The letter thus prepared having been signed by the father on December 3, 1868, the same gentleman, acting as counsel, wrote to Mr. McElroy that he would be at his office with the child; adding that 'to prevent any misunderstanding hereafter,' he would state 'that the executors are willing and desire to retain the child; that he is not delivered voluntarily, but solely in consequence of Mr. Buckley's attempt to take him from their custody by force, and to void a re-occurrence to such scenes and threatened litigation.'

"The father having thus obtained his boy, who was an only child, immediately took him from the city, and, it would seem, removed to another State.

"The executors filed their first account in 1870. A written request signed by all the residuary legatees, accompanied by an affidavit by one of the executors, that they, with the guardian of a residuary legatee, still a minor, were 'all the parties who are interested in the settlement of the estate,' was presented to the Court, asking for the appointment as auditor of the gentleman who had thus acted as counsel, and who was still counsel for the executors. He was accordingly so appointed, the Court, of course, knowing nothing of the facts or circumstances, and relying wholly on the accuracy of the affidavit.

"The auditor held meetings, which were attended by the executors, and proceeded to consider the question of the forfeiture of the provisions for the grandson by reason of the acts of his father. The child, then in the fourth year of his age, was residing out of the jurisdiction of the Court. He was not represented in any way before the auditor, whose report does not even allude to the fact that one of the executors had, through his agency when acting as counsel two years before, been appointed guardian of the person; a fact which was probably regarded as immaterial since the executor (possibly advised that the appointment was contrary to the Act of Assembly) had never acted as guardian, and in the letter prepared for the father's signature, demanding the possession of his son, he was addressed as executor only. It is not pretended that notice of the reference to the auditor, or of the filing of his report, was given to the father, or that he had knowledge of what was thus done. The proceeding was *ex parte* purely; and under it the balance shown by the account was distributed among the residuary legatees, who each received $100,000 to the utter exclusion of the trust for $50,000 for the grandson and his descendants, which, so far as that fund was concerned, was thus wiped out of existence.

"The report of the auditor, after setting forth the provisions of the will and codicil relating to the trust, states the facts (*quorum pars magna fuit*) narrated above, and refers to the letters prepared or written by him while acting as counsel. It contains no discussion of legal principles, but simply concludes as follows: 'As the testator directs by the codicil above referred to, that the bequest in favor of his grandson should be revoked, if any attempt was made by the father,

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at law or otherwise, to withdraw the grandson when in his minority from the charge or custody of the executors, your auditor is of the opinion from the evidence, and so reports the facts, that such attempt has been made, and that the request under the express direction contained in the codicil is hereby revoked.' This report was confirmed absolutely, under the rules of practice, for want of exceptions, and without ever having been seen or considered by the Court.

"While the view thus taken was, as we believe, erroneous and wholly at variance with the principles relating to conditions subsequent and to the rules of construction governing testamentary gifts, there can be no doubt that the parties benefited accepted it in entire good faith. It was in accordance with the advice given by counsel before he became auditor, and as laymen they could not have been aware of the reasons which made the condition inoperative. Nor can any intentional wrong be attributed to the auditor. He labored under the disadvantage of being without the aid of counsel on the part of any one interested in sustaining the trust; and hence, not having his attention called to the authorities upon the subject, he naturally retained the convictions, with regard to the forfeiture, under which he had acted when he had prepared the affidavit that the residuary legatees were the only parties interested in the account.

"It seems quite clear, in the light of the authorities, as to the absolute strictness with which conditions divesting estates are construed (Sheppard's Touchstone, 133; Brothers *v.* McCurdy, 12 Casey, 407), that neither the attempt of the father to take his child from a woman with whom he found it—not in the house or actual custody of any of the executors, nor the voluntary surrender by the executors, without any assertion of right to retain, either as executors or guardian of the person, after notice to one of them, in his individual capacity, of the intention to have the matter decided by the proper Court, was a taking from the 'charge or custody of the said executors.' That a subsequent condition against 'an attempt' to do an act is not broken by the actual doing of it, was expressly decided in Ware *v.* Cann, 10 Barn. & Cress. 435, and in Brothers *v.* McCurdy, *supra.* Moreover, a condition against an attempt is void for vagueness and uncertainty, since an attempt is not an issuable fact (Pierce *v.* Win, 1 Vent. 321): still more so where the attempt which is to cause the forfeiture is not only that of a designated individual, but of 'any other person,' *e.g.*, a kidnapper, a lunatic, a drunken man, etc., etc.

"Finally, if the condition is not void for any of these reasons, and if what was done by the father, with the co-operation of the executors and their counsel, constitutes a breach as against the infant grandson, the absence of a limitation over left the condition without any divesting effect whatever. Under the rule of property in Pennsylvania, as declared by Judge THOMPSON in Mickey's Appeal, *supra*, less than six years before the execution of this codicil, and under the presumption of knowledge of the law by the testator, who, as the evidence shows, was aided in its preparation by counsel, it is a fair inference that the deliberate omission of the limitation over showed affirmatively that the real intention was to restrain the father through his affectionate fear of doing an injury to his son, and not to disinherit the only child of the testator's deceased daughter for an act which he was powerless to prevent and for which he was absolutely irresponsible. Every presumption is in favor of one standing in the relation of heir. But irrespective of any question of intention, the condition was of the class recognized by Lord CRANWORTH as requiring a limitation over in order to divest the interest to which it was annexed. The opinion of the Vice-Chancellor, *In re* Dickson's Trust, does not profess to enumerate all the conditions of this character, and the instances referred to are simply illustrations of conditions affected by considerations of public policy. The law favors but does not enjoin marriage; parental or rather paternal duty, which lies at the very foundation of society, is no less favored, but it is also enjoined, and performance may be compelled. On what theory can such duty be regarded as outside of the rules of public policy? So far from its being so regarded, we find in Sheppard's Touchstone, at the page referred to by Lord CRANWORTH (132), that 'if the matter of the condition tend to provoke or further the doing of some unlawful act, or to restrain or forbid a man the doing of his duty, the condition for the most part is void.' There is still another reason which brings the case within the doctrine of Lord CRANWORTH. Conditions against contesting a will, which are among the instances specified by him, are in derogation of public policy, not because a will has peculiar sacredness in the eye of the law, but because they seek to interfere with the right of resort to the Courts, which are at all times to be open in order that every man 'shall have remedy by due course of law, and right and justice administered without sale, denial or delay,' precisely what is sought to be accomplished by this codicil. The father is not to attempt to resume the performance of his paternal duties by 'law or otherwise.' The prohibition covered the entire minority of a child then two years of age; so that no matter whether the father should or should not change his course of life and outlive the obloquy of his early offence, thus becoming, as he seems to have be-

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come, a respectable man, fitted to associate with his child and be entrusted with his maintenance and education, he should not be permitted to establish the fact, even upon the clearest proof and by the judgment of the highest judicial tribunal.

"The auditor carries the forfeiture far beyond even the letter of the codicil. The will, in the clearest and most explicit terms, gives the principal of the sum directed to be held in trust during the lifetime of the grandson to his issue; and the codicil, after republishing and confirming in no less explicit terms, 'all the directions relative to the said sum of $50,000,' confines the conditional revocation to 'the provisions for such grandson.' The provisions for the children of the grandson, the estate of the latter being for life only, are not included in those for their parent, and it is a 'canon of construction in the interpretation of wills' (and this altogether irrespective of the strictness with which words of forfeiture are confined to their very letter) that a clear gift cannot be cut down by any subsequent words or codicil unless they show an equally clear intent: Kiver *v.* Oldfield, 4 DeG. & J., 30; Wetter's Appeal, 20 WEEKLY NOTES, 499; Reichard's Appeal, 1 Crumr. 232; 1 Jarman on Wills, 160; Sheetz's Appeal, 1 Norris, 213, etc., etc.

"In 1876 a second account was filed by the executors, showing debits amounting to $165,577.03 (the greater part of which was credited as having been paid, from time to time, in distribution), and a balance in securities, subject to cash payments due the executors, of $27,366. The credits for distribution were blended with administration, and scattered through the account. By this time the auditor had resumed his functions as counsel, and in that capacity prepared a paper addressed to him by all the residuary legatees, requesting him to appear before the Court when the account should 'come up for confirmation,' and assent, on their behalf, to its confirmation; and this being accompanied by his own affidavit that the parties so addressing him were 'all the parties who are interested in the settlement of the account, and that they are all of full age,' a decree was indorsed upon the account as follows: 'Confirmed *nisi* by agreement of all the parties in interest, May 4, 1876. T. B. Dwight.'

"The grandson, then ten years of age, was at the time, or soon after, going to school at Cheltenham, near Philadelphia, where he remained for two years—his expenses at first being paid by one of his uncles, and afterwards by his aunt. He frequently visited their houses, and was always treated with the greatest kindness. He went to Ohio in 1878; to Illinois in 1880; and to Kansas, where he is now living, in 1886. He still, however, was occasionally in Philadelphia, and from 1883 to the end of 1891, Mrs. Borie paid to him $600 in each year. He was, of course, too young at the time of the confirmation of the second account to understand anything with regard to his rights under the will of his grandfather, and when he grew older he naturally got the impression from what he heard or knew as to the facts, that whatever rights he might originally have had, had been lost by the act of his father, and by the decree of the Court upon the report of the auditor. He became of age July 25, 1887, and it was not until 1891 that he learned from counsel in Kansas, to whom a copy of the will had been exhibited, that he was then entitled to the entire income of the trust fund (having completed his twenty-fifth year). The present proceeding was begun November 2, 1891, less than five years after he had attained his majority. In the meantime (January, 1889), he married, and has two children, who have been joined as parties. He is now an inspector of meats for foreign shipment, in the employ of the department of agriculture, in Kansas City.

"But it is said any claim on the part of the grandson or his issue is barred by the decree upon the auditor's report in 1870, and the distribution in pursuance of it; and that it is now too late to review the decree, or in any manner to open the proceedings. The conclusiveness of a decree obtained as this was may well be doubted, and it is far from clear, under the circumstances of the case, whether the parties profiting by the distribution so made, can, even after the lapse of time, withhold moneys upon which a trust was impressed by the will of the testator in favor of the persons now claiming. We need not, however, consider the question. The subsequent distribution in 1876 was not under any decree of Court, and the error in the first distribution did not justify it (Kline's Appeal, 5 Norris, 363; Kuhn's Appeal, 6 Norris, 100). The mere confirmation of the account, blending distribution with administration, did not authorize the payment of residuary legatees to the exclusion of those entitled under the provisions of the trust for $50,000; and if the payment was made without the exaction of refunding bonds for the protection of the executors, the loss must fall upon them and not upon innocent parties not represented and then in their infancy. The petitioner, as already stated, did not attain his majority until July 25, 1887, and his right to demand the entire income did not begin until July 25, 1891; and until December 31, 1891, he was receiving from his aunt $600 each year.

"In Jones' Ap., 3 Outerb. 124, relief was granted though many years had elapsed since

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the confirmation of an account blending distribution with administration, and the actual payment to the distributees. In that case, it is true, the proceeding was by a creditor; but the rights of a creditor as against distributees are no higher than the rights of beneficiaries for whom the will creates a specific trust as against mere residuary legatees. The real point decided was that distribution voluntarily made by an executor or administrator is at his risk; and the confirmation of an administration account in which, in disregard of the repeated rulings of the Supreme Court, items of distribution are promiscuously injected, is not an adjudication of the correctness of such distribution as against parties not actually before the Court: a principle especially applicable in favor of infants or persons not yet in being, to whom interests dependent upon a prior life estate in a portion of the fund are given. There can be no suggestion of laches in their case, as there might be in the case of a creditor who stands by and gives no notice of his claim.

"Distribution, except under a decree, can only be made with entire safety where refunding bonds for the protection of possibly omitted interests are taken—such bonds enuring for the benefit of omitted legatees and distributees no less than of creditors (Allwein *v.* Werntz, 20 WEEKLY NOTES, 109; Schaeffer's Ap., 4 Crumr. 640.)

"Jones' Appeal was a case of great hardship for the administratrix, who had made distribution in ignorance of the fact that ten years before his death the decedent had become surety on the bond of a guardian, upon which default was not made by the principal until eight years after the distribution and sixteen years after the death of the decedent. Here the hardship is all the other way; the trust was expressly declared and set forth on the face of the will; the primary beneficiary was the infant son of a deceased daughter of the testator; and one of the executors and the wife of another had the benefit, as residuary legatees, of their improvident distribution.

"The moneys and securities embraced in the second account, so far as they ought not to have been paid to the residuary legatees without first making provision for the trust, must be treated as still in the hands of the executors, who will now be ordered to pay the required amount, $50,000, to a trust company in accordance with the provisions of the will. Should the executors refuse to select such company, or fail to make the selection within ten days after the filing of this opinion, the Court, on application of the petitioner or his counsel, concurred in by the guardian *ad litem* of the minor children, will appoint, and the executors will make payment to such appointee.

"A different question is presented with regard to the income of the trust fund. Until his arrival at the age of twenty-five years, the will directed that only so much as the executors shall deem sufficient for the purpose of his maintenance and education suitably to relationship to the testator shall be paid to such persons as they may order and direct. During the minority this provision was simply in relief of the father, who, presumably, has borne the expense of maintenance, etc., so far as it was not borne by the uncle and aunt. He is not a party to the present proceeding, and whatever rights he may ever have had are probably barred by lapse of time and his laches in not sooner asserting them. The sum paid annually by the aunt after the grandson attained his majority seems to have been considered by him as sufficient for the specified purpose; at least it is not averred that under a proper exercise of the discretion vested in the executors a larger sum ought to have been paid, and without such averment we have no authority to inquire as to its sufficiency. In the view of her rights entertained by the aunt, these payments were simply gratuities, prompted by kind feeling or motives of benevolence: but she has received, as one of the residuary legatees, one-fourth, and as legatee of her brother, an additional one-twelfth of the fund directed to be invested for him and his children; and as the principal ought, in justice and equity, as we think, to be returned, they may, without impropriety, be treated as payments of interest on the moneys while so held by her. The will makes no disposition of the surplus income accruing during his grandson's minority and the years preceding his attaining the age of twenty-five, except so far as it directs the payment of the principal with its accumulations at his death; but as accumulation is not permitted under the Act of 1853, except for an existing minority and for the benefit of the minor (Washington's Est., 25 Smith 102; Carson's Ap., 3 Outerb. 325), it follows that such surplus properly belongs to the residuary legatees in whose hands it already is.

"When the grandson attained the age of twenty-five years (July 25, 1891), he became entitled to the entire income of the fund. Had the provisions of the will been complied with, the fund would then have been held by one of the trust companies, producing income. That it was not was because of the omission of the executors to appropriate the requisite sum out of the assets embraced in their second account, thus repeating the error of the auditor in his *ex parte* settlement of the first account. The consequences of their omission must fall upon them and not upon innocent parties not represented, and they will therefore be required to pay to the petitioner

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(the grandson) interest on fifty thousand dollars from June 25, 1891, to the time of payment of the principal sum as above directed.

"Counsel for petitioner will prepare a decree in accordance with the principles of this opinion."

The decree directed the surviving executors to forthwith designate a trustee for the petitioner, and "that said executors shall forthwith pay unto such trustees so appointed by them, or in default of such appointment by them, then to such trustee as may be appointed by the Court, the sum of fifty thousand dollars, to be held by such trustee upon the trusts and as and for the purposes specified in said item of said will.

"And it is further ordered and decreed that said executors shall forthwith pay unto William W. Buckley lawful interest upon said sum of fifty thousand dollars, to be computed as from the 25th day of July, 1891, to the date of the payment of said principal sum to such trustee.

"And said executors are further directed to pay the costs of this proceeding."

Appeals were taken by both sides, Wm. R. White and J. Henry Hentz assigning as error the decree of the Court, directing the appointment of a trustee, and in directing the payment of the interest on the sum of $50,000 from July 25, 1891, and in not decreeing that the legacy of $50,000 became void on account of the removal of the petitioner by his father, and that the former decrees bound the right of the petitioner.

The petitioner assigned as error the refusal of the Court to allow him interest prior to July 25, 1891.

The case was twice argued by the same counsel, the first time on March 28, 1893, WILLIAMS and THOMPSON, JJ., being absent, and a re-argument being ordered, one was had January 24, 1894, on which occasion GREEN, J., was absent.

John G. Johnson, for W. R. White and J. H. Hentz.

The condition attached to the legacy to W. W. Buckley was valid; (*a*) it violated no policy of the law; (*b*) it was not vague or indefinite. An estate may be made divestible by reason of an attempt.

Adams *v.* Adams, 45 Ch. D. 426.

The testator desired that no one but the executors should have charge of the education and maintenance of his grandson, and he sought to insure an income only in case the grandson continued under their control. This control failing, the legacy failed.

Gilliland *v.* Bredin, 63 Pa. 393.

The condition subsequent in this case was not such a condition *in terrorem* as would require for its validation a bequest over.

Carr's Estate. 138 Pa. 352.
Colston *v.* Morris, 1 Jacobs, 257.
In re Dickson's Trust, 1 Sim. N. S., 43.
Craven *v.* Brady, L. R. 4 Eq. 209: 4 C. A., 298.
Jenner *v.* Turner, 16 Ch. D. 195.

These hardships will not protect against the operation of a condition subsequent.

Astley *v.* Earl of Essex, L. R. 18 Eq. 297.

The condition was broken, a demand was made for the boy and the executor knowing that the demand could be enforced surrendered him.

The confirmation of the executor's account in 1870 was final and is now irreversible. Fraud will not be presumed, and in the absence of proof of fraud the decree cannot be attacked.

Cramp's Appeal, 81 Pa 90.

Payments having been made in accordance with the decree of distribution, there can be no review.

Baggs' Appeal, 43 Pa. 512.
Russell's Admr's Appeal, 34 Id. 258.
Lehr's Appeal, 10 WEEKLY NOTES, 282.
Stewart's Appeal, 86 Pa. 149.
Kost's Appeal, 107 Id. 143.
Clothier's Estate, 20 WEEKLY NOTES, 379.
Fletcher's Appeal, 125 Pa. 352.

The decree of 1870, unappealed from and unreversed, finally concluded the right of the petitioner to his legacy. Distribution in 1876 was necessarily made in pursuance of this decree.

Guenther's Appeal, 4 WEEKLY NOTES, 41.
Kline's Appeal, 86 Pa. 363.
Chandler's Appeal, 100 Id. 265.

Even though the decree of confirmation in 1876 stood by itself, without the aid of the decree of 1870, it would be final and irreversible.

Leslie's Appeal, 63 Pa. 355.

The condition imposed by the codicil was not a condition subsequent. The codicil provided for an event which must necessarily happen before any estate could vest in the grandson. He must reach twenty-five, and until he reached twenty-one he did not even have an interest in the income of the legacy. The rule applicable to conditions subsequent, therefore, does not apply.

Donohue *v.* McNichol, 61 Pa. 73.
Egerton *v.* Earl of Brownlow, 4 H. of L., 1.

Under no circumstances could Buckley claim any income directly until he reached twenty-five. Up to that time the executors only could demand and appropriate so much of the income as they thought fit. Their discretion could not be controlled.

Thompson *v.* Griffin, 1 Cr. & Ph, 321.

Where there is no antecedent gift which is independent of the direction as to the time of payment, the legacy is contingent.

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Crawford *v.* Ford, 7 WEEKLY NOTES, 532.
Coggins' Appeal, 124 Pa. 33.
Seibert's Appeal, 13 Id. 503.

The direction to accumulate the surplus income, until the attainment by the grandson of the age of twenty-five, was void *in toto*, under the Act of 1853.

The surplus income which accrued prior to the attainment by the grandson of the age of twenty-five passed, because of the void direction to accumulate, to the residuary legatees.

Washington's Estate, 75 Pa. 106.
Hibbs' Estate, 143 Id. 224.
Grim's Appeal, 109 Id. 397.

Under the circumstances interest is not recoverable.

Wherever a person who has not used a fund, and has not had possession thereof, is obliged to pay interest thereon to another, he is subjected to a penalty.

In good faith, under a mistake of law (if their action be held by this Court to have been a mistake), the executors paid over the whole estate to the residuary legatees in the year 1870, saving the small portion which was paid later in 1876. This payment was sanctioned by the Orphans' Court, which had jurisdiction of their accounts. If they be obliged to pay the large sum demanded, they will be subjected to a penalty, despite their good faith and their compliance with what was held by the Court which had jurisdiction over the fund in their possession, to be the law.

In the absence of fraud, however, there is no liability upon persons who have received money in good faith, to return the same with interest, even if they be liable to make any return.

Knight *v.* Reese, 2 Dall. 182.
Patterson *v.* Nichol, 6 Watts. 383.
Pass. Ry. Co. *v.* Philadelphia, 51 Pa. 468.
Porter *v.* Commonwealth, 17 Id. 17.
Philadelphia *v.* Ridge Ave. Ry. Co., 102 Id. 190.

Silas Porter (of Kansas) and *Samuel T. Brown* (*John Scott, Jr.* with them), for W. W. Buckley.

The conditional revocation contained in the codicil is void and of no effect. It is on an indefinite contingency that might or might not happen any time within twenty-two years after the legacy became vested. The revocation does not contain any limitation over to fix where the suspended payments would go should the contingency happen. This is essential under all the authorities. The revocation is made to depend, not on the act of the legatee, but on the act of a third party, the father, over whom the legatee had no control. It was a mere threat, with the added weakness of being against a third party who took nothing under the will. It was *in terrorem* and void. It required the separation of parent and child, depriving the father of the society and services of the child, and the right to control his education and habits, and deprived the son of the care, protection and maintenance of his father during all the years of his minority.

Chew's Appeal, 45 Pa. 228.
Mickey's Appeal, 46 Id. 337.
Bryant *v.* Thompson, 59 Hun. 545 (N. Y.).
State *v.* Richardson, 40 N. H. 272.
O'Hara on Construction of Wills, 268.
Mallett *v.* Smith, 60 Am. Decisions, 107.
McIlvane *v.* Gethen, 3 Whart. 575.
In re Vandevort's Estate, 62 Hun. 612.
Wilkinson *v.* Wilkinson, L. R. 12 Eq. 604.

The legacy to the petitioner was a vested one. A bequest of this interest on a definite sum for life is an annuity, and interest begins at the death of the testator.

Flickwir's Estate, 136 Pa. 374.
Peterson's Appeal, 88 Id. 397.
Sprankle *v.* Com'th, 2 Walk. 420.
Evans' Estate, 155 Pa. 646.
Macalester's Estate, 3 Dist. Rep. 103.
McClure's Appeal, 72 Pa. 414.
Little's Appeal, 117 Id. 27.

The discretionary power vested in the executors matters not at all as to the vesting of the legacy or the time when it vested; whether the whole or a part only of the income was used during his minority, it belonged to the *cestui que trust*.

Beevor *v.* Partridge, 11 Sim. 229.

"Whether a condition is subsequent or precedent must depend on the language in which it is framed, and very little help can be derived from decided cases on the point. It may, however, be noticed that when the condition requires something to be done which will take time, the argument is in favor of construing it as a condition subsequent."

Theobald on Wills, 399.

In this case the revocation of the legacy was not to take effect, unless at some time before the grandson arrived at twenty-five years of age he should be removed from the control of the executors. This event then, upon which the legacy was to be revoked, could not happen before the death of testator, and might happen at any time within twenty-three years after his death. That *would* "take time," and according to the rule laid down by Theobald, *supra*, "the argument is in favor of construing it as a condition subsequent."

A condition attached to the enjoyment of a legacy upon a contingency to happen after the time at which it would ordinarily vest, and which is either unlawful or impossible of performance by the legatee is void.

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The child could not determine whether he would stay or not stay away from his father. The guardian had no right to surrender possession of the boy; he should not have yielded to a mere threat of procedure.

In a question on a habeas corpus touching the custody of a minor child, the controlling consideration is the interest of the child.

Commonwealth *v.* Kenney, 1 Chester Co. 322.
Commonwealth *v.* Gilkeson, 5 Clark 33.
Commonwealth *v.* Demot, 7 Phila. 624.
Commonwealth *v.* Hart, 37 Leg. Int. 72.
Commonwealth *v.* Addicks, 5 Bin. 520.

Yet the guardian joined with his wife and other legatees who would profit if the legacy were avoided, in giving up the child.

No executor, trustee or legatee under this will ought to be permitted to personally profit by his own wrong, or even by standing silent when duty and honor required him to speak.

The confirmation of the auditor's report of 1870 had no effect as a decree on the right to the legacy. The auditor was appointed simply to distribute a certain balance, the legacy was outside of his duties. It did not appear in the account. The minor was not represented. His rights could not be concluded by proceedings to which he was neither party nor privy, and of which he had no notice.

Richards *v.* Rote, 68 Pa. 248.
Senseman's Appeal, 21 Id. 331.
Mintzer's Appeal, 111 Id. 524.

The parties procuring the decree of 1870 were guilty of legal and constructive fraud at least, and the Court will not permit them to take advantage of their own wrong.

Jackson *v.* Summerville, 13 Pa. 359.
Kuhn's Estate, 87 Id. 100.
Whelen's Appeal, 70 Id. 410.
Bricker *v.* Lightner, 40 Id. 199.
Cunningham's Appeal, 22 WEEKLY NOTES, 538.
Ricketts' Appeal, 21 Id. 229.

The statute of limitations cannot apply.

The legacy was a trust fund, and the Orphans' Court has jurisdiction to follow the fund and decree its payment to the rightful owner, and no lapse of time under the circumstances of this case would interfere with this power.

Bispham's Equity, 200 and 205.
Gallen's Estate, 8 P. C. C. R. 40.
Brooke's Appeal, 102 Pa. 150.
Odd Fellows' Appeal, 123 Id. 356.
Palmer *v.* Allen, 26 WEEKLY NOTES 514.
Hugh Gaffney's Estate, 146 Pa. 49.
Sutter's Estate, 19 Phil. 103.

Besides until the disability of the petitioner was removed it could not be pretended he was guilty of laches, for the purposes of this case. Buckley was a minor until twenty-five years old. The petitioner was entitled to the unexpended income arising prior to his twenty-fifth birthday.

The executors had a discretionary power, it is true, as to how much of the income should be used up to that time, but they might have so used it all. If they had done so, no one could have disputed their right, and this question could never have arisen.

The executors never exercised their discretionary powers at all in the matter, and never set apart the fund to produce *any* interest, and it follows the *surplus* contemplated by the will never existed in strictness. In view of this, it is very difficult to see how their default can defeat the right of the petitioner, and make the whole interest fund "properly belong to the residuary legatees," and that while the grandson is in full life.

The accumulation of a surplus is not directed by this will, but it is permitted, and if the Act of April 18, 1863, forbidding accumulation, referred to, has any application whatever in this case, it is to give such surplus to the legatee, he being "the person who would be entitled thereto if such accumulation had not been directed." The law favors the first taker. That is the spirit of this Act, and it is the construction put upon it.

Washington's Estate, 75 Pa. 102.
Carson's Appeal, 99 Id. 325.

APPEAL OF WHITE AND HENTZ.

October 1, 1894. WILLIAMS, J. There are two principal questions involved in this case. The first relates to the conclusiveness of the proceeding in the Orphans' Court under which distribution was made by the executors of William R. White, deceased, in 1870. The second involves the construction of the codicil to the will of the testator.

The report of the auditor shows that the testator died about the first of October, 1868, disposing by his will of an estate amounting to more than half a million of dollars. Four of his children survived him. The fifth, a daughter, was dead; but her husband, George D. Buckley, and her son, William White Buckley, the petitioner, were living.

The testator gave his estate to his four surviving children, except the comparatively small sum of fifty thousand dollars, which he directed his executors to set apart and place in the hands of some Philadelphia life insurance, annuity and trust company to be selected by them, for the benefit of his grandson, William White Buckley. The income from this sum was to be paid annually to his executors and by them disbursed for the education and care of his grandchild until he reached the age of twenty-five years, after which it was to be paid to him directly, during his natural life, with a limitation over to his chil-

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dren, or in default of children, then over to the testator's four surviving children and their heirs.

By a codicil to his will he directed, "that should any attempt at law or otherwise be made during the minority of my said grandson to withdraw his person from the charge or custody of my executors by his father or any other person, then and in such case I hereby direct my executors to suspend all further payments aforesaid, and in such case I hereby revoke all provisions for such grandson by my said will."

The testator had been involved in business difficulties with his daughter's husband, George D. Buckley, had come to distrust his integrity, and to regard him with positive aversion. He desired to preserve the child from what he believed would be the unwholesome influence of his father, and this feeling suggested the codicil to the will. Mrs. Buckley, the daughter of the testator, died about one year before her father, and her husband became involved in criminal proceedings in Berks County. The testator's living children seem to have regarded their sister's infant child as under their care, and he was removed to the home of his aunt, Mrs. Borie. Soon after the probate of the will her husband was appointed by the Orphans' Court guardian of the person of the child. He was therefore in the custody of his guardian and living as a member of his family. During the month of November, 1868, Geo. D. Buckley was at large and came to Philadelphia to look after his son. He made an effort to remove him from the custody of his guardian forcibly. Failing in this, he employed an attorney and through him opened a correspondence with the attorney of the executors for the purpose of obtaining the possession of his child. Without any legal proceeding whatever, the executors and the guardian of his person appointed by the Court, surrendered the child to his father, who carried him into another State, and thereafter retained possession of him.

In 1870, the executors filed their account, and at the request of the four surviving children of the testator, their attorney was appointed an auditor to make distribution. The whereabouts of the petitioner and his father were known, but no notice was given to either of them of the filing of the account, of the application for the appointment of an auditor, of the proceedings before the auditor, or the filing of his report. Notwithstanding this, the auditor reported that the provision made for the petitioner in his grandfather's will had been defeated by the conduct of his father; and that he was entitled to no part of the same and no interest whatever in his grandfather's estate. This report was confirmed, and distribution ordered among the four children who survived the testator.

Now the rule undoubtedly is that the judgment of a Court of competent jurisdiction is conclusive of the point decided, between parties and privies, and therefore when the question is raised in any collateral proceeding between other persons it is to be regarded as conclusive on such persons also. But the conclusive character of a judgment or decree depends not only upon the statutory grant of jurisdiction to the Court pronouncing it, but upon actual jurisdiction over the persons whose rights are the subject of investigation. Unless the Court has the parties before it, by appearance or service of process, it is obvious that it can not bind them by its adjudications. The four children of the testator appeared voluntarily with the executors of their father's will and asked the appointment of Mr. Paul as auditor. They stated to the Court that they were the only parties who had any interest in the estate. After his appointment the auditor proceeded at once to what was the main purpose of his appointment, viz: to consider the situation of the grandson and to determine that the legacy to him had been forfeited by the attempt of his father to withdraw him from the custody of the testator's executors. He found the fact of such attempt, and therefrom concluded as matter of law that the grandson had no further rights under the will, and reported a schedule of distribution wholly excluding him from the fund.

This was confirmed without objection, and the payments were made by the executors to the four children accordingly. This is the adjudication, and these are the payments made under it, that are set up as conclusive against the petitioner.

It will be seen from this statement or review of the facts that the real parties in interest in the controversy before the auditor were the four living children of the testator on one side, and his infant grandson, then about four years old, on the other. The subject of controversy was the legacy to the infant grandson contained in the testator's will. The auditor before whom the question was to be heard was selected by one side without notice to the other. He was the attorney of the parties selecting him, under whose advice the grandson had been surrendered to his father. He was to pronounce upon the legal effect of a surrender which was the result of a correspondence, both sides of which were conducted under his supervision; as both the demand of George D. Buckley for his son, and the reply thereto on behalf of the executors were written by him. As an auditor he held that what he had arranged as an attorney was effective to extinguish the rights of the infant, and vest the fifty thousand dollars provided by the will for him, in his clients; and he awarded it to them accordingly. Neither the auditor, nor

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the executors, nor the children of the testator suggested to the Court that William White Buckley was an infant, and a non-resident of the State. Neither of them asked the appointment of a guardian *ad litem* to represent him. The fact of his existence was withheld from the Court by the agreement for the appointment of an auditor, and the representation that it was signed by all the parties having any interest in the estate.

To enter upon an argument to prove that such a proceeding was not conclusive upon the unrepresented infant would require an unnecessary waste of words and could add nothing to the force of a mere statement of the facts. The character of the parties forbids the idea that it was a scheme to divest this infant of his rights. It was doubtless the result of haste and thoughtlessness on the part of the children of the testator, and of a mistaken confidence in his professional opinion on the part of the attorney and auditor; but whatever the fact may be as to the manner in which the proceeding was conducted the conclusion is inevitable that it was not such an adjudication as could conclude the infant against whom it was rendered without a hearing and without notice. As a settlement of the accounts of the executors it may be conclusive, at least it is not now questioned; but as a decree of distribution it was a nullity so far as the interest of the petitioner is concerned.

The Court below was right therefore in holding that the petitioner had a right to be heard on the subject of his interest under his grandfather's will.

This brings us to the second question, and requires us to consider the construction of the codicil to the will of the testator. There is no doubt that the will as originally written gave to the petitioner a vested interest. If this interest has been divested it must be by virtue of the codicil in which the testator directs that if "any attempt" is made to withdraw his grandson from the custody of his executor by "his father or any other person," then the provision made for him in his will shall be inoperative. The testimony shows that at the date of the codicil the grandson was in the care of Mrs. Borie. The father was then in confinement. The purpose of the codicil was to secure to the child such an education and such moral training as the father could not give him, by making it largely to the interest of both father and son that he should remain under the care of his maternal relatives.

The custody of the child was that which the testator desired to secure. If he could not control this, but the child was to go to and be reared by his father, then the testator was unwilling to make any provision for him. What then did he mean by the words "any attempt"? If he meant to include unsuccessful and abandoned attempts then it might happen that the custody of the child might continue in his executors and family, and yet all provision for his education and support be forfeited. This was not the testator's thought. He wished to make the legacy depend on the continued custody of the child so that he might be suitably educated if he remained with his mother's relatives. The attempt against which the testator tried to guard was not an abortive one that should leave the custody unchanged, but a successful one that should change the custody. The idea of a surrender as the result of correspondence he evidently did not entertain. We do not think the evidence or the report of the auditor shows any such attempt to withdraw the child from the custody of the executors as the testator intended to provide against; and we quite agree with the Court below that if the auditor's construction of the codicil could be sustained the condition would be void for vagueness and uncertainty. The codicil is an attempt to engraft upon the legacy to the grandson a condition subsequent, by means of which the estate of the legatee might be forfeited by the acts of persons over whom he had no control and for whose conduct he was in no sense responsible. Such conditions are not regarded with favor by the Courts and will not be enforced when they can be reasonably relieved against.

It is not necessary to treat the codicil as intended to operate *in terrorem* merely. It is enough to say that if interpreted as the auditor held it should be, so as to include all attempts whether successful or unsuccessful, whether abandoned or defeated, whether made by the father or a stranger, it is void for uncertainty. If, on the other hand, it is interpreted to mean successful attempts made with force, or at the law, the evidence shows no such attempt. It shows simply a correspondence conducted on both sides under the supervision of the attorney for the executors, and a surrender of the child as the result of such correspondence. This did not, it could not, divest the vested legacy of the infant who was the subject of the correspondence and transfer it to those who through their attorney were consenting to the surrender.

The decree appealed from is affirmed, the appellants to pay the costs of this appeal.

MITCHELL and FELL, JJ., dissented on the second ground, in construction of the will.

BUCKLEY'S APPEAL.

October 1, 1894. WILLIAMS, J. This appeal is from the same decree just considered in the appeal of William R. White and J. Henry Hentz, executors. The appellant contends that the Orphans' Court did not go far enough in the

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matter of interest, and alleges that the executors should be required to account to him for the income of the legacy, given him in the will of his grandfather, from the death of the testator down to the date of the decree.

The Orphans' Court held him entitled to the income after he reached the age of twenty-five years, but denied his right to demand it prior to that time. This seems to be exactly in conformity with the directions of the will. The testator gave the sum of fifty thousand dollars to such life insurance, annuity and trust company of Philadelphia as his executors should designate, in trust to invest the same, collect the income therefrom, and pay it over to his executors, or so much of the same "as my executors may deem sufficient to maintain and educate my grandson, Wm. W. Buckley, suitably to his relationship to me until he shall arrive at the age of twenty-five years." After he should reach the age named the will directed the trustees to pay the income, not to the executors, but to the grandson in person during the remainder of his natural life. At the death of his grandson, the testator directed the trustee to turn over "the whole principal sum and whatever increase thereto, there may be" to the lawful issue of the grandson; and in default of lawful issue then over to the testator's children living at the time of his own death and to their heirs. Until the grandson reached the required age his interest in the income from the legacy was made to depend on the discretion of the executors. The trust was in effect a spendthrift trust in which the beneficiary whose judgment is distrusted, is left to the care of those in whom the testator confides. The testator in this case placed his executors in his own stead and left to them the direction of the education and care of his grandson, which had he lived he would have controlled in accordance with his own views.

The appellant has no right therefore under the terms of the will to call the executors to an account for the exercise of their discretion. What he was authorized to receive and demand from the trustee he may ask the executors to account for, because of their failure to appoint the trustee, but the learned Orphans' Court was right in holding that he had no legal claim upon the income which was not payable to him, and which the executors were empowered to use in their discretion for his maintenance and education.

What rights the remainder men may have, if any, under the terms of the will, to require an account of the "increase" which the testator anticipated as probable, it is not now possible to determine. They are not, and can not become, parties to this proceeding.

The appeal is dismissed at the cost of the appellant. H. B.

May, '93, 26. May 28, 1894.

Enders v. Enders.

Public policy—Contract—Parent and child—Family compact.

A contract, to be void as against public policy, must be inconsistent with sound policy and good morals, and to the consideration of the thing to be done.

While a contract by a parent, by which she bargains away the control of her child to a stranger, and so attempts to relieve herself of all parental responsibility, is void as against public policy, yet a contract of the nature of a family compact, by which a mother in needy circumstances agrees that her child may be brought up by and live with his grandfather, who is of good character and ample estate, and who further agrees that the mother shall visit her child when she desires, and have him at her house when convenient, is not against public policy, and the mother may recover the stipulated consideration upon which she surrendered the possession of her child.

Appeal of Annie Enders, plaintiff, from the judgment of the Commou Pleas of Danphin County, in an action of assumpsit in which William J. Enders and Annie Elizabeth Enders, executors of William Enders, deceased, were defendants.

On the trial of this cause, before SIMONTON, P. J., the following facts appeared:—

Several years prior to 1872, the plaintiff was married to Emanuel Enders, who was the son of defendants' decedent, and the father of William J. Enders, one of the defendants.

A separation took place between husband and wife, as alleged by the plaintiff, on account of the former's failure to support and ill treatment of his wife; as alleged by the defendant, through the wilful desertion of the husband by the wife.

The plaintiff sought shelter at the home of her father at Berkley, in Berks County, Pa. On November 7th, 1872, some months after the plaintiff had separated from her husband, Emanuel Enders, and while she and her son, William J. Enders, one of the defendants, who was then about two years old, were living with her father, William Enders, the grandfather, came to visit her. William J. Enders was his only grandson, and naturally, the grandfather was solicitous that the child should have advantages of education which his means afforded, and which the means of his mother did not afford. The matter was discussed by the grandfather and the mother of the boy, and also with his maternal grandmother, and finally the grandfather said that if the plaintiff would let him have the child, he would give him a good education in some college, and would give her twenty thousand dollars and the child ten thousand dollars, when he should come of age, and if she would remain single he would rather give her more; that she should come to see the child whenever she liked to, and should

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have the boy at her home whenever it was convenient, but that the home of the boy should be with him.

To this proposition the mother assented. Thereafter the home of the boy was with his grandfather, but frequent and prolonged visits were made by the mother and son at their respective homes.

William Enders died November 24, 1891, and the plaintiff was never paid the $20,000 promised her, and brought action to March term, 1892.

The Court, after summing up the evidence to the jury, concluded its charge as follows:—

"If a verdict be found in favor of the plaintiff, it will be subject to the reserved points on the following facts: Old Mr. Enders, the grandfather, said that he came to fetch the child, and my sister (its mother) did not want to part with the child, who was about three years old; then he promised her if she would let him have the child, he would give her twenty thousand dollars and the child ten thousand dollars when he should come of age, and at the same time he would give him a good education at some college; and if she would stay single till he was of that age, he would sooner give her more; and he said that she could come to see the child whenever she would like to, and the same time that she could have the boy occasionally for certain length of time, but that the home should be with him. She said she sooner keep the boy than have the money, but by consulting a little with her they compromised that he should take the boy along on those terms.

"On those facts these questions of law are reserved:

"1st. Whether the contract set forth in the facts is contrary to public policy.

"2nd. Whether the facts show any consideration for the promise.

"3rd. The further question is also reserved whether there are any facts in this case that ought to go the jury upon which they can legally find in favor of the plaintiff."

The jury found a verdict for the plaintiff for $20,000. The defendants moved for judgment *non obstante veredicto*, and the Court in banc after argument entered judgment for the defendant.

The plaintiff took this appeal and assigned for error the entry of judgment.

Robert Snodgrass (with him *S. J. McCarrell*, *Ermentrout* and *Ruhl*), for appellant.

A contract having for its object the promotion of the best interests of an infant, where such object is actually attained, is not void, because there is attached to it a money consideration. If the contract pass the test of "the best interests of the infant" it is valid, even if other considerations are incidentally involved.

Van Duyne *v.* Vreeland, 11 N. J. Eq. 371; 12 Id. 142.

The plaintiff here was entitled to the benefit of the Act of May 4, 1855. She was entitled to the control of and to receive the earnings of the child. She could have apprenticed him.

Brotzman *v.* Bunnell, 5 Whart. 128.

She gave up these rights to the grandfather, who agreed to pay her for so doing a certain sum when the boy became of age. That she might have withdrawn from the contract, or the child on reaching the age of fourteen might have left his grandfather, does not constitute a defence here, where the other party to the contract has enjoyed the fruits of it, *i. e.*, the society and control of his grandchild. The mother did not withdraw, the boy did not leave his grandfather.

The consideration is sufficient to support a promise to pay.

Neal's Exrs. *v.* Gilmore, 79 Pa. 427.

Family compromises are favored, and may be sustained, even if resting on grounds which would not have been satisfactory in a transaction between strangers.

Burkholder's Appeal, 105 Pa. 31.
Bentley *v.* Terry, 59 Ga. 555.
Geist *v.* Geist, 2 Pa. 441.
Walker *v.* Walker, 67 Id. 185.
Gilkeson *v.* Gilkeson, 1 Phila. 194.

Casper S. Bigler and *Frederick M. Ott*, for appellee.

Contracts by which parents seek to evade the obligation of care and nurture of their offspring are against public policy, and will not be enforced.

In re Lewis, 88 No. Car. 31.
In re Scarritt, 76 Mo. 565.
Chapskey *v.* Wood, 26 Kan. 650.
State *v.* Baldwin, 5 N. J. Eq. 454.
Vansittart *v.* Vansittart, 2 De G. & J. 259.
Roberts *v.* Hall, 1 Ontario 388.
Johnson *v.* Terry, 34 Conn. 259.
Torrington *v.* Norwich, 21 Conn. 543.

The validity of a contract is determined by the tendency of the class to which it belongs, and not by the fact whether in the particular case it had or had not any prejudicial effect.

Greenhood on Public Policy, Rule VI, p. 5.
Holliday *v.* Patterson, 5 Oreg. 177.
Richardson *v.* Crandall, 48 N. Y. 343.
Webb *v.* Dietrich, 7 W. & S. 401.
Chorpenning's Appeal, 32 Pa. 315.

The law does not recognize the rights of a parent in his offspring as property. The welfare of the child is the object with which the Courts are concerned, and whatever right a parent has to the custody of his child grows out of the duty he owes to the child, and is recog-

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nized only as a means of fulfilling the obligation.

Com'th *v.* Addicks, 5 Binn. 520; 2 S. & R. 174.
Com'th *v.* Gilkeson, 5 Clark, 30.
Com'th *v.* Nutt, 1 P. A. Browne, 143.
Dumain *v.* Gwynne, 10 Allen, 270.
Heinemann's Appeal, 96 Pa. 112.

A mother not being bound to maintain her minor child is not entitled to his service.

Fairmount Ry. Co. *v.* Stutler, 54 Pa. 375.
Burrell Township *v.* Pittsburgh Guardians of the Poor, 62 Pa. 472.

October 1, 1894. DEAN, J. About the year 1868, Annie Enders, the plaintiff, was married to Emanuel Enders, son of William Enders. Two years after their marriage, a son, William J. Enders, was born to them. At that time they lived at Cornwall, Lebanon County. Two years after the birth of the son, on account of her husband's ill treatment and neglect to support her, the wife left him, and, with her child, took up her home with her father at Berkley, in Berks County. Some months after leaving her husband, and while living with her father, on 7th November, 1872, William Enders, the father of her husband, visited her. Her boy was his only grandson, and he was desirous that he should have a better education than his mother could afford him. The subject of the boy's future was discussed between her and both grandfathers, and others of the wife's family, at this visit. The grandfather, Enders, proposed to her, if she would permit him to take her son and educate him, the boy to make his home with him until he was of age, she to have the privilege of visiting her child when she desired, and to have him at her home whenever convenient, he would give the mother $20,000, and the boy $10,000 when he came of age. The mother consented, and thereafter the home of the boy was with his grandfather, the mother and son visiting each other frequently. About the 25th November, 1891, soon after the boy came of age, the grandfather died, but he had not paid, nor had he made any provision by will or otherwise, for payment of the $20,000 to the mother, Annie Enders. Thereupon she brought suit against his executors. At the trial, the defendants contended:

1. That the contract, even if proven, was void because against public policy.

2. There was no sufficient consideration to support the alleged promise.

The Court submitted the testimony, as to whether the contract was made as averred by the plaintiff, to the jury, who found for the plaintiff; at the same time reserved the questions of law raised by defendants, and afterwards entered judgment in favor of defendants, *non obstante veredicto*. From that judgment, plaintiff brings her appeal.

The Court, having decided the consideration was sufficient, the sole question here is, whether the contract was against public policy, and therefore void. The learned Judge of the Court below was of opinion that it was, and refers to many cases, holding that the parent cannot divest himself of the custody of his child by any agreement or contract; that, notwithstanding such agreement, his obligation as a parent remains, as well as the right of custody and guardianship.

It is admitted in the opinion, that none of the case cited raise the precise question on which this case, because of its peculiar facts, turns.

Public policy, in the administration of the law by the Courts, is essentially different from what may be public policy in the view of the Legislature. With the Legislature, it may be and often is, nothing more than expediency. The public policy which dictates the enactment of a law, is determined by the wisdom of the Legislature. If the Legislature declared by statute that it was injurious to public interests under any circumstances for the parent to surrender the custody of a child during minority to a grandfather, that would be the end of the discussion on that question. It has declared the parent can apprentice his child; can, by certain proceedings in Court, permit its adoption by another, and that it can take away for misconduct the right of testamentary guardianship. But in the absence of any statute forbidding such a contract as the jury have here found, we must find as a fact that such contracts have a tendency to injure the public, or are against the public good; or, as is said in Trist *v.* Child, 21 Wall. 448, a contract, to be void on this ground, "must be inconsistent with sound policy and good morals as to the consideration or thing to be done." If by well-settled judicial precedent the law has determined that such a contract as this tends to the injury of the public, or is inconsistent with sound morality, we would feel bound to follow the law thus declared, without regard to our own notions of the tendency of the contract.

As to what the contract was here, that has been definitely settled by the verdict on a full and impartial submission of the evidence. It is precisely the contract averred by plaintiff. Many of the cases cited by appellee bear on some features of evidence adduced in denial of this contract, which the jury found as a fact to have been made. It does not help us in the determination of the question, to allege the wife maliciously deserted her husband and child, and had no marital right as against her husband to its custody. Whatever may be the law applica-

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ble to such a state of facts, they are not the facts here. She had the custody, when the grandfather made the promise, and he conceded her right to and authority over it. This is a necessary inference from the verdict.

We cannot find in the cases cited that a contract, such as this one, has ever been declared void as against public policy; nor is the principle announced in any case holding the contract void applicable to these somewhat peculiar facts.

At the time the contract was made the child was about two years old; the mother was living with it at her father's, apart from her husband; she and the child were dependent on the bounty of her father, who was in moderate circumstances. Obviously, whether this situation was brought about by marital discord, or the father's viciousness, the future welfare of the helpless child was in peril. A deserted or a deserting wife, without means, cannot give much of advantage in the way of education and comfort to the child. The grandfather, conscious of this, and being of ample fortune, with a view to his grandson's future and the gratification of his own family pride and affection, proposed to take the boy, give him a home and educate him. While no severance of the maternal relation was contemplated, a personal separation was involved. By the arrangement the grandfather secured the constant companionship of the boy, and the mother relinquished it. No parental duty or obligation on the part of the mother was cast off, nor was there any such intention. Nor was the arrangement prompted by self-seeking on the part of the mother; the proposition was made by the grandfather, and she, out of regard for the advantage accruing to the child, reluctantly consented. The grandfather did all he agreed to do; the grandson received all the advantages expected by the mother. She suffered the deprivation of his constant society for nineteen years; the grandfather enjoyed the presence of his grandson. Without alienation in affection, the mother relinquished the benefit of his personal service and the comfort derived from a son's personal attention. For this she was to receive $20,000 when the son came of age. She has a right to recover it, unless the contract was against public policy.

We concede the authorities establish that the contract of a parent, by which he bargains away for a consideration the custody of his child to a stranger, he attempting to relieve himself from all paternal obligation, and place the burden on another, who is to shoulder it, without natural affection or moral obligation to prompt to the performance of parental duty, but only because of a bargain, is void as against public policy. Such a contract would be the mere sale of the child for money. But this was a family compact. The pride of the grandfather centered on the child as his only living male descendant in whose future there was promise; he was called by his name, and without question, both in blood and affection, he stood near to him. Nor was his relation to the child wholly without legal responsibility. In the case of poverty on the part of one, and ability on the part of the other, by the Act of 1836 there was a legal liability on the part of each to support the other. These are the circumstances under which this contract was made. We concede that because the event showed this contract did promote the child's welfare, that is not sufficient to warrant us in saying the contract was not against public policy. The particular instance does not determine public policy, but only the probable or natural tendency of such contracts. But we are clearly of the opinion that the tendency of such contracts, between grandparents of good character and ample estate and parents in reduced circumstances, where parental solicitude and affection are not to be extinguished, and where the welfare of the child is intended to be promoted, is neither to the injury of the public nor to good morals. In Van Duyne *v.* Vreeland, 11 N. J. E. R. 371, and Hill *v.* Gomme, 1 Beavan 541, the contracts of the parents were decided not to be against public policy, although made with strangers to the blood; because of the special facts, and on the ground that the contract was for the welfare of the child. In Neal's Executors *v.* Gilmore, 79 Pa. 427, the contract was made by the father, who was intemperate, he relinquishing the custody of his two boys, respectively two and six years of age, to a childless couple, relatives of his, until the children were of age. It was held that if the contract had been proven there was sufficient consideration to support and enforce it, but that the proof was not sufficient to establish the contract. The point was not even made that such a contract was against public policy.

The payment to be made the mother was by the contract fixed at the majority of the child, but there never was a time during its existence that the law would have declared it void as against public policy; because it contemplated no severance of the parental relation, no extinguishment of parental solicitude, and was wholly for the welfare of the child. Such custody as was necessary to gratify the pride and affection of the grandfather, and further the boy's education, was relinquished; a custody not unlike that which she would have surrendered had she placed him in a boarding school for several years.

As we see nothing in this contract which should prevent its enforcement, the judgment of

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the Court below is reversed, and judgment is now entered on the verdict for plaintiff.

H. B.

Jan. '94, 319. April 4, 1894

Muzzarelli v. Hulshizer et al.

Equity— Injunctions — Building Restrictions— Covenants Running with the Land.

S., being seized of three contiguous lots, sold them to three separate persons, by deeds executed and delivered on the same day, reserving a rent in each deed. In each deed the description of the lot conveyed, referred to the adjoining lot or lots, as "intended to be this day granted by the said S. to," naming the purchaser of such adjoining lot. The deed for the middle lot contained the following clause: "It is further understood, conditioned, aud agreed by and between the said parties hereto," and then followed a restriction as to the dimensions and character of building to be erected on the rear of the lot. In the deeds for the adjoining lots, no reference was made, in express terms, to this building restriction, but in each case the lot conveyed was described, in part, as to its boundaries, by a reference to the conveyance of the middle lot. The three deeds, all of the same date, were duly recorded. The middle lot, by mesne conveyances, came into the possession of one H., and the lot adjoining it on the south into the possession of M. H. having begun to erect a building upon his lot in violation of the restriction, M. filed a bill for an injunction:

Held, that the restriction was in the nature of a covenant running with the land, and was intended to create, and did create, an easement of light and air in favor of the adjoining lot, which the owner had a right to enforce, and that a preliminary injunction should have granted.

Clark *v.* Martin, 49 Pa. 289; and St. Andrew's Church's Appeal, 67 Pa. 512, followed.

Appeal of Emma Muzzarelli, plaintiff, from the decree of Common Pleas No. 1, of Philadelphia County, dismissing a bill in equity filed by Emma Muzzarelli against A. H. Hulshizer and John W. Chestnut, for a preliminary injunction to restrain A. H. Hulshizer and John W. Chestnut from erecting any building or other erection upon the premises No. 254 North Ninth Street, in the City of Philadelphia, in violation of the terms and provisions of the covenant and condition contained in the deed by which the owners of said premises claim title.

The bill filed in this case substantially set forth as follows: Elizabeth B. Sergeant, being seized in fee of three adjoining lots of ground, now numbered 252, 254, and 256 North Ninth street, respectively, conveyed the same, by three separate deeds of conveyance, reserving in each case a ground rent, to three different purchasers. The middle lot, the premises in question now known as 254 North Ninth street, was conveyed to one William G. Hough, reserving a ground rent of $111.66 per annum. The said deed, signed and sealed by the said William G. Hough, contained the following provision:

"It is futher understood, conditioned, and agreed by and between the said parties hereto that the said William G. Hough, his heirs and assigns, shall not nor will at any time hereafter, erect or build on the said hereby granted lot any building or part of a building further westward than thirty-seven feet from the line of Ninth street, except a privy and bath-house not exceeding six feet in depth and sixteen feet in height from the lower floor of the house now erecting on the said lot to the eve of said bath-house."

By sundry mesne conveyances the premises, No. 252 North Ninth street, came into the possession of Emma Muzzarelli. The deed creating the ground-rent upon this property, which has since been extinguished, contained no reference in terms to the above building restriction upon the premises No. 254 North Ninth street, but the land therein conveyed, was described, in part, as follows: Bounded, "Northward partly by a lot of ground intended to be this day granted by the said Elizabeth B. Sergeant to William G. Hough on ground rent;" and similar language was used in each of the other deeds. A. H. Hulshizer and John W. Chestnut having acquired title to the middle lot; No. 254 North Ninth street, proceeded to erect a building on their lot, intended to extend on said lot further westward than thirty-seven feet from the line of Ninth street, and in violation of the terms set forth as above, in the original ground-rent deed. Emma Muzzarelli then filed a bill asking for an injunction, preliminary until hearing, and perpetual thereafter, against the said owners of the premises, No. 254 North Ninth street, to restrain them from erecting any building upon the premises in violation of the terms and provisions of the above covenant, alleging, that as Mrs. Sergeant retained no interest in the adjoining lands, but conveyed her adjoining lots at the same time, the covenant against buildings was intended for the benefit of the said adjoining lots. The defendants filed an answer, averring that in the several conveyances of their property subsequent to the original ground-rent deed, no mention is made of the several building restrictions, nor is any mention made of the covenant referred to in the chain of title of plaintiff's property. They further expressly denied that their deed contained any covenant against building restrictions intended for the benefit of the said adjoining lots, so as to run with them, or that any such benefits vested in the plaintiff to which the defendants are subject. They averred that the condition above referred to was only intended to bind the immediate grantee of Mrs. Sergeant, and not subsequent grantees, the entire condition of the

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three properties, the purposes for which they are used, and their respective values, the wants, requirements, and conditions of the entire neighborhood and community being in fact entirely changed, so that the only reason remaining for such a restriction, is to afford reasonable and sufficient light and air to plaintiff's property, which the buildings proposed will in no wise affect.

The Court refused the motion for a preliminary injunction, BREGY, J., delivering the following oral opinion: "I have carefully considered this case, and have decided to refuse the injunction prayed for in the bill. I do this principally upon the ground that the locality of Ninth and Vine streets, in the City of Philadelphia, has entirely changed its character from being a place of residence to one almost exclusively given up to business purposes. In addition to the evidence, my own experience and acquaintance with the neighborhood, which covers a period of nearly thirty years, is such that I now remember the houses which were built along the westerly side of Ninth street between Race and Vine; they were all similar in appearance and were occupied as dwelling-houses. During that time the neighborhood has entirely changed, and it is now used almost exclusively for retail stores and shops. It would be a hardship not to allow the owners of the ground to improve their lot for such purposes as they desire, beyond the line mentioned, under the condition or covenant, if it may be called such, in the deed made by Mrs. Sergeant. I am also of the opinion that it would be inequitable to grant the injunction which would prevent the owners of the land from occupying more than one-half their premises, especially as it has been shown that they intend to improve it for business purposes, for which, as I know, the neighborhood is now used. The injunction is also refused in view of the fact that complainant has an ample remedy at law for the recovery of such damages as their property may sustain by the extension of the buildings which it is the intention of the owners of the lot to erect. I therefore refuse the injunction." Whereupon the plaintiff took this appeal, assigning for error the action of the Court.

J. Howard Gendell for appellant.

This case is ruled by:

Clark *v.* Martin, 49 Pa. 289.
St. Andrew's Church's Appeal, 67 Pa. 512.

This case must be distinguished from those in which the restriction is that the building shall only be of a certain character, the purpose being to preserve the whole neighborhood for dwelling houses. In such cases where the reason fails the restriction will not be enforced; but this is not applicable in the case of a covenant to give light and air to the dominant property.

Joseph L. Tull, for appellee.

The restriction in the Hough deed was a condition only and not a covenant for the benefit of the adjoining lots.

Jewell *v.* Lee, 96 Mass. 145.
Dana *v.* Wentworth, 111 Id. 291.
Keates *v.* Lyon, L. R. 4 Ch. App. 218.

The facts of Clark *v.* Martin, 49 Pa. 289, are altogether different from those of the case at bar.

Public policy requires that lands shall not be held subject to building restrictions when the character of the neighborhood has entirely changed from one of residence to one for business purposes; and it has been held that changes in a neighborhood would justify a Court in refusing an injunction to enforce building restrictions.

Sayers *v.* Collyer, L. R. 24 Ch. Div. 188.
Trustees of Columbia College *v.* Thacher, 87 N. Y. 311.
Orne *v.* Fridenberg, 28 WEEKLY NOTES, 545.

October 1, 1894. STERRETT, C. J. This appeal is from the refusal to grant a preliminary injunction restraining defendants from violating the building restriction contained in the deed, hereinafter referred to, under which they derive title.

So far as they are material to the question involved in this contention, the facts are sufficiently stated in the bill. In 1830, Mrs. Elizabeth B. Sergeant owned three adjoining lots, each fronting twenty feet and four inches on the west side of North Ninth street, Philadelphia, and extending back, preserving same width, about one hundred and sixteen feet, now numbered respectively 252, 254 and 256, on which it is alleged that three houses were then being erected. On December 21, of that year, by three separate deeds, of same date, Mrs. Sergeant conveyed said lots to different persons, reserving a ground rent. Each deed was therefore signed and sealed by the purchaser. In each, the description of the lot conveyed referred to the adjoining lot or lots as "intended to be this day granted by the said Elizabeth B. Sergeant, to" the purchaser of such adjoining lot. The middle or central lot, now owned by the defendants and numbered 254, was thus conveyed to William G. Hough, who signed and sealed the deed therefor. That deed contains, at the end thereof but above his stgnature and seal, the following clause: "It is further understood, conditioned and agreed by and between the said parties hereto, that the said William G. Hough, his heirs and assigns, shall not nor will at any time hereafter erect or build on the said hereby-granted lot any building or part of a building further westward than thirty-seven feet from the line of Ninth street,

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except a privy and bath-house not exceeding six feet in depth and sixteen feet in height, from the lower floor of the house, now erecting on the said lot, to the eve of said bath-house."

By deed of same date, as above stated, lot No. 252, now belonging to plaintiff, was conveyed by same grantor. In that deed no reference, in express terms, is made to said building restriction, but the lot conveyed, is described, in part, as bounded, "Northward partly by a lot of ground intended to be this day granted by the said Elizabeth B. Sergeant to William G. Hough on ground rent." In like manner, her deed to Mr. Hough describes the lot conveyed to him as bounded on the south by property intended to be granted to David R. Knight, through whom plaintiff derives her title. By similar deed of same date, lot No. 256 was conveyed to John C. Davis. These three deeds, all of same date, were duly recorded, etc.

It is conceded by defendants that they have commenced and intend to erect an addition to their front building, which will extend further westward than thirty-seven feet from the line of Ninth street; but they deny that their lot is subject to any building restriction in favor of plaintiff's lot.

On the other hand, it is claimed by plaintiff that the building restriction above quoted is in the nature of a covenant running with the land, and was intended to create and did create an easement of light and air in favor of her lot as well as the lot adjoining that of defendants on the north, the observance of which as to her own lot, she has a right to enforce. Considered in the light of the undisputed facts, and giving to the words employed their ordinary and proper meaning, we are unable to see that the clause in question is susceptible of any other reasonable construction. It cannot be successfully contended that the restriction was intended to be merely personal or temporary, such as during the lifetime or the ownership of Mr. Hough the grantee of Mrs. Sergeant. No warrant for any such construction can be found in the language employed. The words of the covenant are that "the said William G. Hough, his heirs and assigns, shall not nor will, at any time hereafter, erect," etc. In principle the case does not essentially differ from Clark *v.* Martin, 49 Pa. 289, and St. Andrew's Church's Ap. 67 Pa. 512, and is ruled thereby.

On the case as presented, we think the learned Court erred in denying the motion for a preliminary injunction.

Decree reversed, with costs to be paid by defendants, and it is ordered that upon plaintiff giving bond in such sum as may be fixed by the Court below, a preliminary injunction, as prayed for, be issued. S. H. T.

May '94, 18. May 29, 1894.

Commonwealth v. Lehigh Coal & Nav. Co.

Taxation—Payment of tax on capital stock exempts shares in hands of holder—Acts of April 29, 1844; January 3, 1868; June 1, 1889; June 8, 1891, and June 8, 1893—Double taxation though within the power of the Legislature, not to be presumed—Commonwealth v. Fall Brook Coal Co., 156 Pa. 488, followed.

Shares of stock on which a State tax has been paid by the corporation issuing them are not liable to be again taxed in the hands of the holder, whether an individual or another corporation: Commonwealth *v.* Fall Brook Coal Co., 156 Pa. 488, followed.

Taxation upon a stockholder as such, which was imposed by the Act of April 29, 1844, secc. 32, 33, P. L. 486, was expressly repealed by the Act of January 3, 1868, P. L. 1318.

The Act of June 1, 1889, P. L. 420, is no less explicit. While declaring shares of stock in corporations taxable, it goes on expressly to except manufacturing corporations, and corporations which pay a State tax. Stock of a corporation belonging to either of these classes is not taxable in the hands of the holder.

Semble, that no change has been made in this respect by the Acts of June 8, 1891, P. L. 229, and June 8, 1893, P. L. 353.

While it is true as a general proposition that the Legislature has power to impose double taxation, an intention to exercise this power will not be presumed, but must be affirmatively shown.

Appeal of the Lehigh Coal and Navigation Company, defendant, from the judgment of the Common Pleas of Dauphin County, in favor of the Commonwealth, plaintiff.

This was an appeal from settlement of the auditor-general and State treasurer of State tax against the defendant on capital stock for the year 1890. By agreement, the case was tried without a jury, before SIMONTON, P. J.

It was found as a fact by the Court that the defendant held as a part of its capital stock shares in certain Pennsylvania corporations amounting in value to $1,674,981.45. That these shares had all been returned by the corporations issuing them for the year covered by the settlement, and the tax on them paid to the State. As matter of law the Court held that defendant was not exempt from tax upon that portion of its capital which was represented by these shares, and entered judgment for the Commonwealth accordingly.

Defendant appealed, assigning this conclusion of the Court as error.

M. E. Olmsted, for appellant.

It is conceded that beginning in 1844, the Legislature imposed double taxation. But that

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law was done away with, and the cases arising under it rendered of no weight, by—

Act January 3, 1868, P. L. 1318.
Act May 1, 1868, P. L. 108.

The subsequent revenue acts expressly exclude double taxation. See first sections of—

Act June 1, 1889, P. L. 420.
Act June 8, 1891, P. L. 229.
Commonwealth *v.* Standard Oil Co., 101 Pa. 119.
Commonwealth *v.* Mining Co., 5 Pa. C. C. R. 90.
Fox's Appeal, 112 Pa. 337.
Fidelity Co. *v.* Loughlin, 139 Id. 612.
Penna. Co., etc. *v.* Commonwealth, 22 WEEKLY NOTES, 340.
Commonwealth *v.* Penna. Co., 145 Pa. 266.
Com'th *v.* William Cramp & Co., Dauphin C. P. Sept. T. '93, 263.
Commonwealth *v.* Fall Brook Coal Co., 156 Pa. 488.

W. U. Hensel, attorney-general, (*James A. Stranahan*, deputy attorney-general, with him), for appellee.

The Act of 1868, while relieving *individual* holders of corporate stock on which tax had been paid did not relieve corporations.

Penna. Co., etc. *v.* Commonwealth, 22 WEEKLY NOTES, 340.
Fidelity Co. *v.* Loughlin, 139 Pa. 612.

This position is strengthened by the Revenue Act of 1891, which subjects to taxation in the case of a corporation "its WHOLE CAPITAL STOCK of all kinds."

Act of June 8, 1891, sec. 21, P. L. 233.
Commonwealth *v.* Westinghouse Electric Co., 151 Pa. 265.
Commonwealth *v.* Westinghouse Air Brake Co., Id. 276.

July 11, 1894. WILLIAMS, J. This case raises but one question. It is whether shares of stock on which a State tax has been paid by the corporation issuing them are liable to be again taxed in the hands of the holder? This question was decided in Commonwealth *v.* Fall Brook Coal Company, 156 Pa. 488, which was before this Court just one year ago.

It is fair to the learned Judge of the Court below, however, to say that the judgment now appealed from was entered before the decision of that case was announced. But the question now before us is no longer an open one. It was discussed at some length in Commonwealth *v.* Fall Brook Coal Company, *supra*, and the opinion filed in that case is referred to as expressing the views of the Court upon the general subject.

We shall add to what was then said but two observations, and we shall do this as briefly as possible. The first of these is that the question presented in this case was anticipated and answered by the Act of 1868, in the most explicit manner. That Act declares that the shares of stock held by any stockholder in any corporation that, in its corporate capacity, pays the tax on capital stock imposed by the State, shall not be liable to taxation in the hands of such stockholder for either State or local purposes. It is not easy to see how any possible doubt could exist as to the meaning of this clear and positive provision. But the law-makers evidently did not mean to be misunderstood or misinterpreted, for in the very next sentence they proceeded to repeal unconditionally so much of the Act of 1844 as imposed taxation upon a stockholder as such, and provided the machinery for its assessment and collection.

Here we have, (a) the legislative judgment that capital stock and the shares or parts into which it is divided are practically identical; (b) a recognition of the fact that the tax paid by the corporation on the whole capital stock is paid on behalf of each and every holder of its several parts or shares; (c) a positive declaration that when the tax is paid by the corporation it shall not be again levied on the shareholders; and (d) a repeal of the Act under which, alone, such assessment against the shareholder could be made.

But the Act of 1889, under which this assessment is made, is no less explicit upon the same subject. It enumerates the subjects of taxation in its first section. Among other kinds of property declared to be taxable are shares of stock in corporations. But there is an express exception made in favor of two classes of corporations. One of these is that known as manufacturing corporations.

The other is made up of those that are assessed with a capital stock tax by the auditor-general, which is paid to the State treasurer by the corporation.

Shares of stock in any corporation belonging to either of these classes are not to be charged with taxes in the hands of the holders because, as to the first class, the stock is not taxable for any purpose, and as to the second class, the tax is paid by the corporation as such in bulk.

Under the law as declared by these statutes there can be no room for serious contention over the position of capital stock and shares of stock. Capital invested in corporate stocks, like capital invested in bonds, mortgages, municipal loans and the like should pay taxes once. Whether these are paid by the holders of the stock for their respective interest, or by the corporation itself as the agent and representative of all its shareholders is of no possible consequence to the owners of the property.

It is more convenient for the State to keep its accounts with the corporations, and to collect its taxes on corporate property from the officers

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of the corporation and in a lump, than to collect it in small sums from many shareholders. The State adjusts her machinery of taxation to this method of dealing with her corporations, and relieves the separate holders of stock from liability for this reason. She says in substance to the shareholders "You are many, but the artificial person you have created to represent you is one. We will deal with the common fund in the name of its legal holder, the corporation, and we will not deal with you as separate holders of distinct parts of it."

Now it makes no difference who is the shareholder. He may be a natural person holding in his own right, or as a trustee for others. The shares may be held by a firm, a limited partnership, or a corporation. In each case, however, the person, firm or corporation that holds shares of stock on which the capital stock tax has been paid is within the spirit and the letter of the protection given to individual holders by the Acts of 1868 and 1889 and the shares held by them are not taxable in their hands. There is no escape, therefore, from the conclusion that the judgment rendered in this case is in the very teeth of our tax laws, and we can say no less of it than was said of the judgment of the Court below in Commonwealth *v.* Fall Brook Coal Company: "The judgment in this case cannot be sustained upon any decision of this Court, upon the provisions of the statute under which the tax is assessed, nor upon principle, and it is now reversed."

But we are reminded by the learned attorney-general that even if the fact be that the taxation insisted on in this case would be double taxation, yet the Legislature has power to impose it.

This is a general proposition we do not question; on the other hand it has been asserted by this Court on many occasions. What we do say, however, is that the law will not presume an intention to exercise this power, but such intention must appear affirmatively. Fidelity Company *v.* Laughlin, 139 Pa. 612. The presumption is against the existence of an intention to impose double taxation or any other unjust burden, and that presumption will prevail until it is overcome by express words showing the contrary. Commonwealth *v.* Fall Brook Company, *supra.*

When such intention is made to appear, the double taxation provided must be such as will meet the uniformity test provided by the Constitution, or the Courts will still refuse to enforce it. But in this case we have the legal presumption which standing by itself would be enough; and then we have express words, not rebutting the presumption, but affirming it, and putting it into the form of a legislative declaration of intention not to exercise its power of double taxation but to select one of the two sources from which the tax might be drawn, and distinctly relieve the other.

The suggestion is also made in this case that it is not double taxation to assess the capital stock tax against the corporation and then assess the shares of the several holders of the same stock against them separately. This question has several times been fully considered by this Court, and very recently in the Fall Brook Company case. In that case we said that a corporation came into the world like a natural person, naked. The persons who join to create it, and whom it is to represent in the business proposed, put into its treasury the several sums they had agreed with each other to contribute to its capital stock, and take a certificate of that fact therefor. These certificates afford evidence for the persons to whom they are issued that they have severally subscribed and paid for, certain shares in the venture or business to be undertaken by the corporation. The effect of this is that the money subscribed by those who organized the corporation is brought together in the treasury ready for use, while the subscribers have their certificates to show what each one has paid, and what his relative interest is in the venture and its profits. The money in the treasury is the common stock or capital to be employed. The certificates in the hands of those who paid the money are evidence of the amount of their shares of the stock. The corporation then puts the money into coal lands, cars, canal boats, mining machinery, wages of employés, and other necessary expenses. The property of the corporation consists of many items, and is often widely scattered. How shall this property be valued for the purposes of taxation? The law provides that instead of making use of an extended inventory of assets and estimating the value of each article thereon separately, the property shall be deemed worth for purposes of taxation just what it is apparently worth for business purposes, and so adjusts its value by a statement which the corporation is required to submit annually for this purpose.

Upon this statement the auditor-general fixes the actual cash value of the stock of the corporation at just what the items in the statement show its property to be worth. The capital stock tax is then assessed upon the valuation so made and the corporation as such is required to pay it to the State treasurer. These certificates of stock held by the respective stockholders represent the several interests of each holder. The capital stock comprehends the interest of all the stockholders. When the corporation as the legal owner of the property held in its name, and as the representative and trustee of the equitable owners pays the tax on all the stock in a single

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lump, this total is the exact equivalent of the aggregate of the several sums due upon the separate shares into which the stock is divided. Such payment discharges the claim of the State upon each and all of the shares into which the capital stock may have been divided, for the very obvious reason that the whole includes the parts of which it is composed.

But it seems to be thought that we have overlooked a proviso to be found in the Act of 1868 that is entitled to weight in the determination of this case.

Immediately following the provision in that Act which has been already commented upon, and which declares that shares of stock shall not be taxed in the hands of the separate holders where the corporation has paid the tax on capital stock, is a proviso which forbids any construction of the Act itself that shall extend the relief given to shareholders, to the corporation as such. This proviso imposes no burden on the corporation, lays down no rule for fixing the value of its capital stock, but leaves the subject of taxation just where it was before the Act of 1868 was passed. The body of the section in which the proviso occurs declares in effect that the stock shall be taxed but once; and when the tax has been charged against the corporation upon the aggregate of all its shares it shall not be again charged against the parts into which it is divided in the hands of their respective owners. The proviso then adds in substance by way of explanation that the section must not be extended by judicial construction beyond the plain meaning of its words. The State might properly assess the stock to the corporation in bulk or to the holders in detail, but the section and the proviso together to deal with it in the hands of the corporation and not in the hands of the shareholders. We see nothing in this that sheds the faintest glimmer of light on the point in controversy.

Equally unsatisfactory is the citation made by the learned Judge of the Court below from the Act of 1891, section 21, P. L. 238, passed two years after this tax was assessed and the argument built upon it. We quote from the opinion as we find it in the paper books, the following passage: "And as if in view of this recent claim (the claim that shares of stock in a corporation that has paid its capital stock tax shall not be again taxed in the hands of the separate holders) and to effectually exclude it, the Act of June 8, 1891, section 21, enacts that every corporation liable to the tax on capital stock shall be subject to and pay into the treasury of the Commonwealth annually a tax at the rate of five mills upon each dollar of the actual value of the whole capital stock of all kinds, and this is repeated in the Act of June 8, 1893."

The learned Judge emphasizes the words "the whole capital stock," and argues that the meaning of the law makers was that no deductions should be made from the whole amount of the appraised value, because of the character of the property in which any part of such capital was invested or for any other reason. But the learned Judge must have quoted from memory and could not have had the Act of 1891 before him.

The passage which he quotes stands in the statute thus "shall be subject to and pay into the treasury of the Commonwealth annually a tax at the rate of five mills upon each dollar of the actual value of its whole capital stock of all kinds, including common, special and preferred, as ascertained in the manner prescribed in said 20th section."

The word whole was used by the Legislature for the purpose of excluding all doubt about the taxability of the various kinds or classes into which the stock might be divided and with no reference to the character of the investment in which the capital might be employed. No other reply to the argument built on the fragment of a sentence taken from the Act of 1891 need be made, or will be made, than simply to place the entire sentence together, and leave it as the Legislature left it, to tell its own meaning.

The Legislature has never attempted to tax all the property in which the stock of a corporation or the capital of a private person was invested. It is well settled by the decisions of the Supreme Court of the United States as well as of this Court that when the total appraised value of the property of a corporation and the consequent value of its capital stock has been made, so much of this sum as represents investments in United States bonds or in patent rights must be deducted before the taxes are assessed.

In addition to these deductions so much of the capital stock as may be invested in manufacturing corporations should be deducted, for the shares in such corporations are not subject to State tax; and finally, so much as may be invested in shares of stock in corporations that have been assessed with, and paid, the tax on capital stock should be taken out, and the sum so arrived at will represent the total value of the whole capital stock for the purposes of State taxation.

As the taxes due from the defendant under our construction of its liability have been paid, and the item still unpaid is one for which the defendant is not liable, we can dispose finally of this case at this time. The judgment in favor of the Commonwealth is reversed, and judgment is now entered in favor of the defendant with costs of suit.

J. D. B., Jr.

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Jan. '93, 350. February 26, 1894.

Fulton v. County of Lancaster.

Juries judges of fact and the credibility of witnesses—Contracts by county officials.

Where the Court has carefully and clearly instructed the jury, calling their attention to the conflict of testimony and their duty under the circumstances, the finding of the jury must stand, as they are the judges of the fact and the credibility of the witnesses.

The salary of a county official covers all his services to the county, and he cannot, therefore, make a binding contract with the county entitling him to receive extra compensation for specified services.

A county solicitor cannot recover for services rendered upon a contract made with the county commissioners during his term of service.

A binding contract may be made by a county with one who has recently been an official, although the subject of the contract be the accomplishment of something which the latter has unsuccessfully attempted to accomplish during his term of office, and the terms of the contract are similar to or identical with those of a void contract made during his incumbency of office; his compensation, however, must be limited to services rendered in pursuance of the new contract, and so far as it is sought to recover for services rendered while in office the plaintiff must fail.

Appeal of the County of Lancaster, defendant, from the judgment of the Common Pleas of Berks County, in an action of assumpsit by Hugh R. Fulton, to recover for services rendered.

The facts of this case are fully stated in the charge of the Court, ENDLICH, J., as follows:—

"There is no dispute about the facts, that on June 28, 1882, the plaintiff was directed by the commissioners of Lancaster County to take proceedings for obtaining from the Commonwealth a credit in favor of the County of Lancaster for overpaid taxes, and that at that time they promised to pay him for his services, in event of success, a percentage upon the amount of the credit recovered. Neither is there any dispute about the facts that the plaintiff did institute such proceedings; that during the succeeding years of 1883, '84, '85, '86, and first half of '87, the plaintiff, with the knowledge and consent of the commissioners of Lancaster County, rendered services in pushing the County's claim for such credit; that the result was the obtaining of a credit in 1884 of $2,560, and in 1887 of $20,823.50; that upon the former credit the plaintiff has received a payment equal to twenty-five per cent. thereof, and that upon the latter credit he has received no percentage. The main questions before you in this trial now are, whether or not the plaintiff is entitled to any compensation for the services he has rendered subsequently to the first Monday of January, 1883, in the procurement of the $20,823.50 credit; and if so, what sum in dollars and cents will reasonably compensate him for those services. Now, gentlemen, we will look at these questions in their order.

"First. Is the plaintiff entitled to claim compensation for his services after the first Monday of January, 1883?

"In 1882, the plaintiff was the solicitor to the Board of Commissioners of Lancaster County. To that office the law affixes a certain salary, which is in full of all the services incident to the duties of the office. It follows, that by no contract between himself and the Board, made during the time he holds that office, can the county solicitor become entitled to any compensation for such services above or in addition to the salary given him by law. Such a contract is not only void, but it is illegal. It is not only of no force whatever during the continuance of the solicitor's term of office, but it cannot be made effective, ratified, or renewed after the expiration of that term. So you see that if the plaintiff's claim in this case arises out of the contract made on June 28, 1882, or out of any subsequent attempt to renew or ratify that contract, then he cannot be permitted to recover one cent, no matter how much work he did, no matter how valuable his services were to the County of Lancaster, and no matter how much the County of Lancaster gained by them. In this connection, I affirm the first point submitted by the defendant: 'The contract of June 28, 1882, given in evidence, was contrary to public policy and void, and there can be no recovery by the plaintiff in this action for services rendered under or in pursuance of said contract, whether said services were rendered while the plaintiff held the office of solicitor of Lancaster County, or after the expiration of his term of office.' That is a correct statement of the law, and is affirmed; but, gentlemen, the plaintiff in this action professes not to claim under the contract of June 28, 1882, or under any renewal or ratification of that contract. He says that subsequently to the expiration of his term of office as county solicitor, some time after the first Monday of January, 1883, the commissioners of Lancaster County made an altogether new and distinct contract with him, by virtue of which he received from them a new employment to collect these overpaid taxes for the County, and a new promise of reward in case of success. Now, if that is true, gentlemen, then, since the plaintiff, after the first Monday of January, 1883, was no longer solicitor of Lancaster County, and therefore was no longer under any disability to make such a contract, he is entitled to recover in this action whatever his services rendered under this new contract are fairly

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worth, together with interest from the time when that amount was due and payable to him—that is, the date when the $20,823.50 credit was finally allowed—June 18, 1887. Nor is it necessary, gentlemen, that such a contract should be in writing, if its existence and terms by word of mouth are shown.

"In this connection I read you two points submitted by the plaintiff: 'If the jury believe, from the evidence, that by reason of any contract or agreement entered into between the plaintiff and the County Commissioners, after the first Monday of January, 1883, he undertook with their knowledge, approval and consent the collection of a claim of the County of Lancaster against the Commonwealth, and by his labors rendered subsequently to that date, secured the collection of said claim, the verdict must be for the plaintiff for such amount as the jury believe from the evidence his services were worth to the County of Lancaster, with interest from June 20, 1887.' 'If the jury believe that, after the expiration of the plaintiff's term of office as solicitor for the County of Lancaster, a new agreement was entered into between him and the County Commissioners, and that the services rendered by him for which he seeks compensation were rendered exclusively under the new agreement, the verdict of the jury must be in his favor for such a sum as under the evidence will properly compensate him for such service, with interest from June 20, 1887.' These points are affirmed.

"So you see, gentlemen, that the first inquiry you will have to make is this: Was there, or was there not, a new contract made between the plaintiff and the commissioners of Lancaster County for these services, after the first Monday of January, 1883? On this inquiry you will bear in mind all the evidence that has been adduced on the one side to support it, and on the other to deny it. I am not going to rehearse the evidence to you. It is for you to remember it, and to say what effect is to be given to each part of it. I shall simply give to you the rules of law which you are to apply in considering that evidence, and to the facts as you shall find them under it.

"Gentlemen, the burden of proving that there was a contract between the plaintiff and defendant after the first Monday of January, 1883, lies upon the plaintiff. An express contract in writing relating to the same subject-matter, made between the same parties, for the same purposes and embodying substantially the same terms being shown to have been made on June 28, 1882, and proceedings for the collection of these overpaid taxes being shown to have been begun by the plaintiff under that contract, the presumption arises that whatever was done in the premises down to the time of final collection was done under that contract—or in other words that that contract continued to be the basis of the relations between the parties unless and until it is shown that it was abandoned by both parties, or that it was abrogated and supplanted by a new contract, which was understood and intended by both parties to be the beginning of a new relation between them. Now, gentlemen, the only direct evidence that I remember that such a transaction did take place between the plaintiff and defendant in this case, is the evidence of the plaintiff himself. You will remember what he testified to as having occurred on June 13, 1883, in the County Commissioners' office at Lancaster, and you will remember his declarations that the contract of June 28, 1882, was dropped, and all further steps under it terminated after the resolution of the Board of Revenue Commissioners of the 23d of November, 1882, refusing to allow the claim of Lancaster County, and that everything done subsequently by him was done under a new arrangement with the commissioners. You will remember all that testimony, and give it such weight as you think it deserves. You have a perfect right to consider as bearing upon the credibility of the witness, his manifest interest in the event of this suit; his testimony upon a previous trial, in so far as it has been brought out in this case; his own acts consistent or inconsistent with the assumption of a new contract made after 1882; the substantial identity between the terms of the old and the alleged new contract; and you will consider all this in connection with whatever evidence there is on the part of the plaintiff bearing upon this point, and you will also consider in the same connection and compare with that the testimony of the defendants adduced to disprove this, and give it such weight as you think it deserves. It is your duty, I may say here, to reconcile all the evidence on both sides, if you can. If you cannot reconcile it you will have to determine which of two contradictory stories you will believe. And you will remember that you cannot find in favor of the plaintiff unless you are satisfied by fair preponderance of the whole evidence, that subsequently to the first Monday of January, 1883, there was a distinct agreement between the plaintiff and the commissioners of Lancaster County, so understood by both parties, that from thenceforth the plaintiff should proceed in the collection of this claim under a new employment, and a new promise of compensation. That agreement must, moreover, have been made with the Board of County Commissioners acting as a board, and not rest upon mere conversation with one or two, or even all of them at various times. If what was agreed between

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these people constituted only a renewal of the old contract of June 28, 1882; if it was intended only to ratify and give new life to that old contract, or to modify it by the addition of other counsel; if the parties understood that the plaintiff was still acting under the old employment, and that what happened on June 13, 1883, was simply a reiteration of the old contract, then, I charge you, there can be no recovery, and your verdict must be for the defendant.

"Second. I now come to the second question, which, as I said before, can only arise if you decide the first question in favor of the plaintiff —I refer to the question of compensation. You will remember that the plaintiff's testimony is that the defendant promised him twenty-five per cent. of whatever credit he should secure. Even if you believe that testimony, that amount, though it is some evidence of the value of his services, is not binding upon you. The question here is one of compensation, not of commissions. The plaintiff sues here for what his services are fairly worth; and that, whether it be more or less than twenty-five per cent., he is entitled to recover, if he is entitled to recover anything. In this connection, as to the value of the services, you will remember the evidence as to what was done by the plaintiff throughout this period of years beginning after the first Monday of January, 1883, and you will bear in mind the nature of the claim. You have also heard the evidence of the plaintiff's witnesses as to the value of services such as plaintiff claims to have rendered. That testimony was, as you remember, based upon a hypothetical question, embracing what the plaintiff's counsel deemed to be material elements of those services as shown by the evidence. It is for you to say whether that question as propounded to the witnesses really presented a correct description of what those services actually were, under the facts as you shall find them; and accordingly as you determine that question, as well as according to your estimate of the credibility and experience of the several witnesses called as experts as to those services, you will judge of the weight, effect and value of their testimony on this point. I may say you ought not to disregard this evidence, but give it all due and fair consideration. But you are not bound by any estimate made by any witness. You must decide upon the facts under the whole evidence, and under all the circumstances of the case, upon your own responsibility. In connection with this question of the value of the services, I want to say that the plaintiff makes no claim, and, of course, cannot recover for any services rendered before the first Monday of January, 1883. For whatever services he performed in 1882 he was paid by his salary as county solicitor. And, if it is true, as claimed by the defendant, that the bulk of the work, or any part of the work, in the proceedings to obtain this credit was done by the plaintiff during 1882, so that, under the new contract (if there was any,) he had the benefit of work he had been paid for doing—then that circumstance may be considered by the jury as bearing upon the quantity and value of the services for which this suit is brought. You will also remember that for the obtaining of the first credit of $2,560, the plaintiff has received payment, and is making no claim; but that this claim here is for obtaining only of the second credit of $20,-823.50.

"Now, gentlemen, I think I have said everything to you that I need to say. I will repeat that the questions for your determination are:

"First. Has the plaintiff shown that in 1883 a new contract was made between these parties, which they intended to be the basis of all future services and compensation? If he has not shown so, you will return your verdict for defendant. If he has, and only then, you will inquire:

"Second. What sum fairly represents the value of plaintiff's services, rendered after 1882, in obtaining the credit of $20,823.50? To that sum you will then calculate and add interest from June 18, 1887, and for the aggregate return your verdict for plaintiff."

Verdict was rendered in favor of plaintiff for $6,923 56.

A motion for judgment *non obstante veredicto* was overruled, and this appeal was then taken.

Cyrus G. Derr and *Hugh M. North* (with whom were *George A. Lane*, *E. K. Martin* and *George F. Baer*), for appellants.

There was no testimony in the case of any contract other than the void one of June 28, 1882. What the plaintiff in his testimony designates as a new contract of June 13, 1883, was, if the testimony be believed, nothing more than an incidental iteration of the terms of the void contract.

W. U. Hensel and *J. Hay Brown* (with whom were *Ermentrout & Ruhl*), for appellee.

The jury found there was a new contract; that it was not a reiteration or modification of the old one; and the Court having reserved this point, reviewed the evidence at its leisure, and after full argument and consideration of the whole case, entered judgment upon the verdict in an elaborate opinion.

The Court cannot draw conclusions of fact from the evidence.

Commonwealth *v.* McDowell, 86 Pa. 377.

"In a common law action every disputed fact must be determined by a jury, and not by the Judge."

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Wilson *v.* Steamboat Tuscarora, 25 Pa. 317.

It is error after submitting a particular fact in a cause to a jury, and after the fact has been found by them, to enter judgment *non obstante veredicto* for the party against whom it was found, on the ground that the evidence was insufficient to establish it.

The North American Oil Co. *v.* Forsyth Bros., 48 Pa. 291.

Where there is evidence justifying an inference of a disputed fact it must be submitted to the jury.

Reno *v.* Moss, 120 Pa. 49.
Patterson *v.* Dushane, 115 Id. 334.
School Furniture Co. *v.* School District, 122 Id. 501.
Howard Express Co. *v.* Wile, 64 Id. 201.

The credibility of conflicting testimony is wholly a matter for the jury, who may believe where even a Judge would reject the testimony of a witness.

Terrerri *v.* Jutte, 159 Pa. 244.
Reno *v.* Moss, 120 Id. 49.
Patterson *v.* Dushane, 115 Id. 334.
Wilson *v.* Steamboat Tuscarora, 25 Id. 318.
Graham & Watterman on New Trials, Vol. 3, 1239.

July 11, 1894. GREEN, J. As this case is now presented, and as it was submitted by the learned Court below, it exhibits but a single question of pure fact. The plaintiff alleges and positively testifies that on June 13, 1883, and several months after his relation as county solicitor had ceased, he made a new contract with the County Commissioners for the rendition of his services in the prosecution of the claim of the defendant for the collection of overpaid taxes. He describes in his testimony what took place at that time. He said, "I stated to the Board of County Commissioners—there was a full board in session, Myers, Summy and Hildebrand; Myers was president of the board; I stated to them that my efforts before the Board of Revenue Commissioners of the Commonwealth, and before the Board of Public Accounts had not been successful; I stated that I had endeavored to have a law passed authorizing suits against the Commonwealth by counties to recover this money, and endeavored to have a bill passed authorizing the Board of Public Accounts to give credit settlements in cases like ours, but I had failed. I then told them that I desired to take in associate counsel; I told them that if they would agree to it, I would associate Mr. Hensel with me in the prosecution of the claim against the Commonwealth. They were favorable to the proposition, and asked upon what terms the services of Mr. Hensel could be procured. I said to them, 'You pay me twenty-five per cent. of the amount collected from the Commonwealth and I will compensate Mr. Hensel; this is to be in full for all costs and expenses, as well as all fees; this if we recovered, and we would make no charge if nothing was recovered. Q. What, if anything, did they or any of them say to you in response to that proposition? A. They agreed to do it, and authorized me to go ahead and engage Mr. Hensel, and that I should have twenty-five per cent. of the amount collected, and I should compensate Mr. Hensel and pay all costs and expenses."

It seems that the principal services performed by the plaintiff were rendered after this time, and that they were successful. The learned Judge of the Court below very carefully instructed the jury that there could be no recovery upon the contract made on June 28, 1882, because of the plaintiff's relation as county solicitor at that time. And he also, most cautiously and clearly, instructed them that there could be no recovery except upon a contract made after January, 1883, and only for services rendered in pursuance of such contract. He called the attention of the jury to the conflict of testimony upon this important subject, and correctly instructed them as to their duties in such a state of the evidence. It is impossible for us to say that there was any error in all this. The testimony of the plaintiff was direct, positive, explicit, minute and emphatic. The Court could not possibly withdraw it from the jury, but was bound to submit it to them. This was done in a perfectly fair and impartial manner, of which no complaint has been, or could be, made. The jury has found for the plaintiff, and has thereby declared their belief in his testimony, as they had a perfect right to do. They are the sole judges of the credibility of witnesses, as we have said very many times, and it is not in our power to defeat their verdict upon any theory that they should have believed differently. The very elaborate and exhaustive opinion of the learned Court below on the rules for a new trial and to enter judgment for defendant, *non obstante veredicto*, is a perfect vindication of the action of the Court on the trial, and is a satisfactory exposition of the case on its merits of law and fact. We discover no error in any of the assignments, and must therefore affirm the judgment.

Judgment affirmed. W. C. S.

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Orphans' Court.

Oct. 1886, 587.

Lafferty's Estate.

O. C.—Jurisdiction—Injunction—Act of May 19, 1874.

The Orphans' Court has the power to prevent by injunction, either a repetition of acts prejudicial to property within the control of the Court, or the commission of threatened acts and conduct to the injury and damage of such property.

Sur motion to dissolve injunction.

The essential facts are stated in the opinion.

J. Willis Martin, for the motion.

George L. Crawford, and *Samuel Gustine Thompson*, contra.

May 31, 1894. HANNA, P. J. The injunction asked for and granted in this case is based upon the provisions of the Act of May 19, 1874, § 7, P. L. 207. The Act confers upon the Court "power to prevent, by order in the nature of writs of injunction, acts contrary to law or equity, prejudicial to property over which they shall have jurisdiction."

It will thus be observed, the jurisdiction conferred is to be exercised as a preventive of either a repetition of acts prejudicial to property within the control of the Court, or the commission of threatened acts and conduct to the injury and damage of such property. The power and authority conferred is both a wise and salutary exercise of jurisdiction. But this strong arm of the Court should not be extended except upon good and sufficient reasons; and the power and authority of an executor or testamentary trustee, confided to him by his testator, should not be withheld from him, nor interfered with, except upon satisfactory proofs of such actual misconduct, or threatened misconduct, as will render the property and estate in his charge and custody likely to suffer loss and be jeopardized by its further continuance under his control and management. When such facts be made to appear, the Court will be alert to protect the interests of all parties to the full extent of its authority. In the case before us, the alleged misconduct of the executrix is that, with the assistance and connivance of one of her co-executors, she has used moneys of the estate for her own private purposes, by appropriating them towards carrying on a business enterprise with him as a co-partner. But this she most emphatically denies. And, without passing upon the question of partnership in this preliminary proceeding, which, from the contradictory statements in the numerous affidavits presented, is not of easy solution, it will suffice to say that, if moneys of the estate were thus misappropriated, it has not yet been made to appear that it was with the knowledge and consent of the executrix; and that it was done with her knowledge or approval is also denied by her with equal emphasis and positiveness.

Nor does it appear that the executrix has threatened or declared her intention to use, or in any manner appropriate for any purpose whatever wrongfully, the property of the estate.

But, on the contrary, it does appear she is actually powerless so to do, even if she entertained or expressed such intention. The estate consists largely of real estate, its income is not received by her, and the personal securities and investments are not in her sole custody or control. We therefore fail to discover any reason to anticipate any failure of duty on the part of the executrix, or to restrain her from further performance of her functions as executrix and trustee.

What is here said, however, has no application to the proceeding now pending and yet undetermined to remove her and her co-executor.

The motion to dissolve the order in the nature of a writ of an injunction against said Rose E. Lafferty is therefore granted. And her co-executor and petitioner, Charles H. Lafferty, being entitled to inspect at all proper times the books, vouchers and papers relating to the estate now in her possession or that of her co-executor, Patrick J. Corcoran, we think they should be deposited where they will be equally accessible to him. If such place cannot be agreed upon, upon application we will designate the depository. F. B. N.

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WEEKLY NOTES OF CASES.

VOL. XXXV.] *FRIDAY, OCT. 26, 1894.* [No. 7.

Supreme Court.

Jan. '94, 495. April 27, 1894.

County of Crawford v. Merchants' National Bank.

Banks and Banking—Deposit of one person in name of another—Payment—Set-off—Assignees for benefit of creditors—Equity jurisdiction.

Where money of a county is deposited by its treasurer in his own account in bank, but is known by the banker to be county funds, and the banker has become possessed of county warrants, his claim upon said warrants is subject to be set-off by the amount of the deposit of county funds in his hands, and they will be regarded as paid if the amount of deposit exceeds the amount of the warrant; this rule will apply as against the banker's assignee for benefit of creditors.

The fact that the treasurer was from time to time accustomed to give at convenient intervals his checks for the amount of warrants held by the banker, does not alter the rule and prevent the deposit of money from constituting payment in the case of a failure by the banker at a time when the money on deposit exceeded the amount of the warrants and no check had been given for their amount.

[STERRETT, C. J., and MITCHELL, J., dissented].

Where it is sought to compel the surrender of county warrants, to discover their custody and the equities, if any, attached to them and to determine the character of a fund, alleged to be composed in part of trust money, the proper proceeding is by bill in equity.

Where, in a proceeding in equity by a county to recover possession of certain warrants, it appears that its treasurer is also interested, and that for the proper determination of the suit the assignees for the benefit of creditors of the depositaries of a fund claimed by the county to have in effect paid the warrants, are necessary parties, the treasurer may be added as a plaintiff and the assignees as defendants.

Appeal of Geo. W. Haskins and John O. McClintock, assignees of Delamater & Co., bankers, from the decree of the Common Pleas of Crawford County, sitting in equity, amending the record by making H. M. Miller, county treasurer, party complainant, and the appellants parties respondent, and in overruling and dismissing appellants' exceptions to, and confirming the master's reports in a suit in equity brought by the County of Crawford against the Merchants' National Bank of Meadville. The bill in this case, filed December 13, 1890, by the County of Crawford, against the Merchants' National Bank of Meadville, set out that for a year past H. M. Miller had been treasurer of the County of Crawford and Geo. B. Delamater and George W. Delamater, (who, with T. S. Delamater, composed the banking firm of Delamater & Co.,) were his sureties on his official bond; that on December 5, 1890, the firm of Delamater made an assignment for the benefit of creditors, at which time it had on deposit county funds to the credit of said treasurer to the amount of about $58,000; that Delamater & Co. had from time to time paid orders drawn by plaintiff on the county treasurer, out of county funds, on deposit with them, and instead of surrendering the orders for cancellation, took of said orders so paid by county funds, $19,000, and pledged the same with the defendant as security for loans made to Delamater & Co., which loans were further amply secured by judgments given before the date of the assignment by the members of the firm, and binding the real estate of the said members; that the president of the bank defendant, when he took the orders knew that Delamater & Co. were the depositaries of the county funds and that the orders had been paid out of county funds in their hands; that in addition to the said sum of $19,000 there were outstanding other county orders and neither the plaintiff nor the treasurer had any means of knowing what particular orders had been pledged to and were held by the defendant, or any means of preventing said orders from being transferred by delivery and again presented to the treasurer for payment; that the defendant had refused to give information as to said orders; the bill prayed discovery as to county orders received from Delamater & Co., and to the number, date, amount and name of payee of each of said orders, as to the amount and which orders were still held by the defendant, and how, and for what purpose, and when, those still held were received, and a decree that the orders be surrendered; that the president of the defendant be required to furnish a schedule of all the county orders held by the defendant; that an injunction issue restraining the defendants from transferring, passing or delivering any county orders held by or for the defendant.

The answer set up the following defence:

"That said Delamater & Co. did, from time to time, purchase county orders from the holders thereof, and pay therefor out of the general funds of said bank, and said orders, so purchased, became and were the property of said bank. Of said orders so by them purchased and owned, they pledged to said Merchants' National Bank $19,125.67 to secure the payment of two loans made to them by said Merchants' National Bank, for $9,137.97 and $10,000 re

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spectively, prior to the assignment of said Delamater & Co., for which said loans they also took notes of Delamater & Co. and G. B. Delamater, upon which said notes judgments have been entered. Whether said judgments afford ample security for the payment of said loans, we do not know, and neither admit nor deny, but deny that it is either relevant or material in this cause. And we further aver that whatever amount of said county orders, if any, as may not be required to pay the loans for which they are held, belong to the creditors of Delamater & Co., and by the assignment of said firm, passed to their assignees, for the benefit of said creditors; said orders so as aforesaid purchased by Delamater & Co., and by them pledged to said Merchants' National Bank, were not paid or redeemed for the County of Crawford, or the county treasurer, nor were they paid for out of county funds, nor had they been charged up to the county treasurer's account in said bank; they had not been presented to the county treasurer for payment, but were paid for out of the funds of the bank of Delamater & Co., placed therein by the general depositors of said bank."

The defendants accompanied their answer with two schedules of county orders received by them from Delamater & Co., and it appeared that the warrants were drawn on the "Treasurer of Crawford County."

The case was referred to H. J. Humes, Esq., as master, who after discussing the evidence came to the following conclusion in his report:

"The master therefore has no hesitation in determining that these warrants should be returned to the county for cancellation. But all the warrants came lawfully into the hands or possession of the Merchants' National Bank as collateral security. Therefore, while the Merchants' National Bank is the absolute owner of these warrants, for the purpose of securing the payment of the debts for which they were received as collateral, Delamater & Co., bankers, and their assignees also have an interest therein, and should the two loans for which they were given as collateral be paid from other sources, then these warrants must be returned to Delamater & Co., bankers, or their assignees. I think this suit was properly and wisely brought, but when the defendants' answer was filed the information given in the eighth paragraph and in schedules 'A' and 'B,' was such as to require the amendment of plaintiffs' bill by adding the name of Henry M. Miller, county treasurer, as a party plaintiff, and Delamater & Co., bankers, and George W. Haskins and John O. McClintock, assignees, as parties defendant. Then the whole question between the County of Crawford and Delamater & Co., bankers, arising out of the fact that the bank was depositee of the funds of the county treasurer and what the legal duty of the bank was concerning these county warrants, could have been determined.

"The claims of Delamater & Co., bankers, to these warrants cannot be determined in this suit, and the conclusion of the master that county warrants No. 10, No. 11, No. 32, No. 36 and No. 1554 is founded on the evidence before him, but Delamater & Co., bankers, not having been heard, and it being the legal duty of the defendants to either call its collateral by law or return it to its assignor, the master is of the opinion that the parties should be left to their remedies at law. Yet to prevent a multiplicity of suits the Court might restrain the defendants from disposing of these county orders to any one except to return them to the assignees of Delamater & Co., bankers, after the purposes for which they were transferred to defendants shall have been accomplished. But this being the defendants' legal duty the master cannot recommend such an order. The master therefore recommends that the bill be dismissed, at plaintiffs' cost, without prejudice."

Exceptions were filed, but before argument thereon was heard by the Court Henry M. Miller, the county treasurer mentioned in the bill, presented a petition to intervene *pro interesse suo*, and that the assignees of Delamater & Co. be made parties defendant, alleging, *inter alia*:

1st. That during his term as county treasurer, aforesaid, there was to his credit as such a large sum of money, viz: The sum of $20,000 as an average daily deposit in said Delamater & Co.'s bank, and at the time of the failure of said bank, there was a balance due him as said county treasurer, of $58,000 or thereabouts, which were the funds of said County of Crawford.

2nd. That at the time of the failure of said Delamater & Co., there were orders or warrants, drawn by said county, upon petitioner, as county treasurer aforesaid. Among others, the warrants mentioned in schedule "A" of defendant's answer hereto, amounting to $9,137.97, and of schedule "B" amounting to $9,987.70, many of which were taken in charge of and redeemed by this petitioner, as said county treasurer, and all of which were paid for and redeemed by the said Delamater & Co.'s bank, by an understanding and arrangement made between petitioner and said Delamater & Co.'s bank.

The answer admitted that during part of the term of said Henry M. Miller as treasurer of said county there was to his credit as county treasurer aforesaid, at different times large sums of money on deposit in said bank of Delamater & Co., bankers, and at the time of the failure of said bank there was a balance due him as said treasurer of about $58,000—but denied that the said sum was the funds of the said County of

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Crawford, and averred that it was the money of Delamater & Co., bankers.

The amendments asked were allowed and the case was sent back to the master, who reported that Delamater & Co. were the agents of the county treasurer in collecting the county orders or warrants, and as it was the treasurer's duty to apply the county funds in his hands to the payment of all outstanding orders or warrants, and as his agents had in their possesssion the funds out of which these orders were to be paid, he had a right to compel them to charge them off and turn them over for cancellation; that the true state of affairs was known by the Merchants' National Bank because it turned over all county orders received from time to time to Delamater & Co. as though they were checks on the Delamater bank; that as between the county treasurer and the county the money deposited with Delamater & Co. was trust funds; that the Merchants' National Bank knew the character of the fund; that the county orders received by Delamater & Co. were taken subject to the rule of set-off, and should have been at once charged off against the county treasurer's account and returned as his checks. The master recommended a decree making perpetual an injunction against the transference of the orders held by the Merchants' National Bank and that the Merchants' National Bank be ordered and directed to return the county orders or warrants mentioned in schedules "A" and "B," of defendants' answer, to Delamater & Co., bankers, (their assignees), and that when so received by the assignees they be charged off against the account of Henry M. Miller, county treasurer, with Delamater & Co., bankers, and then returned to the plaintiffs in this suit for cancellation, and that, when cancelled, the said Henry M. Miller, county treasurer, receive credit therefor, on his account with the County of Crawford, as of the date of settlement of the same by the county auditors in January, 1891.

The defendants' filed exceptions which were dismissed by the Court, and a decree was made as recommended by the master.

The defendants took this appeal, assigning as error, *inter alia*:

(1) That the Court allowed the intervention of Henry M. Miller as plaintiff and the addition of the assignees of Delamater & Co. as defendants.

(4) The decree, directing the surrender of the warrants to the assignees of Delamater & Co., and that said assignees deliver up the said warrants to plaintiff, and that a credit be given to H. M. Miller upon the books of Delamater & Co., upon receipt being given by the county commissioners to the assignees.

(8) In overruling the defendants' eighth exception viz: "The master erred in finding that this case is properly one on the equity side of the Court."

George W. Haskins and *Thomas Roddy*, (*John O. McClintock* with them), for appellant.

A plaintiff cannot introduce by amendment facts which have occurred since the filing of the original bill.

Brightly's Equity, sec. 699.

After witnesses have been examined the Court will not, unless under very special circumstances, or in consequence of some subsequent event, allow the bill to be altered or amended.

Story's Equity Pl., sec. 887.
Brotzmans' Appeal, 119 Pa. 645, 652.

An amendment to the bill, introducing a new cause of action is not admissible. After replication an amendment of the bill can only be made upon affidavit that it is not for delay and that the matter is material and could not with reasonable diligence have been sooner introduced in the bill.

Toomey *v.* Hughes, 25 Weekly Notes, 66.

As the warrants were not negotiable, there is a convenient and adequate remedy for complainants in this case, by defence to an action at law by the holders of these warrants, should they attempt to collect them.

Clark's Appeal, 62 Pa. 447.

And therefore equity has no jurisdiction in this case.

C. W. Tyler and *J. W. Smith*, for appellees.

A county warrant is not a bill, note, check or contract; it is not negotiable; and no action lies upon it; suit must be upon the original claim.

Allison *v.* Juniata County, 50 Pa., 351.
East Union Township *v.* Ryan, 86 Id. 459.
Township of Snyder *v.* Bovaird, 122 Id. 442.

To such a suit by Delamaters' assignees the right of set-off is clear if the treasurer's credit balance in the bank was county funds.

Money deposited in a bank by one person may be shown to be the property of another either by an attaching creditor or by the true owner.

Hemphill *v.* Yerkes, 132 Pa. 545.
Stair *v.* York N. Bank, 55 Id. 365.

Where the deposit is ear-marked as the property of another than the depositor, the bank may not pay it to the depositor.

Arnold *v.* Macungie Savings Bank, 71 Pa. 287.
Gaffney's Estate, 146 Id. 49.
Burger *v.* Burger, 135 Id. 499.

Where discovery is asked in a bill and the discovery is effectual, that becomes a sufficient

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ground on which a Court may proceed to grant relief.

Bank *v.* Biddle, 2 Pars. Eq. Cases, 31.
Story's Eq. Jurisp., sec. 699.

Where the remedy at law would necessarily lead to the multiplication of action and useless and burdensome litigation, equity maintains its jurisdiction.

Bank of Ky. *v.* Schuylkill B'k, 1 Pars. Eq. Cas. 180.

The defendants here did not demur, but answered and replied and went on to hearing, this should prevent their taking advantage of the question of jurisdiction.

Adams's Appeal, 113 Pa. 449.
Evans *v.* Goodwin, 132 Id. 136.
Drake *v.* Lacoe, 157 Id. 17.

If the Court in which the suit is brought have jurisdiction of the cause of action, both of law and equity, it may proceed to give relief, unless the bill be demurred to on the ground that the proper remedy is at law.

The Sunbury & Erie R. R. Co. *v.* Cooper, 33 Pa. 278.

Where a bill in equity is inartistic and incomplete, but has substance by which to amend, if necessary, amendment will be allowed in the Supreme Court.

Darlington's Appeal, 86 Pa. 512.

Where a party interested adversely to the plaintiff in the bill is not made a party defendant, but has appeared as attorney for the defendant throughout the proceedings, the Court upon adjudging him a necessary party should permit him to be added as a party defendant.

Manufacturers N. Gas Co. *v.* Douglass, 130 Pa. 284.

The assignees of Delamater & Co. were the counsel of the Merchants' National Bank in this case and prepared the answer, attended at the taking of the testimony and conducted the entire defence throughout before the master and in Court until they were added as parties defendant. It was not error to admit them to be made parties.

October 1, 1894. GREEN, J. Although the Merchants' Bank is nominally a party to this record they are not appellants, and have no interest in the suit. Their debt against Delamater & Co. was paid in full out of the proceeds of the sheriff's sale of Delamater & Co.'s real estate, under judgments which were given to the bank by the firm or its members. As the county warrants delivered by Delamater & Co. to the Merchants' Bank were pledged as collateral for the same debts for which the judgments were confessed, the bank has not, and does not claim to have, any right to retain the warrants and must therefore in any event surrender them to the assignees of Delamater & Co. The question to be decided, therefore, is simply, whether the assignees are lawfully bound to surrender them to the county or to the county treasurer, and enter a charge for the amount of the warrants in the account of the county treasurer with Delamater & Co. In the regular course of dealing between the treasurer and Delamater & Co., that is precisely what would have been done, just as it had been done many times before. It is true the treasurer was in the habit of drawing his check for the amount of the warrants at the various times of settlement, but that formality was entirely unnecessary. The right of the bank to have credit on the account for the amount of the warrants on hand was just as complete without the check as with it. The present controversy therefore is only a contest between the county and the county treasurer on the one hand, and the assignees of Delamater & Co. on the other hand. But the assignees of Delamater & Co. merely stand in their shoes and have no higher rights than they had. Bullitt & Fairthorne *v.* The Chartered Fund, etc., 26 Pa. 108; Kent's Appeal, 87 Pa. 165; Morris' Appeal, 87 Pa. 368; Wright *v.* Wigton, 84 Pa. 163.

If then, Delamater & Co. could not have resisted a claim, by either the treasurer or the county, to have the warrants in the hands of Delamater & Co. charged against the account of the treasurer and delivered up, their voluntary assignees for the benefit of their creditors could not do so. Now it is the undisputed fact that Delamater & Co. had in their hands on deposit by the county treasurer at the time of the assignment money to the amount of $58,000 of which about $50,000 belonged to the county. That Delamater & Co. knew perfectly well that the account was a treasurer's account, and that the great bulk of the money in their hands to the credit of this account was trust money belonging to the county, is not only found as a fact by the master and the Court below, but it is so palpably and necessarily true that no time need be wasted in the discussion of the subject. It would be an astounding proposition, therefore, to assert, that if Delamater & Co. had brought an action or actions on the warrants in question, against the county, the latter could not have set up in defence the fact that at that very time Delamater & Co. had in their hands money of the county to the extent of $50,000, and therefore that the county must pay the $19,000 of warrants. Independently of the fact that it was the established course of dealing between the parties to have the warrants charged off against the treasurer's account, the defence would be good as a

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set-off, and also as an equitable assignment of the necessary amount of the funds in the Delamater & Co. bank to extinguish the warrants. The subject seems too plain for discussion. There is not the least force in the objection on the ground that equity has no jurisdiction. The surrender of the warrants could not be obtained in a common law action, but only by a decree or order in chancery. In addition to that, discovery of the outstanding warrants, and of the facts pertaining to their issue, their ownership, their custody and the equities, if any, attaching to them, the adjustment of the account of the treasurer with the firm, and the determination as to how much of it was trust money, the inadequacy of the legal remedy, and the prevention of a multiplicity of suits by bringing all the parties interested into one litigation so that the rights of each could be determined and adjudged in one decree, each and all of these are sufficient sources of equitable cognizance.

The introduction into the case by amendment, of the county treasurer and of the assignees of Delamater & Co. was entirely right and clearly within the power of the Court. It did not change in the least the character of the litigation, or the cause of action asserted in the bill. It merely brought in other parties whose interests were affected and who ought to be heard in their adjudication.

The assignments of error are all dismissed.

Decree affirmed and appeal dismissed at the cost of the appellants.

DEAN and FELL, JJ., concurred.

Eo die. MITCHELL, J., dissenting. I am unable to concur in this judgment.

The warrants were not paid. Delamater & Co., had no authority to pay them unless authorized, or directed by the treasurer to do so. This is the hinge of the case, and the findings of the master, especially numbers 11 and 13, show that there was no such authorization or direction, and no payment until the treasurer gave his check. It was the practice and perhaps the understanding that at convenient intervals checks should be given, and in the meantime as a matter of convenience and accommodation the orders were treated by Delamater & Co. as cash, but until the treasurer's check was actually given there was no payment in law, and this is a case for strict law, as one or other of innocent parties must lose by another's fault.

Until the orders were paid Delamater & Co. held them as valid claims on the county treasurer, and the creditors have succeeded to their rights.

STERRETT, C. J., concurred.

WILLIAMS and MCCOLLUM, JJ., absent.

Jan. '94, 452, 453. April 20, 1894.

Armor's Estate. Butts's Appeal. Butts v. Armor.

Constitutional law—Bill of Rights—Courts—Associate Judges not learned in the law—Duty of Court of first instance—Practice—Point reserved—Verdict.

Section 11 of the Bill of Rights, which declares: "All Courts shall be open, and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay," suggests a course of conduct in litigation which should be present in the minds of those who hold judicial station in this Commonwealth.

A Court constitutionally organized can act only as a whole, and in a constitutional manner. The acts of the individuals who compose it are not the acts of the Court. While an individual Judge can express the opinion of the Court, it can be only when he has been empowered to express the decision of the Court arrived at after consultation, or when the opinion found and submitted by such an individual is approved and adopted by his associates, and thus becomes the opinion of the Court.

Under the present Constitution of this Commonwealth the office of Associate Judge not learned in the law not having been abolished in counties not forming separate judicial districts, the Courts in such counties are constituted under the Act of 1834. When a cause has been tried before the President Judge and the two Associates not learned in the law, the three together constitute the Court, and neither the President Judge alone, nor the two Associates alone, can take up and dispose of a question growing out of the trial.

A case having been taken by appeal to the Supreme Court and sent down for further proceedings, it is the duty of the Court of first instance to carry into effect the judgment of the appellate Court not grudgingly, but with that fairness and impartiality which, in the performance of a plain duty, becomes a tribunal intrusted with the judicial administration of justice.

It is erroneous practice, and ground for reversal, for the trial Court to submit questions as to which there is conflicting testimony to the jury, reserving the point "whether there is any evidence upon which defendants are entitled to recover," and subsequently to enter judgment *non obstante veredicto.* The remedy where a fact submitted has been improperly found is the grant of a new trial.

An issue was tried to determine whether an alleged testatrix was of sound mind, and whether she had been subjected to undue influence. The jury were instructed if they found for the defendants to state in full whether they found testatrix was not of sound mind and memory, or that she was acting under undue influence. The verdict was for defendants, and that testatrix was not of sound mind. As there was thus nothing upon the record to show that the jury considered the question of undue influence, the reserved point and the judgment upon it did not embrace the issue, and therefore the judgment entered upon it could not be sustained.

Appeals from decree of the Orphans' Court

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of Centre County, and judgment of the Common Pleas in an issue directed, in the estate of Ruth B. Armor, deceased.

The Orphans' Court having directed an issue to test the mental condition of the decedent and the validity of her alleged will, but having refused an issue on the question of undue influence, the Supreme Court on appeal directed that an issue be directed on both points (154 Pa. 517).

The cause having been tried before FURST, P. J., and RILEY and FAULKNER, JJ., and a point reserved, a verdict was rendered against the will. Subsequently FURST, P. J., filed an order entering judgment *non obstante veredicto*, and certifying the same to the Orphans' Court. Later RILEY and FAULKNER, JJ., who were Judges unlearned in the law, Centre County being part of a judicial district containing more than one county, filed an order overruling FURST, P. J., entering judgment upon the verdict, and directing the register to grant letters of administration upon the decedent's estate.

The executor named in the alleged will took these appeals, assigning as error the acts of the Associate Judges. The facts are fully stated in the opinion of the Supreme Court.

James A. Beaver (*John M. Dale* with him), for appellant.

Samuel Gustine Thompson (with him *C. M. Bower* and *Ellis L. Orvis*), for appellees.

October 1, 1894. DEAN, J. These appeals were argued from one paper book. They are so woven together in the proceedings in the Court below, that the questions in dispute will be disposed of in one opinion.

Personal imputations on the motives of a Judge who has rendered an adverse judgment, alleged to be erroneous, add nothing to the force of counsel's argument; they often tend to render obscure meritorious objections, and afford us no help in passing on the real contention. Our judgments must be founded on something of more substance than suspected motives.

A brief statement of the material facts, as gathered from this record, will largely aid in an intelligent judgment.

On the 20th of February, 1890, Ruth B. Armor, the testatrix, being then about ninety years of age, made her will. She was possessed of a very considerable estate, which she divided among her five children, one of whom, a daughter, Eliza, was married to David M. Butts. The shares of all, except Mrs. Butts, were bequeathed to David M. Butts as trustee; he was also appointed sole executor. In less than a year after the execution of the will the testatrix died. The legatees, except Mrs. Butts, contested the will on the ground that the testatrix was of unsound mind at the date of its execution, and that she had been induced to make it by the undue influence of her son-in-law, D. M. Butts. Much testimony was taken, and after due consideration, the Orphans' Court directed an issue to be tried in the Common Pleas, to determine whether the testatrix was possessed of sufficient mental capacity to execute the will, but refused an issue to determine whether it had been procured by undue influence. From so much of the decree as refused an issue on the question of undue influence the contestants appealed to this Court. We, being of opinion that the Court erred in refusing an issue on the second question, directed that an issue be awarded as to both, which was accordingly done, and the case came on for trial in the Common Pleas, September 4, 1893. The Judges on the bench were President Judge A. O. FURST, and his Associates, THOMAS F. RILEY and C. A. FAULKNER. Many witnesses testified as to the mental capacity of testatrix, and to facts bearing on the avermènt of undue influence. The trial lasted four days. The evidence on both questions was submitted to the jury, who were instructed, if they found for defendants, to specify in their verdict whether the testatrix was not of sound mind, or whether the will was made when she was under undue influence. The jury found a verdict for defendants, and further found, that Mrs. Ruth B. Armor was not of sound mind.

At the close of the testimony the Court made the following reservation: "Whether there is any evidence upon which defendants are entitled to recover." The verdict was recorded the 4th of September, 1893, and on the 11th, on motion of plaintiff's counsel, a rule for a new trial was awarded, reasons to be filed within ten days; same day on motion of same counsel, rule was awarded upon defendants to show cause why judgment should not be entered on verdict for plaintiffs *non obstante veredicto* on points reserved. On September 16 following, reasons for a new trial were filed. On October 13, 1893, in vacation, without consultation with his associates, Judge FURST, in an opinion filed, entered judgment on the point reserved for the plaintiff. On October 19, 1893, Judges RILEY and FAULKNER, without consultation with Judge FURST, filed an opinion overruling the judgment on the reserved point entered by him, and directed judgment to be entered thereon for defendants, and further directed the prothonotary to certify this judgment to the Orphans' Court. Then, on October 30, 1893, Judge FURST filed a supplementary opinion, in which he makes the following decree: "We hold the rule as matter of law, that the evidence in the cause on part of contestants is wholly insufficient in law to submit to the jury upon either issue, and we further hold, upon all the evidence in the cause, that

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the evidence is insufficient to sustain a verdict against the will of Ruth B. Armor, deceased. And we therefore, in accordance therewith, modify our former judgment entered on the 13th of October instant, and in lieu thereof, and as a substitute therefor, we set aside the verdict, and we further direct that the clerk of the Court enter this judgment and decree of record; vacating decree heretofore made by said Court for a feigned issue to determine the validity of the will of Ruth B. Armor, deceased."

This decree the prothonotary of the Common Pleas was directed to certify to the Orphans' Court, which, on being done, Judge FURST, as President Judge of that Court, made this decree: "And now, October 30, 1893, the Court of Common Pleas having certified to us upon the trial of said issue, heretofore awarded by the President Judge of this Court, that the evidence upon the trial thereof was wholly insufficient in law to submit to the jury upon either issue, and that under all the evidence, no verdict against the will can be sustained; and thereupon, having certified to us their opinion with the request that we vacate said order for an issue, we do now in accordance therewith, vacate and annul our former order of decree, awarding an issue *devisavit vel non*, and the same is hereby vacated and set aside, and the clerk is directed to certify this decree to the prothonotary to be entered by him in the record of said suit, and issue is refused."

Then, on February 22, 1894, the Associate Judges, by formal decree, with reasons therefor, overruled the last decree of the President Judge.

The appeals raise this question: Whether the decrees and judgments of the President Judge, or those of his associates, are the judgments of the Courts?

It will be noticed we have but one verdict, but upon it are entered four judgments practically, two sustaining the will and two against it. They cannot all be affirmed; whether any one of them can be is the question we are forced to consider. It is a rare record in the judicial observation of this Court; so rare, that we recall no other case resembling it.

The personal antipathies engendered by litigation between the members of this family seem to have promoted hopeless discord in the tribunal appointed by law to settle strife. The Court apparently resolved itself into a sort of debating society, each member maintaining his side of the question by an opinion filed of record, with the not unusual result of this kind of debate; the further it proceeded the more remote was the end of it; this was probably interesting to the debaters, but whether the suitors who foot the bill have the same measure of enjoyment out of it is at least doubtful. Section 11 of our Bill of Rights suggests a course of conduct in litigation which should be present in the minds of those who hold judicial station in this Commonwealth. That section says: "All Courts shall be open, and every man for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay." The real interests of the parties to this contention would have been best promoted by a final judgment in the Court below, without delay. Each party wanted a judgment; neither was specially concerned in the reasons for it; the Judges seem to have been specially interested in their rights and reasons and less in a speedy judgment. It was the judgment of this Court, on the evidence presented when the case was here before, that a jury should pass on the questions of testamentary capacity and undue influence. If the evidence at the trial was the same, or substantially the same, it was then for the Court below to carry our judgment into effect, not grudgingly, but with that fairness and impartiality which in the performance of a plain duty becomes a tribunal intrusted with the judicial administration of justice.

The first noticeable error appearing on this record is the point reserved, when viewed in connection with the evidence and charge. In the commencement of these proceedings, before the first trial in this Court, the President Judge was of the opinion that there was evidence for the consideration of a jury as to testamentary capacity, and he awarded an issue to try that disputed fact; but he refused an issue on the question of undue influence, and on that refusal was based the first appeal. On review here, we concurred with him as to the issue awarded, but thought the evidence on both questions so blended, that the issue should be directed for trial of both. The question then, as to testamentary capacity, went before the jury, from the judgment of the Court below and of this Court, on the preliminary evidence. After a full trial in presence of the Court and jury, with every opportunity of cross-examination and judgment of credibility from appearance and manner of witnesses, the Court submitted the evidence on this instruction: "The witnesses on part of the contestants testified, generally, that Mrs. Armor not only was a very old woman, but that for years and years she seemed to have lived within herself; that she would sit quietly and converse but little, and that it was only when her attention was called directly by conversation that they could interest her in it. But these same witnesses all testify, with perhaps one or two slight exceptions, that when they did call her attention directly to any matter the answers were rational; and when

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they gave her answers on the stand, they were seen to be so. I do not recollect any irrational expression, proven by any witness in this case, that Mrs. Armor made. If there were any, you must recall them from the testimony; but the Court recollects of no irrational remark that Mrs. Armor made, as detailed by any witness in the case. They also describe her physical condition; that she would wave her hands; that she would talk to herself; and that she would drum on the window. They also describe her conduct in the garden, and that she did once cut off the cabbage in September; and when her attention was called to it she did not deny it, but made some slight remark to the effect that it didn't matter much. Now, whether that was an act showing imbecility of mind or mental disease, or a preoccupied mind, or whether it showed a little spirit of mischief or vandalism would be for the jury to determine under all the facts in the case. She did not justify the act when her attention was called to it, and just why that act was done we cannot aid you in ascertaining. You are to determine it as far as it is a fact, in connection with the other facts in this case."

The evidence of incapacity adverted to here is not nearly all the evidence adduced by contestants; there was evidence tending to show that this old lady had become as a little child; collected and played with bright colored pieces of paper; cared only for the plays of little children; had no choice as to food; would escape into the garden, and there act like a mischievous child, destroying the growing vegetables as well as her clothes; that her memory was almost wholly gone. What was noticed by the learned Judge was called to the attention of the jury, and they were instructed that they were to determine the question in connection with the other facts in the case. It is true, there was much evidence tending to contradict this evidence of contestants, and certainly, the learned Judge did not permit the jury to forget it, for he brought it specially to their notice, and did not neglect to emphatically express his opinion as to its force. Nevertheless, the jury found a verdict for defendants on the ground that the testatrix was not of sound and disposing mind and memory at the time she executed the will. Then, on the reserved point, the learned President Judge in vacation entered judgment for plaintiff, notwithstanding the verdict, on the ground that the inference of incapacity was not warranted from the facts alleged to be proven. This was precisely the error for which this Court reversed the Court below in North American Oil Co. *v.* Forsyth, 48 Pa. 291. The Court there submitted the contradictory evidence of a fact to the jury, and after the jury found the fact, on a point reserved, entered judgment *non obstante veredicto*, on the ground that the facts did not warrant the inference drawn from them by the jury. This Court says: "It may be, as stated by the learned Judge in his opinion upon the reserved points, that there was nothing in the evidence from which readiness to pay on delivery could properly be inferred, but under his instruction this was a fact submitted, and if improperly found, the remedy was a new trial."

The learned Judge, in his opinion on this case, does not attempt to show that the inference of unsound mind might not have been drawn from some of the facts, if proven to the satisfaction of the jury, but his opinion is, that in view of all the facts and the evidence of plaintiff such inference was not warranted. At the very most, his opinion only shows that from the weight of the evidence the jury ought to have found a different verdict.

His answer is not responsive to his point reserved. That is, "Whether there is any evidence on which defendants are entitled to recover?" The answer is, that the evidence was insufficient to warrant the jury in inferring that the testatrix was lacking in testamentary capacity. Whether warranted or unwarranted, the jury believed defendants' witnesses, and on the facts testified to by them drew the inference, which the Court instructed them they might draw if they thought it was warranted. The Court cannot now draw an opposite one and negative the verdict. It can only set the verdict aside if it be against the weight of the evidence.

But the judgment on the reserved point necessarily involves another error. The evidence on both questions, that of mental capacity and undue influence, was submitted to the jury, and at the close of the charge they were instructed thus: "And in drawing out your verdict, if you say you find for the defendants, then write out in full what you mean by that, whether you find she was not of sound mind and memory, or that she was acting under undue influence." The verdict was for defendants, and that she was not of sound mind. But, not a word is said as to the question of undue influence. It is assumed the silence of the jury is a finding for plaintiff. This may or may not have been the case; there is nothing in the charge, or upon the record, to show that the jury passed on that question; the probability is they did not. They were instructed to find generally, and then, if for defendants, state one or other of the grounds in support of the finding, but not instructed to return their findings on both grounds. It is not an unwarranted assumption that the jury when they retired to deliberate, in considering the testimony as to mental capacity, found for defendants; in the absence of instructions to return findings on both questions, they went no further,

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and at once made up their verdict. In so doing they literally obeyed the instructions of the Court. If this was the case, then the reserved point, and the judgment upon it, did not embrace the issue, and for that reason the judgment entered by the learned President Judge could not be sustained.

But, for reasons affecting all the judgments, both those entered by the President Judge, and by his associates, none of them can stand. This trial was had in a Court of Common Pleas composed of three Judges, the President and two associates. All were present on the bench during the trial. It is not necessary to discuss their powers and functions as individual members of the Court at the trial. It is not going too far to assume that there was consultation of the Court at the close of the evidence, its weight and significance discussed, and that the charge which submitted it to the consideration of the jury was the charge of the Court, and not the charge of a single member of it. After the rendition of the verdict, the record does not show that the same Court entered a single one of the four judgments, or ever met for that purpose.

A Court is a "tribunal established for the public administration of justice, and composed of one or more Judges, who sit for that purpose at fixed times and places, attended by proper officers:" Burrill's Law Dictionary; Mason *v.* Woerner, 18 Mo., 570. Section 4, Article V. of the Constitution, declares, that, "Until otherwise directed by law, the Courts of Common Pleas shall continue as at present established." Section 5. "The office of Associate Judge not learned in the law is abolished in counties forming separate districts." Centre County does not form a separate district, therefore the Courts are constituted by the Act of 1834. "The President and Associate Judges of the Court of Common Pleas, or any two of them, or the President Judge in the absence of his associates, shall have power to hold the said Courts, and to hold and determine all causes, matters and things cognizable therein according to the Constitution, usages and laws of this Commonwealth." The Court which took cognizance of this cause at the trial was composed of the three Judges, the President and two associates, and they sat at the time and place appointed by law for that purpose. Then, after adjournment, they commenced to act, not as a Court in consultation over a grave question involving both fact and law, but as individuals. Without consultation with the associates, the President Judge proceeded to his home, and there determined there was no evidence of mental incapacity to submit to the jury, although, presumptively, the Court composed of himself and the associates had agreed there was such evidence, and so charged the jury. Then, without consultation with the associates, he filed in vacation this opinion as the judgment of the Court.

The two associates thereupon, at no Court of which the President Judge was a member, and without consultation with him, overruled this judgment, and filed one to the contrary. And so, this antagonistic action between members of the same Court, not sitting as a Court or in consultation as a Court, went on. It is not to the point to argue that under the law of 1834, any two members of the Common Pleas, or the President Judge in the absence of his associates, had power to hold the said Courts, and therefore the judgments entered by the President Judge, or those entered by the two associates, were legally entered. After hearing a cause, opinions of the individual members of a Court, no matter how diverse, may be expressed to and urged upon each other, as reasons in vindication of a proposed judgment, and the opinion of one may be adopted as that of the Court, and judgment be entered accordingly. But if, after hearing, the members of the Court, without consultation, deliberation or decision, separate, and each one commences to file of record his individual opinion and conclusion, however valuable these may be as law literature, they are not judgments of a Court. "What is ordered and adjudged by the Court, not merely what is entered, constitutes the judgment." Freeman on Judgments, sec. 38.

There never was, so far as this record shows, a Common Pleas Court held by the President in the absence of his associates, at which his judgment, as the act of the Court, was made up or entered; there never was a Common Pleas Court held by the two associates in the absence of the President, for the adjudication of questions arising out of this trial. There was a special Court held for the trial of special causes, at which the President Judge of another district presided, and the two associates sat with him. But this was not, in any reasonable intent of the Act, a Court of Common Pleas, at which two of the Judges in the absence of the President Judge, could take up and dispose of a question growing out of a former trial at which all three sat.

We have no doubt that it is not only convenient, but entirely regular and lawful, for the members of a Court, or a majority of them, to concur in a judgment during their sitting, and then confide the expression of opinion to the President to be filed in vacation as the judgment of the Court. Or the preparation of the opinion may be made by one Judge in vacation, to be filed at the next sitting of the Court, and the other members may then concur, although they did not know of the reasons or the judgment

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until it was about to be filed. But, this is the judgment of the Court, because entered by the Court. But not one of these judgments was entered by the Court of Common Pleas; they were only the individual opinions of the members of that Court, and all of them, as judgments, must for that reason be set aside.

This leaves the only motion which goes to the merits of this case standing untouched. The plaintiff's counsel, on 11th of September, 1893, three days after the verdict, moved for a new trial, and afterwards filed reasons therefor. The Judges, in the heat of the controversy on the reserved point, and over their respective rights as members of the Court, seem to have forgotten this important move in the cause. It has been allowed to sleep now for more than a year. The proper course for the parties to pursue, if they are disposed to still further litigation, is to properly bring this motion before the Court of Common Pleas and argue it. As no one doubts that the same Judges who sat at the trial compose the Court to hear and decide this motion, when they do so, a new trial can be ordered or final judgment entered in the Court below.

The judgments entered in Common Pleas 13th October, 1893, October 19, 1893, October 30, 1893, the decree of the Orphans' Court of 30th October, 1893, annulling and vacating the issue directed to the Common Pleas; and the judgment entered in Common Pleas, 22d of February, 1894, are reversed and set aside, at costs of appellees in each judgment appealed from respectively. J. D. B., Jr.

Jan. '94, 113. March 1, 1894.

Klemmer v. The Mount Penn Gravity Railroad Company.

Jury—Jury commissioners—Custody of wheel—Oath—Waiver.

The list containing the names, occupation and residence of every person placed in the jury wheel ought to be formally filed in the office of the prothonotary and there remain, but if properly made out and placed in the said office, although it be afterwards taken to the sheriff's office, and, for most of the time, kept there, there is no such gross irregularity as calls for quashing the array; but if the list were never made out at all, there would be sufficient ground to quash.

Jury commissioners who, before proceeding to select names to be placed in the jury wheel, prepare private lists of "sober, intelligent and judicious persons," made up largely from the information of other persons, do not violate their duty, but give evidence of a careful performance of it; but if they fill the wheel from lists prepared by others, they grossly violate their duty; and an irregularity of this kind could not be cured by waiver, but necessitates the quashing of the array.

An oath of jury commissioners that they will "faithfully fill the jury wheel in performance of our duties of office, pursuant to the provisions of the Act of Assembly of the 10th day of April, 1867, entitled 'An Act,'" etc., is not the oath provided for in the Act, and the practice of departures from the proper form is not approved, yet when the sheriff and jury commissioners have on entering upon office taken the oath prescribed for county officers by the Constitution, the departure from the correct form will not move the Supreme Court to reverse a judgment because the jury which has given the verdict was selected by commissioners who had taken the oath above set out, when the appellant did not move to quash the array until several months after he had learned that the proper form of oath had not been observed.

The President Judge is not required to take an oath in addition to his official one, before entering on the duty of filling the jury wheel.

That the jury wheel when filled has been kept by one of the commissioners at his house, there being no pretence that it has been tampered with, is not ground for quashing an array of jurors.

Appeal of the Mount Penn Gravity Railroad Company, defendant, from the judgment of the Common Pleas of Berks County, in an action of trespass brought by Francis P. Klemmer.

This was an action of trespass to recover damages resulting from the alleged negligence of the defendant.

On Monday, October 16, 1893, the case was called for trial, ERMENTROUT, P. J., and ENDLICH, J., being on the bench. Counsel for defendant challenged, and moved to quash the array of jurors, and assigned the following reasons:

1. That the list containing the name, occupation and residence of every person placed in the jury wheel was not kept, certified by the Judge and jury commissioners, and filed of record as required by Act of March 18, 1874, § 3.

2. That the oath of the jury commissioners who took part in the selection of jurors for the year 1893 had not been filed in the office of the prothonotary as required by § 4 of said Act.

3. That the form of the oath actually taken was not the oath prescribed by the Act of April 10, 1867, § 3.

4. That the provision of the third section of the Act of 1867 had not been observed, and that the President Judge, although he had taken part with the jury commissioners in the selection of the jurors for the year 1893, had not taken the oath or affirmation required.

5. The oath or affirmation of the President Judge had not been reduced to writing and filed in the prothonotary's office.

6. That the second section of the Act of April 15, 1867, which requires the jury wheel to be locked and to remain in the custody of the jury commissioners, had not been complied

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with, and that the jury wheel had been carried away and kept by one of the commissioners at his private residence.

7. That the selection of the persons whose names were put in the jury wheel was not the alternative selection from the whole qualified electors at large that was prescribed by law, but was made from a list of names prepared by each commissioner before the filling of the wheel.

The Court being divided, the challenge and the motion to quash was denied, and the case proceeded to trial, resulting in a verdict for plaintiff, and judgment thereon. Both Judges subsequently filed opinions in support of their respective views.

The defendant took this appeal and assigned as error the overruling the challenge to and motion to quash the array of jurors.

Henry A. Muhlenberg and *Jeff. C. Snyder*, (*Geo. F. Baer* with them), for appellant.

H. P. Rieser and *W. H. Schaffer*, for appellee.

October 1, 1894. DEAN, J. Francis P. Klemmer, the plaintiff, on the 5th of November, 1891, while a passenger on the Mount Penn Gravity Railroad, near Reading, was very seriously and probably permanently injured. The train, consisting of two cars, was running down the incline by gravity, when, from some cause, the brakeman lost control of the brakes. The consequence was, the cars jumped the track and were wrecked. Klemmer, averring negligence on the part of the company, brought suit for damages. The issue was tried before Judge ENDLICH, who, in a brief, but very clear and impartial charge, submitted the evidence bearing on the questions of negligence and the measure of damages to the jury. There was a verdict for plaintiff in the sum of $4,000. Although defendant submitted four written prayers to the Court for instructions, three of which were denied, no exceptions were taken to the charge, and there is no assignment of error to any of the rulings of the Court after the jury was sworn. Before the jury was sworn, however, defendant's counsel challenged the array of jurors, and moved to quash the same, because of alleged gross irregularities in filling the wheel under the Act of 1867 and its supplements.

The motion to quash failed, because of an equally divided Court; divided in opinion on some questions of law, but, irreconcilably, on some of the most material facts to which the law applied. And to make the questions of fact impossible of decision here, the two most important of them rest on the personal knowledge of the two Judges, as set forth in their respective antagonistic opinions. After the motion was overruled Judge ENDLICH first filed an opinion giving his reasons why the motion ought to have prevailed, and in this he states as within his knowledge facts on which his opinion is largely based. Then Judge ERMENTROUT filed an opinion, overruling the motion to quash, in which he makes a statement of facts within his knowledge in direct conflict with those stated by Judge ENDLICH. Then Judge ENDLICH filed another opinion in reply, and Judge ERMENTROUT another brief one in reply to this.

These opinions, in some of their features, would hardly be called judicial, for both contain at least imputations of unseemly conduct by each against the other in the performance of judicial functions. Harmony between members of the same Court, and cordial co-operation in a dignified judicial administration of justice are highly desirable, but the personal bearing of members of a Court toward each other is not a question which concerns us in a judicial review of their judgments; that is a matter which more nearly concerns the bar, and the people of their own district; unless, indeed, as to some extent in this case, personal asperity in the Court below has so beclouded fact as to render judgment impossible or doubtful.

Our conclusions, as to the law applicable to the facts, would present no serious difficulty if the learned Judges concurred as to the facts; but they radically differ. For example, the first reason in the motion to quash is, that under the Act of 1874, a supplement to the Act of 1867, no list containing the name, occupation and residence of each juror, etc., was filed in the office of the prothonotary. Judge ENDLICH states no such list was filed as required by law. Judge ERMENTROUT states this list, substantially in all particulars, as required by the Act, was made out and certified, and although not formally marked filed by the prothonotary before the motion to quash, it had been deposited in and the seal of the Court affixed in the prothonotary's office; was used by the sheriff and the Court as a document of the Court, and as the list intended by the Act for the prothonotary's office.

This list ought to be formally filed in the office of the prothonotary, and ought to remain there, but if made out according to the requirements of the Act, and put in possession of the prothonotary, although afterwards taken to the sheriff's office, and for most of the time kept there, this is not such a gross irregularity as calls for quashing the array; especially if the Court and all parties interested had access to it. If no list as required was made out at all, it would be sufficient ground to quash. Judge ENDLICH states this list referred to by Judge ERMENTROUT was nothing but the sheriff's book of names, which the Act of 1834 required him to keep, and in no sense the list of the names

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placed in the wheel, which the Judge and jury commissioners were required to certify under the supplement to the Act of 1867. Judge ERMENTROUT states, as within his knowledge, it was made out and certified by himself and the jury commissioners; the seal of the Court attached in the prothonotary's office, and repeatedly laid before the Court when required in conducting the business of the Court. What purports to be a copy of this list, with heading and certificates, and twenty-two names of the 1,200 put in the wheel for 1893 is printed in appellee's paper book. If such list as this was made out and deposited in the prothonotary's office that was a substantial compliance with the requirements of Section 3 of said Act of 1884. And although it ought to have been marked filed of record, and ought to have been kept at all times thereafter as one of the records of the prothonotary's office, still, as there is no intimation that it was ever tampered with or concealed, the irregularity is not of that gravity, as at this stage of the trial warrants this Court in sustaining the motion to quash.

Again, the seventh reason on which the motion is grounded is that the jury commissioners and President Judge did not select alternately from the whole qualified electors of the county such number of sober, intelligent and judicious persons for the year, as the Court at the preceding term had designated.

We decidedly concur with Judge ENDLICH that this is by far the gravest of all the objections urged in the motion to quash. The primary object of the Act of 1867 in taking from the sheriff and county commissioners the duty of filling the jury wheel, and providing for the election of jury commissioners, who, with the President or Additional Law Judge, should perform that duty, was to guard against unjust political prejudice in the selection of jurors. Before the adoption of the Constitution of 1873, the board of county commissioners and sheriff in any one county generally all belonged to the same political party; complaints were made by the minority party in many of the counties of political partiality in filling the wheel. The Legislature, on the assumption that this evil existed, created the office of jury commissioner, and provided for representation of the minority; and further, prescribed a method of filling the wheel, which was intended to remedy the evil complained of under the Act of 1834. The importance of this office to the people of the Commonwealth can scarcely be exaggerated; nor can there be any difference of opinion as to the absolute necessity of requiring strict fidelity to duty in those who hold it.

As to the manner in which the commissioners and President Judge performed this duty, Judge ENDLICH says:—

"When the board met each member had a list prepared in advance, partly from his own knowledge, but largely from suggestions received from others. Some of these suggestions were voluntarily offered by friends or acquaintances, persons who desired to do jury service, or whose friends desired to do so. Many of them, however, were procured by a system of inviting persons of acknowledged prominence, politically or otherwise, in the various wards, boroughs and townships of the county, to hand in the names of a certain number of persons living in their districts for the purpose of filling the jury wheel. From the names thus handed in the lists referred to were largely compiled. From these lists the several members of the board alternated in calling off the names which were placed in the wheel. The list of the 'whole qualified electors' of the county, though readily obtainable, was never before the board or before any member of it."

As to the facts thus stated of such controlling importance in the disposition of this motion, notice the statement of Judge ERMENTROUT in his opinion:—

"Where, I ask, are any such facts of record in this case? They could not have been admitted last May or June, because the reason was not filed until October 16th, 1893. These facts are neither admitted nor proven, nor capable of being proven. At no time did the jury commissioners have a prepared list from which all the jurors were selected. Each jury commissioner for himself, without dictation or suggestion from his fellow commissioner or the President Judge, invariably made his own selection; no jurors were selected concurrently. Each of the three, acting independently of the other, made his own selection of each individual juror alternately; that is, one after another. None knew or permitted each other to know of the selection each one made, until publicly announced and placed in the jury wheel. All were thus honestly selected in the interest of no one; in the interest of neither clique nor faction, political or social, but with the sole desire to place in the jury wheel sober, honest, intelligent jurors, who, in a community composed largely of German speaking people and other mixed nationalities, could understand the English language."

The duty of the jury commissioners and President Judge was to "select alternately from the whole qualified electors of the county" the names of 1,200 "sober, intelligent and judicious persons," and place these names in the jury wheel. At the last presidential election very nearly 29,000 qualified electors voted in Berks

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County. It is not improbable there are in the county 30,000. As 1,200 names were ordered put in the wheel, about one man was wanted out of every twenty-five for jury service. Anyone will readily understand the duty of the board in such a populous county was no light one. To eliminate the aged, decrepit, ignorant, intemperate, and those who did not understand the English language, and then select from the large number of competent persons remaining, 1,200, could only be done by careful inquiry, thought and preparation beforehand. There is not, probably, in the county a single person qualified from his own knowledge to do this. His ability to select must, in a large degree, come from information derived from others. That the members of the board made private lists, prepared by themselves beforehand, of "sober, intelligent and judicious persons," proves nothing more than that they sought, by inquiry, to qualify themselves for a proper performance of their duty. If they had taken up the lists of the voters in the different districts and at once made selections from nearly 30,000 names thereon, unless they were men thoroughly acquainted with the voters of every precinct, and of phenomenal memory, they would have been wholly incapable of performing the duty as the law enjoined. If they filled the wheel from lists prepared by others, no matter by whom, it was a gross violation of duty. But, if they made up lists of sober, intelligent and judicious persons themselves, on their own judgment, although on information obtained from others—this was the only way, in very many cases, that they could intelligently perform their duty. The Act does not require that they shall take up the list of the whole qualified electors and alternately select therefrom, but that the selection shall be made "from the whole qualified electors." That is, the selection shall not be made from a part, such as one political party, the members of one church or one faction, but from the whole, without distinction of party, creed, race, social or family relation.

The fact as stated by Judge ENDLICH is that the lists were made up by political and personal favor, from the selection of others; as stated by Judge ERMENTROUT, they were selections honestly made on the judgment of the commissioners.

We take the record before us, as it stood on the 16th of October, 1893, when the motion to quash was overruled, and the facts as gathered from the opinions of the Judges filed on the motion to quash.

After the final decree, and after the writ out of this Court was served, further evidence was taken. But we must review judgments in the light of the evidence on which they are founded, and not on evidence adduced afterwards. The time to try a cause is when it is at issue, and for trial, and not after the issue has been closed by final decree or judgment.

If the fact were clear, that this jury wheel had been filled by selections made by political and personal friends of the board, we would not hesitate a minute in sustaining the motion to quash, and in reversing the judgment. We would do this, even though as to irregularities of less gravity, appellant might be treated as having waived them. One of this character, no consent or waiver of parties could cure; it effectually undermines the foundation of the administration of justice.

That sworn officers, intrusted with the performance of the highest duty, on which hinges the life, liberty and property of the citizen, should, to any extent, surrender their functions to personal and political friends, as stated by Judge ENDLICH, could not be tolerated for a moment in any Court, even though the parties affected by it were willing to condone the wrong. But here we are met by a flat contradiction as to the fact, with no other means of determining it than by passing on the truthfulness of two Judges, with nothing but their antagonistic attitude on this record to affect the credibility of either; and their imputations are not unevenly balanced. As the appellant did not see proper to take testimony prior to his motion to quash, to sustain it, or to have placed on record any agreement as to the facts, it is not our duty to supply the facts from contradictory statements of members of the Court who passed on the motion, and we can only treat the first and seventh reasons as based on facts alleged, denied and not proven.

The second and third reasons, which allege the oath was not reduced to writing and filed as required by law, in substance raise the same question referred to in the first. The oath was attached to and formed part of the same book or paper containing the list of names placed in the wheel, so these reasons require no further notice.

The fourth alleges the form of the oath was not that required by the statute. The oath taken was as follows:

"We, J. A. Spangler and David Brown, jury commissioners in and for the said County of Berks, do severally swear that we will faithfully fill the jury wheel, in performance of our duties of our office, pursuant to the provisions of the Act of Assembly of the tenth day of April, 1867, entitled An Act for the better and more impartial selection of persons to serve as jurors in each of the counties of the Commonwealth."

The oath prescribed by the Act of 1867 is the

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one enjoined by Section 87 of the Act of 1834, to be taken by the sheriff and county commissioners. The form of that oath, as given in the Act, is:

"You and each of you do swear that you will use your utmost endeavors and diligence in making an impartial selection of competent persons for jurors during the ensuing year, and that you will not suffer partiality, favor, affection, hatred, malice or ill-will in any case or respect whatever to influence you in the selecting, drawing or returning of jurors; but that you will in all respects honestly conform to the true intent and meaning of the Acts of Assembly in such case made and provided."

It is clear, as held by Judge ENDLICH, that this is the oath the jury commissioners should take before proceedings to fill the wheel, and the one, with some modification, the sheriff should take before drawing from the wheel. This was, in effect, decided in Campbell *v.* Commonwealth, 84 Pa. 187. That the words "make an impartial selection of competent persons," cannot, under the duty imposed on the sheriff by the Act of 1867, apply to him, as now he has nothing to do with the selection, is not important. In the oath taken by him, that part having no reference to his duties can be eliminated.

Both the jury commissioners and sheriff, when they entered upon the duties of their respective offices, had taken the oath prescribed for county officers by the Constitution of 1874, that is, to discharge the duties of their offices with fidelity. Then each took an oath to faithfully fill the jury wheel in performance of the duties of their office pursuant to the provisions of the Act of 1867. As the Act of 1867 referred to the Act of 1834, and as the duties of the commissioners, as specified in that Act, were in the form of an oath, it might fairly be implied the commissioners were sworn to perform these duties, and so understood it. And while the oath written out and filed should have been that prescribed in the Act of 1834, so modified in the case of the sheriff as to cover his duties under the Act of 1867, the irregularity is not of that character in view of all that occurred at this trial, as warrants us in holding it fatal.

We do not desire to be understood, however, as in the remotest degree approving the omission to take and subscribe the oath enjoined by the Act of 1867, the form of which is given in the Act of 1834. While such an irregularity as is set out in the seventh is sufficient reason for quashing at any time, whenever the fact of it is established to the satisfaction of the Court, that set out in the fourth reason, while serious enough to move the Court to quash when the objection is promptly urged, is not of that character which would warrant this Court in reversing a judgment, if it were not made promptly when the party was informed of it.

The appellant's counsel knew of this irregularity January 7th, 1893, but without objecting to it then, made a successful application for a continuance; then, on the 1st of May following, nearly four months afterwards, filed his motion to quash, making this one of the reasons. This was not diligence. All text writers on practice say that a motion to quash the array should be made as soon as the facts which warrant it are known.

The fifth objection that the President Judge did not take and subscribe an oath in writing is wholly destitute of merit. He is not required by any statute to take an additional oath before entering on this duty.

The sixth, relating to the custody of the jury wheel, is without weight. After being filled, locked and sealed, in every particular as the law directs, one of the commissioners, who lived some miles from the county seat, by an express agreement between them, took the wheel with him and kept it at his home. There is no intimation that it was tampered with; the possibility of tampering with it under the circumstances is all that is suggested. The Act directs that "the jury wheel shall remain in the custody of the jury commissioners," the keys to be kept by the sheriff.

An expression of this Court in Rolland *v.* Commonwealth, 82 Pa. 306, is wrested from its connection in the opinion, and urged as a declaration that such disposition of the wheel was illegal. In that case the wheel had been left in a chest of a vault in the county commissioners' office, of which the clerk had the key. It was argued that this was not the custody the law required.

Justice PAXSON, in his opinion, says: "We must give this section a reasonable interpretation. It does not designate where the wheel shall be kept, and provides no place where the jury commissioners shall deposit it. It was not intended that they should carry it to their private residences—in many instances they reside several miles from the county seat. Its removal from the seat of justice would be as inconvenient as unnecessary."

The meaning here, in connection with the facts of the case, is so manifest that it ought not to require notice. The appellant in that case argued that the words, "the wheel shall remain in the custody of the said jury commissioners," meant the physical control and possession of the wheel by the commissioners. This Court, in answer, said, No, the law did not require an unreasonable thing; did not impose an unnecessary and inconvenient burden upon the officers; it was in their custody, if in one of the public

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offices of which their clerk had the key. If that wheel had been in the residence of one of the commissioners, by agreement of the other, as here, the counsel in that case would have raised no questions as to its legal custody. Here, the law imposed no such inconvenience and burden on the jury commissioner as he chose to assume in the custody of the wheel; he went further in a literal compliance with the law than a reasonable interpretation of it exacted. He subjected himself to this inconvenience because the county commissioners had not, as it was their duty to do, provided a place in the public buildings, where it could be kept, constructively, in the custody of the jury commissioners.

There is nothing further calling for notice in this record; it is exceptional in its most prominent fact, which is, that two occupants of high judicial station, for whose learning, ability and integrity this Court has the greatest respect, appear to have the opposite opinion of each other, and deliberately make their opinions a part of the records of their Court.

The judgment is affirmed, and the appeal is dismissed at the costs of appellant.

H. B.

Jan. '93, 419. January 23, 1894.

Com'th ex rel. Williams v. The Provident Life Association.

Policy of Life Insurance—Conditions in—Forfeiture of—Assessments—Payment after proper period—Lapsed policy—Reinstatement of holder—Estoppel.

A life insurance corporation chartered in another State, in which its principal office was, and having a branch office in Philadelphia, issued a life insurance policy to one B. By the terms of the policy it was to be null and void, if the semi-annual dues or assessments were not paid at maturity, and no modification of this contract or waiver of forfeiture was allowed, "Except by an agreement in writing, signed by the president or secretary of the association, whose authority for this purpose cannot be delegated." The by-laws of the association provided that: "Any member failing to pay his semi-annual payments and pro-rata assessments at the death of a member within thirty days after notification or according to the terms stated in the notice, shall forfeit his membership;" and that: "Others shall be forfeited in like manner as those that fail to pay their annual dues, with opportunities for reinstatement on similar conditions." There was nothing in the policy or application therefor, nor in the by-laws, prescribing conditions of reinstatement, but the assessment notices sent to B., signed by the secretary of the association, stated that after forfeiture of his policy no payment could be received or reinstatement made except upon the condition that he was "alive and in good health." In or about 1888-90, B. received some five notices of assessments, which he did not pay at the proper time, but did subsequently in December, 1890. Subsequently he received other assessment notices, sent to him by the secretary, after the lapse of his policy by the delay in paying the five assessments, containing notice as to reinstatement given above. He then sent an application for reinstatement with the requisite proof that he was in good health, and in every respect in a good insurable condition, to the company through its Philadelphia agent, which was refused. B. then brought suit to compel the company to reinstate him. The company defended on the ground that the money paid by B. had been received by the agent only on the condition that the company should reinstate him, and that upon refusal so to do, a return of the money had been promptly tendered him.

Held, that the action of the company in sending to B. notices of assessment after his policy had lapsed, was a recognition of him as a member.

Held, also, that as these notices were signed by the secretary, they were a waiver of the forfeiture which by the by-laws the secretary was expressly authorized to make in writing.

Held, also, that the company was estopped by its actions from refusing to recognize B. as a member, and that B. was entitled to reinstatement.

Appeal of The Provident Life Association, defendant, from the judgment of the Common Pleas No. 3, of Philadelphia County, in an action of mandamus issued upon the petition of Carter Williams, relator, in the name of the Commonwealth against the said defendant, to compel it to reinstate the relator as a member of the defendant company.

The facts of this case will be found sufficiently set forth in the charge of the Court, and the opinion of the Supreme Court. On the allowance of the mandamus an answer was filed by the defendant, which the relator traversed, and issue was joined. On the trial the defendant submitted, *inter alia*, the following points:

"1. The condition of the policy in suit, which provides that 'If any semi-annual dues or assessments on this policy shall not be paid when due, the consideration of the contract should be held and deemed to have failed and the policy should be null and void,' was binding upon the plaintiff; and if the jury believe, from the evidence, that the plaintiff neglected or failed to pay, for a period of more than thirty days, assessment dated July 15, 1890, then the policy became null and void, and plaintiff's interests became forfeited, and the verdict should be for the defendant."

Answer: "I refuse that point." (Eighth assignment of error.)

"2. The provision of the policy that 'The contract between the parties hereto is completely set forth in this policy, the application therefor and by-laws of the association, taken together, and none of its terms or provisions can be modified, nor any forfeiture under it waived, except by an agreement in writing, signed by the president or secretary, whose authority for this purpose cannot be delegated,' was binding upon the plaintiff; and if the jury believe, from the evi-

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dence, that the plaintiff's interests became forfeited and the policy null and void, because of failure or neglect to pay assessment dated July 15, 1890, or assessment dated August 15, 1890, or assessment dated September 15, 1890, in accordance with the provisions of the policy, and that such forfeiture was not waived by an agreement in writing, signed by the president or secretary, as provided for in the policy, then the defendant is not liable, and the verdict should be for the defendant."

Answer: "I refuse that proposition, because it does not take into account the other question as to his reinstatement to which I have already referred." (Ninth assignment of error.)

"3. If the jury believe, from the evidence, that, because of failure or neglect on the part of the plaintiff to pay his assessments, his interest became forfeited and his policy null and void, the subsequent receipt by defendant's agent of the assessments, under whatever conditions, if promptly disaffirmed by the company upon knowledge of the transaction, and the money returned, would not be binding upon the company, and the verdict should be for the defendant."

Answer: "I refuse that proposition also, because it entirely ignores the receipt of the money under the application for reinstatement." (Tenth assignment of error.)

"4. Under the contract of insurance in this case the agent, Mr. Balderston, had no authority to waive a forfeiture or to reinstate a person who had allowed his policy to lapse, and any attempt on his part to waive a forfeiture or reinstate a lapsed member would have no effect to bind the company, unless he was so authorized to act by the president or secretary, and in the manner provided for in the contract; and if the jury find, from the evidence, that the president or secretary did not so authorize the agent, the verdict must be for the defendant."

Answer: "As to that proposition I charge you as follows: I affirm the proposition that Mr. Balderston had no authority to waive a forfeiture. I do not affirm the proposition that he had no power to reinstate a person who allowed his policy to lapse, because, as I have already stated the policy is silent as to the conditions under which reinstatement can be had, and hence, that if the general agent representing the company generally, submitted certain conditions of reinstatement to the plaintiff which were complied with, that, then those were all the conditions required by the company so far as the evidence goes, and no others were submitted to the plaintiff under the contract." (Eleventh assignment of error.)

The Court charged the jury, *inter alia*, as follows:

"The plaintiff was a member of this association for some years and paid his assessments on both accounts. [It appears that in the year 1889 or 1890 he received at least five notices of assessments, which, by the terms of the contract, were payable within thirty days thereafter, but which he did not pay within thirty days, but which were, however, paid some time in December, I think on December 24, 1890], and he also paid a semi-annual assessment in January, 1891. In answer to that, defendant avers that it or its agents only received these payments upon the express condition that their receipt was only experimental, and with the understanding that the plaintiff should make application for reinstatement, and that that application should be accepted and reinstatement granted by the company; that it was upon that understanding, and upon that alone, that the money was received; and that the company did not reinstate the plaintiff, and that a tender was made to the company of the money thus conditionally received and was refused.

"Let me first say about that proposition, which is the main question of fact, as follows:—That if you should find, from the evidence, that in December, 1890, this plaintiff was in arrears over thirty days, and that by reason of that his policy had become forfeited, and that if he paid to the agent in December the money, which was received from and paid by him, with the express stipulation that it was only to be taken by the agent and sent to the home office of the company, at Baltimore, for their acceptance or rejection, and that, as a matter of fact, they rejected it, that would be a good defence in this case, and in that event your verdict should be for the defendant.

"But the plaintiff avers also that, by reason of the law in this case, the covenants and the contract, and what took place, he was reinstated, and that the money was received from him as a reinstatement on the part of the company, and hence that the payments were good, and that he made no such condition, and that he is entitled therefore to your verdict.

"It appears, also, that there is a clause in this policy which says that there may be no waiver of the forfeiture, except in writing, signed by the president or secretary of the company. [That binds all of the parties in the case, and if this case turned merely upon the question of the waiver it would be my duty to instruct you that there had been no waiver of the forfeiture, in accordance with the terms of the policy, but it does not turn upon that point alone, as I shall show you in a moment. Because, while there is an express covenant as to the waiver, there is a further covenant contained in the by-laws, in the following language, 'Only as many mem-

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bers as shall pay their mortality assessments within thirty days after the date of the notice shall be counted in determining the assessment basis of the death claim; others shall be declared forfeited in like manner as those who fail to pay their annual dues, with opportunity for reinstatement upon similar conditions.' It thus appears that there is not only a provision that there may be a waiver of the forfeiture by the president or secretary, but there is another method by which the forfeiture may be set aside or made of no effect, and that is by reinstatement.] Hence, there is the fact of a possibility of reinstatement under this policy. How does the reinstatement take place? The contract says that it shall be on similar conditions to the reinstatement of those who fail to pay their annual dues. This plaintiff's policy did not lapse because of failure to pay the annual dues, and if it lapsed at all it lapsed by reason of a failure to pay a mortality assessment, and he, therefore, under this contract, could be reinstated on similar conditions as those who failed to pay their annual dues. What are these conditions? This policy is silent upon the subject. There is nothing from the beginning to the end of it, nothing in the by-laws, or in the body of the policy, or anywhere, which states those conditions, and, hence, so far as this case is concerned, we stand here with a man who had a policy technically forfeited, but who also had the right to be reinstated upon certain conditions not set out in the contract.

"It appears that the plaintiff applied to the company for reinstatement, and that he received from them a certificate of their own preparation, which has been offered in evidence, in which he formally made application to be reinstated, and in which the physician certifies to his insurable health, and for which the plaintiff paid a fee to the company, and which was returned to the company. [In the absence of anything further in the case it might be assumed that the conditions needful, and which were not expressed in the body of the contract, were the conditions exacted by the company when they sent him the proper application for reinstatement. When I said there was no evidence in this contract as to the terms upon which the reinstatement could be had, I should have added that there was no oral testimony as to those conditions.] It is true that something has been said about the power of the company to reinstate a man after the ninety days forfeiture had expired, but [there is no evidence which would bind this plaintiff, for it is not in the by-laws, in accordance with the terms of the policy, and, in the absence of such terms, no further agreement than that set up in the policy would bind this plaintiff. He sent this application for reinstatement to the company. His statement is that he paid the money without any conditions. That, on the contrary, the agent of the company, who was the general agent, said to him that it would be all right, and received the money.]

"There is also another element in this case. It appears that the plaintiff received, after forfeiture had occurred, six different papers, five of them mortality assessments and one the assessment of his semi-annual dues; [that he received them from the secretary of the company in Baltimore; that they were sent from the home office to him by the person authorized to sign and effect waivers of forfeiture; and that they were received by this plaintiff after, according to the evidence, there was a technical forfeiture, by reason of non-payment, so late as November 15, 1890; that they were signed by W. O. Nelson, secretary, and the notice for semi-annual dues was signed by W. O. Nelson, and sent January 8, 1891, when, according to the allegation of the defence, there had been a forfeiture. Now, it appears by another covenant in this contract that only members who had paid their annual assessments were liable to assessments on account of death claims, but, nevertheless, this company, by its secretary, did send this man at least four assessments on account of death claims. You will say, therefore, under the evidence, whether that was a recognition of him as a member, and if that was a waiver of the technical forfeiture by the secretary, who was expressly authorized to do it in writing.]

["If you find in this case, gentlemen of the jury, that a reinstatement was asked for by the plaintiff, and the conditions for such reinstatements—all the conditions required by the general agent of the company—were complied with by him, and that the receipt of the money was taken without further condition because of an application for a reinstatement, and because of conformity in everything exacted in that regard, and without any further conditions, it would be a good payment and one which would constitute that a valid reinstatement of him, so as to operate to save him from the effect of forfeiture. That resolves itself into a pure question of fact for you and a question as to credibility under the evidence.]

["It is probably not necessary for me now to rule directly upon the point to which I have alluded, to wit, that, so late as January, the secretary of the company did assess him as a member of the company, but I state it to you as going to the entire good faith of the party, and also as to his credibility as to what took place between him and the general agent of the company.]

"As to the question of the ninety days' default, and the allegation that there was a rule of the company excluding the power after that time to reinstate him, I charge you explicitly that

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there is no evidence which would bind this plaintiff under any such rule as that, because it has not been proven that any such rule was made in conformity with the covenant and contract in this case."

Verdict for plaintiff and judgment thereon. Whereupon the defendant took this appeal, assigning for error, the answers to his points, and the portions of the charge given above in brackets.

A. E. Stockwell, for appellant.

In order to sustain the claim for reinstatement, it must be shown either, that the agent of the company had express authority to reinstate a lapsed member, or that the company had so acted, by ratifying or recognizing such acts of the agent, as to justify persons dealing with said company in assuming that the agent possessed such authority.

Lautz *v.* The Vermont Life Ins. Co., 27 WEEKLY NOTES, 276.
May on Insurance, sec. 138.
Reynolds *v.* Insurance Co., 36 Mich 131.

There was no waiver of forfeiture as described by the terms of the policy; and even if the agent had so attempted, it was not binding on the company, as the agent had no authority.

Ins. Co. *v.* Conover, 98 Pa. 384.
Ins. Co. *v.* Imp. Co., 100 Id. 137.
Ins. Co. *v.* Weiss, 106 Id. 25.

The assessment notices sent could not act as an estoppel against the company, where the insured was not misled to his prejudice.

May on Insurance, sec. 507.
Ins. Co. *v.* Amerman, 119 Ill. 329.
Diehl *v.* Ins. Co., 58 Pa. 443.
Ins. Co. *v.* Laury, 84 Id. 43.
Beatty *v.* Ins. Co., 66 Id. 9.

William W. Wiltbank, (*H. B. Amerling* with him), for appellee.

Oct. 1, 1894. McCollum, J. The appellant is a Maryland corporation having its principal office in Baltimore. It has a branch office in Philadelphia in charge of Thomas C. Balderston, who is its general agent for Pennsylvania. It is engaged in the business of life insurance. On the 8th of January, 1883, it issued a policy of insurance on the life of the appellee in the sum of one thousand dollars, payable to him ten years from the date thereof if he survived that period, and if he did not then to his executors or administrators, ninety days after his death. By the terms of the policy it was to be null and void if the semi-annual dues or assessments upon it were not paid at maturity and there could be no modification of the provisions of the contract or waiver of any forfeiture under it "except by an agreement in writing, signed by the president or secretary of the association." The policy, the application therefor, and the by-laws of the association taken together, constituted the contract between the insurer and the insured. The by-laws provide, *inter alia*, that "any member failing to pay his semi-annual payments and pro rata assessments at the death of a member or members within thirty days after he is notified or according to the terms stated in the notice shall forfeit his membership," and that "only as many members as shall pay their mortality assessments within thirty days after date of notice shall be counted in determining the assessment basis of the death claim. Others shall be forfeited in like manner as those who fail to pay their dues, with opportunity for reinstatement on similar conditions." There is nothing in the policy, in the application therefor or in the by-laws prescribing the conditions of reinstatement in the case of a forfeiture for non-payment of semi-annual dues and there is no designation of them in the oral testimony. The assessment notices signed by the secretary of the association and delivered to the appellee informed him that after forfeiture of his policy no payment could be received or reinstatement made except upon the condition that he was alive and in good health. He might reasonably conclude from these notices that the only condition of restoration to membership in case of forfeiture of his policy was that mentioned in them. Four notices of mortality assessments were sent to him after he failed to make payments of the July assessment within the time prescribed in the by-laws we have quoted, and in them he was requested to remit the assessments to the company's office, or pay the same to its authorized collecting agent. He paid the mortality assessments on the 24th of December, 1890, in accordance with the company's request; he signed and delivered to its representative at its Philadelphia office the application for reinstatement which it prepared and sent to him and he furnished the requisite proofs that he was "in good health and in every respect in a good insurable condition." He received notice January 8, 1891, of an assessment of his semi-annual dues which he promptly paid. All of these payments were accepted without condition. The company is chargeable with knowledge of the appellee's default when it made these assessments, requested him to pay them, and informed him of the condition on which he could be reinstated in case he failed to make the payments within thirty days from the date of the notice. Its action, therefore, was clearly inconsistent with a declaration of forfeiture or a purpose to relieve him of the duties and deprive him of the privileges pertaining to membership in it. Such action ought in equity to estop the company from repudiating what was done on

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the faith of it. It was a recognition of the appellee as a member and well calculated to create the belief that payment of arrearages and proof of continued good health were all that were required for the preservation of his rights as such. He knew that the by-laws provided for the reinstatement of a member on compliance with conditions which did not appear in them or in the body of the policy. His sole knowledge of these conditions was derived from the assessment notices received from the company over the signature of its secretary who was authorized by the contract to waive any forfeiture under it.

In view of the facts recited, all of which appear in the undisputed testimony or are established by the verdict of the jury, we think the appellee was entitled to reinstatement as a member of the defendant company. We discover no error in the instruction complained of and we overrule all the specifications.

Judgment affirmed. S. H. T.

July, '93, 41. May 7, 1894.

Henderson, Hull & Co. Lim. v. Stryker et al.

Vested legacy—Extinguishment of mortgage on death of life tenant—Jurisdiction of Court—Postponement of lien.

Extinguishment is the extinction of a charge or equity by its passing into the hands of the owner of the lands charged; and it takes place when the same hand that is to receive is to pay.

An executor and trustee must account in the Orphans' Court of the county of his appointment; that Court has full jurisdiction, and cannot be ousted by a Court of equity of another county.

Appeal of R. B. Stryker and Sarah E. Stryker, his wife; Chas. B. Weaver, executor of Henry Weaver, deceased, and J. F. Strieby, defendants, from the decree of the Common Pleas of Union County, in a suit wherein Henderson, Hull and Company, Limited, were plaintiffs.

The facts of this case are fully stated in the opinion of the Supreme Court, *infra*.

The errors alleged, *inter alia*, were (1 to 4) that the Court dismissed the following exceptions to the master's report:—

The master erred in not finding as a matter of law as requested in defendant's third point of law: "That the title to the fund invested in the house and lot and in securities for the benefit of the widow did not vest immediately in the children upon the death of the widow, but remained vested in the executor for the purpose of collecting and distributing the proceeds."

The master erred in finding: "He, the executor, has no estate in the mortgage, but Mrs. Stryker, the mortgagor, has a vested estate in these assets, and the moment the intervening life estate became extinct the legacy was due and payable to her, and the mortgage was extinguished *pro tanto*."

The master erred in finding: "The equities of all the parties interested will be preserved under any and every view of the case by postponing the lien of the Charles E. Weaver mortgage to the lien of the Henderson, Hull and Company mortgage."

The master erred in imposing the costs on defendant.

The master erred in recommending a decree postponing the lien of the Charles B. Weaver mortgage to that of Henderson, Hull and Company to the extent of the amount of the legacy payable to the said Sarah E. Stryker, under and by the last will and testament of Henry Weaver, deceased, out of the funds directed by said testator to be invested for the use of his widow during her life, and at her death to be paid to his children in equal shares, and out of the fund vested in real estate, as the same shall appear in the Orphans' Court of Lycoming County.

That a record of the decree be made by the Recorder of Deeds in Union and in Lycoming Counties, and that the decree be entered of record in the Courts of Common Pleas of said counties.

(5) That the Court assumed jurisdiction of the case.

J. C. Bucher, (*J. F. Strieby* with him), for appellants.

Merger in equity depends upon the intention of the parties.

Cook *v.* Brightly, 46 Pa. 444.

Where it is manifestly the interest of the owner of the encumbrance that it should not be sunk in the inheritance, it will be kept alive.

Hatz's Appeal, 40 Pa. 209.
Duncan *v.* Drury, 9 Barr. 332.
Richards *v.* Ayres, 1 W. & S. 485.
Moore *v.* Harrisburg Bank, 8 Watts. 138.

It is clear that no merger could take place under the facts of this case. There are no two estates vesting in the same person, nor union of two titles in the same person, so that the higher might extinguish the less. On the other hand we have distinct ownership of the subject matter in different persons—the mortgage belongs to the executor of Henry Weaver, and the money secured by the mortgage is the property of the same person, to wit, said executor, the fund belonged to him as trustee of the same estate—so that merger has nothing to do with the case. If the prior mortgage in favor of the ex-

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ecutor merged, or was extinguished by mere operation of law, then the junior mortgage of the plaintiffs became the first lien, and plaintiffs had a full, complete and adequate remedy at law, to wit, to sell the mortgaged premises and appropriate the proceeds to the discharge of their claim. Having such a remedy at law, equity will not aid them, and this proceeding must be dismissed.

Can there be a set-off? To wit, can Mrs. Stryker's distributive share in the annuity fund be used to pay the mortgage which she gave to the executor of Henry Weaver, deceased, for the money she borrowed of him? And further, can a subsequent lien creditor of Mrs. Stryker compel the set-off to advance his own security?

The personal estate of the decedent vests in the administrators or executors in trust for creditors, heirs or legatees.

Walworth *v.* Abel, 52 Pa. 370.

These principles require that the estate of a decedent can only be settled and distributed through the Orphans' Court, it alone having jurisdiction to supervise accounts of trustees, executors and administrators.

The master found that the executor was a trustee, *virtute officii*, of the fund devised to him. His relation to the fund is in all points identical with that of an executor, to whom land was devised to be sold and the proceeds divided among certain legatees. In such case the executor's control over the fund or estate devised is absolute for the purpose mentioned, with the one exception that under certain circumstances the legatees may elect to take the land itself, instead of the proceeds. If they do not so elect they have merely the right to receive a sum of money.

Gray *v.* Smith, 3 W. 291.
Morrow to use *v.* Brenizer, 2 Rawle 190.

But in this case no election could be made; at all events none was made by Mrs. Stryker. Her right was merely to receive a sum of money and the executor had a perfect right to collect the mortgage.

Waite on Actions and Defences, Vol. 7, p. 505.
Irving *v.* DeKay, 10 Paige 319.
Morgan *v.* Morgan's Ex., 1 Monaghan 137.
Dobbs *v.* Prothro, 55 Ga. 73.
Guthrie *v.* Guthrie, 17 Texas 541.
Stokes *v.* Fireman, 12 La. 171.
Wolfersberger et al. *v.* Bucher, 10 S. & R. 10.
Steel *v.* Steel, 12 Pa. 64.

Thus it is clear that Mrs. Stryker had no estate in the corpus of the fund, either as land or money; she had none in the mortgage, and hence there was nothing belonging to her to be extinguished or merged.

As to set-off, mutual debts do not extinguish each other *per se*.

Hinkly *v.* Walters, 9 Watts 179.

Debts to be set-off must be in the same right.

Milliken *v.* Gardner, 37 Pa. 456.

The mortgage was not a personal obligation, and the executor could not set-off the amount of the mortgage against her legacy, as in the case of a personal debt due the testator by the legatee.

Fidelity Insurance Co. *v.* Miller, 89 Pa. 26.
Baum *v.* Tonkin, 110 Id. 569.

And if the executor acted fraudulently or negligently in making the investment, the loss would have to be borne by all the legatees in equal parts, and not by the mortgagor alone. A Court of equity would not interfere with the sale, and the defence would be unavailable by the mortgagor.

In a suit by executors to foreclose a mortgage given to them as executors, the mortgagors cannot set-off a distributive share in the estate of the testator which has not been ascertained and ordered to be paid.

Waite on Actions and Defences, Vol. 7, p. 505.
Morgan *v.* Morgan et al. Exs., 1 Monaghan 137.

Untold confusion would ensue if the Common Pleas (in this case of Union County) should do the business of the Orphans' Court of Lycoming County. Again, what right has a subsequent lien mortgage creditor to intervene? He cannot complain because when he took his security the prior mortgage existed in legal form, and he cannot be heard to assert any defence for Mrs. Stryker in his own relief, except actual payment and that is not shown; besides, he could only interfere upon sale of the mortgaged property in the appropriation of the money.

J. M. Linn and *P. B. Linn*, (with them *Addison Candor* and *Munson*), for appellee.

A devise to the testator's widow during life or widowhood, providing that whenever her death or marriage should take place the land should be equally divided among his children which may then be alive, or who have left legitimate heirs, gives to the children a vested remainder in fee.

Manderson *v.* Lukens, 23 Pa. 31.
Macalster's Est., 14 Pa Co. Ct. R. 386.
Crawford *v.* Ford, 7 WEEKLY NOTES 534.
Womrath *v.* McCormick, 51 Pa. 504.
Laguerenne's Estate, 12 WEEKLY NOTES 110.
Bushong's Estate, 11 Id. 107.
Provenchere's Appeal, 67 Pa. 463.

Extinguishment is the extinction of a charge or equity by its passing into the hands of the owner of the lands charged—and as such extinguishment is popularly spoken of as a merger—at the present day they are governed by the

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same general rules and produce practically the same effect.

3 Shars. & Budd's Lead. Cas. Am. L. R. P. 228.
Wankford *v.* Wankford, 1 Salk. 305.
Reigle *v.* Seiger, 2 P. & W. 340-3.
Shelly *v.* Shelly, 8 W & S. 161.
Hollenberger *v.* Yaukey, 145 Pa. 179.
Jeffs *v.* Wood, 2 Peere William's Rep. 129-30.
Gouchenauer *v.* Cooper, 8 S. & R. 187.
Gouchenauer *v.* Froelich, 8 Watts. 19.
Bender *v.* Seigel, 1 Leh. Val. 62.

The position of Mr. Strieby, assignee, rises no higher than that of the assignor. A bond or specialty is evidence of a debt, of its amount and time of payment—and that is all. Its payment may be resisted in the hands of any one, for any reason which would show that it should not be paid.

A subsequent encumbrancer may show that a prior encumbrance has been paid, extinguished or its enforcement estopped.

Clark *v.* Douglass, 62 Pa. 408.

And he may attack it for some matter arising subsequently to the entry of it, as payment or a release, which would show that it was kept on foot in fraud of him.

Campbell *v.* Sloan, 62 Pa. 481.

In the assignment of all choses in action the assignee takes subject to all the equities existing at the time of the assignment between the parties.

Gouchenauer *v.* Cooper, 8 S. & R. 203.

The assignee of a paid judgment takes no title against subsequent creditors.

Wood *v.* Vanarsdale, 3 Rawle 401.
Waters *v.* Largy, 5 Rawle 131.

Where mortgagors procure the payment of a first mortgage with what is admittedly their own money, it extinguishes the mortgage at law and equity as between it and the second mortgage.

Loverin *v.* Humboldt Safe, Dep. & Trust Co, 113 Pa. 6.

It is not a question of set-off, because the mutual demand is concerning the same thing.

October 1, 1894. DEAN, J. Sarah E. Stryker, wife of R. B. Stryker, is a daughter of Henry Weaver, in Lycoming County; he died in the spring of 1876, leaving a will, of which Charles B. Weaver is now sole executor. In this will he directed his executors to purchase a house and lot for the use of his widow, not to exceed in price $2,000, and also invest in real estate securities, $6,000, the interest to be paid annually to the widow during her life. At her death, the house and lot to be sold, and the proceeds, along with the money invested, to be divided equally among his seven children. Sarah E. Stryker was the owner of a small farm lying partly in Union and partly in Lycoming County. In 1883, the executor of her father loaned to her $1,200, payable in five years, interest annually, and took as security a mortgage joined in by her husband upon the farm. On the 4th of November, 1886, three years afterwards, Henderson, Hull and Company, these plaintiffs, loaned R. B. Stryker, the husband of Sarah, $1,500, payable in four years, interest annually, and as security took a second mortgage upon the same land, the wife joining in the mortgage upon her separate estate

February 10th, 1889, the widow of Henry Weaver died. On December 18th, 1890, the executor, for value received, assigned his mortgage to J. F. Strieby. On January 20th, 1891, the plaintiffs filed their bill, setting out the facts as stated, and further averring that at the death of the widow of Henry Weaver, the share of Sarah E. Stryker in the proceeds of the house and lot, and in the money invested for the use of the widow, vested absolutely in the said Sarah, and therefore her said mortgage to the executor merged in her title, at least to the amount of the legacy payable to her by the executor, and so far as concerned plaintiffs became thereby satisfied; that their second mortgage could not be sued out until twelve months from November 4, 1891; that their security was endangered by reason of their inability to sue, and praying that the lien of the first mortgage of the executor be postponed to the lien of theirs, and that the executor be restrained from proceeding to collect his mortgage, or doing any act by which their mortgage might be prejudiced. They afterwards amended their bill by averring collusion between the Strykers and the executor to defraud them by assigning the mortgage to Strieby, and further, that Strieby was not an innocent purchaser for value, but, with full knowledge of the facts, took the assignment from the executor for the purpose of depriving the plaintiffs of the first lien they would otherwise have had by reason of the merging of the mortgage in the title of Sarah E. Stryker.

The defendants, in their answer, denied any fraud or collusion; denied that the $1,200 vested absolutely in Sarah at the death of her mother, and that there was any merger of the mortgage in her title by which the plaintiff's mortgage, or any part thereof, became a first lien on the premises.

The executor, for himself, answered that he assigned and transferred the mortgage for the consideration of $1,373.40, which was paid him by Strieby; that the share of Sarah E. Stryker in the balance of her father's estate would only equal a part of the loan secured by the mort-

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gage given by her to him, and the exact amount could not be determined until a final settlement of his accounts in the Orphans' Court of Lycoming County. The defendants further denied the jurisdiction of the Common Pleas of Union County over the trustee and executor of the estate of a testator whose domicile was in Lycoming County; and further averred adequate remedy at law for plaintiffs touching the several complaints in their bill.

The bill was sent to an examiner and master to report testimony and facts, and suggest decree.

After full hearing, the master found as facts:

1. The sum of $1,200 loaned Sarah E. Stryker by the executor on the first mortgage was part of the money directed by the will to be invested during the life of the widow, but there was no agreement or understanding that any part of the mortgage was to be satisfied out of her share of the money invested for the widow.

2. That there was no evidence to impeach the *bona fides* of the assignment to Strieby.

3. That by the will, Sarah E. Stryker was entitled at her mother's death to the one-seventh of $6,000, and the one-seventh of the purchase money of the house and lot, and her whole share of both, he believes, will equal $1,000; but it is impossible to find the amount of assets in the executor's hands at the death of the widow.

4. He fails to find any fraud or collusion between the parties to prejudice Henderson, Hull and Company.

As conclusions of law, the master determined:

1. That the legacy to Sarah E. Stryker, under her father's will, vested immediately on his death, its enjoyment being postponed until the death of her mother.

2. That the only legal method of determining the amount of Sarah E. Stryker's share, was by settlement of the accounts of the executor, and distribution to the legatees in the Orphans' Court of Lycoming County; and that, at the death of the widow, the executor held this mortgage with the other funds of the estate as trustee for Sarah E. Stryker and the other legatees.

3. That any extinguishment of the mortgage cannot extend beyond the amount due Sarah E. Stryker under the will of her father on a final settlement of the account of the executor in the Orphans' Court of Lycoming County; that at the death of her mother the mortgage was extinguished to the amount of the mortgagor's share in the fund.

4. That Strieby, the assignee, stands in place of the executor, and the mortgage in his hands is subject to the same equities as immediately before the assignment. That the equities of the plaintiffs entitles them to a decree postponing the lien of the first mortgage, and he therefore suggests a decree of postponement in favor of the second mortgage.

On exceptions filed to the report of the master, the Court, after argument, overruled the exceptions, and made the decree suggested by him, and therefore defendants appeal.

It having been found as a fact, that the money loaned Mrs. Stryker on the mortgage was out of the very fund, part of which the executor, under the will, was to pay her at the death of her mother, then in effect, as to a large part of the loan, she had borrowed her own money, and by mortgage secured the annual interest on the whole to her mother; therefore, the moment her mother died, by operation of law the mortgage was paid in an amount equal to the amount of her legacy. And the second mortgage to that amount became a first lien on the premises; there was no need of a decree of postponement in favor of the second mortgage, for to the amount it was paid, there was no lien; to the amount it was not paid, there was no equity in the holder of the second mortgage which could impair the executor's right; to the amount it was paid, he no longer had a right. Nor could the assignment to Strieby after the death of the widow, give life to so much of the mortgage as was extinguished; the lien of the second mortgage, as to that much, had attached as a first lien at the death of the widow; the right of a third party had vested, which it was not in the power of the executor to divest by an assignment. If the assignment had been made in the lifetime of the widow, no one could have been heard to object to it but Mrs. Stryker; but as to the part paid at the death of her mother, it had no existence as a debt against her, and therefore was incapable of assignment.

Extinguishment is the extinction of a charge or equity by its passing into the hands of the owner of the lands charged: Leading Cases, A. L. of Real Property, Vol. 3, 228. It takes place when the same hand that is to receive is to pay—that amounts to extinguishment: 1 Salk. R., 305. And the principle is fully stated and applied by GIBSON, C. J., in Reigle *v.* Seiger, 2 P. & W. 340.

But how can the Court of Common Pleas, sitting in equity for Union County, by any decree measure the value in dollars and cents of Mrs. Stryker's legacy in Lycoming County?

The executor and trustee must account in the Orphans' Court of Lycoming County for the fund; that Court must determine the exact balance, and award to Mrs. Stryker one-seventh; by law, another Court of another county has

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full jurisdiction, and this cannot be ousted by a Court of equity in Union County: Loomis *v.* Loomis, 27 Pa. 233. It would lead to interminable confusion were such a practice approved. In so far as the decree of the Court determines what are the rights and equities of the second mortgagees at the death of the widow, it is unobjectionable. But it cannot decree that the lien of the first mortgage be postponed in favor of the second mortgage, for in so far as the first mortgage is paid by operation of law, there is no lien; in so far as it is not paid, no Court can postpone, or in any manner disturb, the clear legal right of plaintiff and his assignee, Strieby. It is argued that the holders of the second mortgage have an equity in asking a decree that will enable them to bid intelligently; but they are not entitled to such decree, if the right of the executor and his assignee be impaired thereby; their right to a first lien, for whatever is due and payable from Mrs. Stryker in excess of her legacy, is superior to any supposed equity of this character.

The holders of the mortgage loaned their money with the record before them. It must be assumed, they anticipated this very element of uncertainty, and took the risk of it. The only relief they can have is through the Orphans' Court of Lycoming County. That Court has full equity powers in the premises. Although this case is complicated somewhat by the record of the second mortgage and the assignment of the first, yet the equities of both parties being now determined by this decree, the case stands as clear of embarrassment as if the first mortgage was only for the difference between her legacy, and the amount due on the mortgage. And in so declaring, the equity jurisdiction of the Common Pleas in Union County is exhausted.

Whatever risk is incident to bidding on the property, before the exact amount payable to the executor or his assignee is determined, must be assumed by these plaintiffs.

The decree of the Court below is affirmed, but so far modified as to vacate the general order postponing the lien of the first mortgage in favor of the second. The lien of the first must continue for whatever amount is still unpaid.

W. C. S.

Jan. '94, 131. January 31, 1894.

Kuhns's Estate.

Kuhns's Appeal.

Assignment of expectancy—Void at law, good in equity—Competency of witness—Act of May 23, 1887, sec. 5, clause "e."

At law a valid transfer can be made of anything in actual existence, but not of an expectancy.

In equity, if the consideration for such an assignment is a fair and honest one, the assignment will be treated as an agreement to transfer when the assignor's title accrues, and it will be held to take effect as an assignment when the expectant interest vests in the assignor.

Where a legacy is claimed by an assignee and by an attaching creditor, the death of the attaching creditor does not render the legatee and his assignee incompetent to testify to the facts attending the assignment.

Appeal of Julia Ann Kuhns from the decree of the Orphans' Court of Lehigh County, making distribution of the estate of Reuben Kuhns, deceased.

Before A. G. Dewalt, Esq., the auditor, the legacy of Franklin R. Kuhns, a son, was claimed by his sister, Julia Ann Kuhns, under an assignment made in February, 1890, of all his interest in his father's estate. The testator died June 8, 1890, and the assignment was recorded June 9, 1890. On October 10, 1890, James Newhard, a judgment creditor of Franklin R. Kuhns, issued an attachment against this legacy. In April, 1892, James Newhard died, testate. In December, 1892, the executor of Reuben Kuhns filed his account, which was referred, and before the auditor the executors of James Newhard also claimed Franklin R. Kuhns's legacy under the attachment.

The auditor found that such an assignment as was set up by Julia Ann Kuhns, though void in law would be good in equity if for a valid consideration, but rejected the testimony of both the assignor and the assignee on the ground that the death of James Newhard, a party to the "thing or contract in action," rendered them incompetent, and in default of any evidence of consideration for the assignment, awarded the legacy to the representatives of the attaching creditor.

Exceptions to the report having been dismissed by the Court, ALBRIGHT, P. J., Julia Ann Kuhns took this appeal, assigning as error the sustaining of the exceptions and the award made.

Marcus C. L. Kline, for appellant.

While the point involved has not been decided under the Act of 1887, it was settled under the Act of 1869, and the Acts have the same intent and spirit.

Karns *v.* Tanner, 66 Pa. 297.
Pattison *v.* Armstrong, 74 Id. 476.

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Craig *v.* Brendel, 69 Id. 153.
Waltman *v.* Herdic, 90 Id. 459.
McFerren *v.* Mont Alto Iron Co., 76 Id. 187.
Appeal of Jordan et al., 107 Id. 75.
Dickson *v.* McGraw, 151 Id. 98.
Tarr *v.* Robinson, 158 Id. 60.

John Rupp (*E. H. Stine* with him), for appellees.

October 1, 1894. WILLIAMS, J. This appeal comes from the Orphans' Court, but it grows out of a controversy between an attaching creditor of Franklin R. Kuhns and an assignee of his interest as a residuary legatee, under his father's last will and testament.

The important facts are that Franklin R. Kuhns assigned his expectant interest in his father's estate to his sister, Julia Ann Kuhns, in February, 1890. The father died in June, 1890. In October of the same year a judgment creditor of Franklin R. Kuhns issued an attachment execution against him on a judgment obtained in 1885, and seized his interest in his father's estate. If the assignment is valid, the attachment is too late. If not valid then the creditor is entitled to the fund to the extent of his just demand upon it.

Two questions were considered by the learned auditor and the Court below. First, can a valid assignment of an expectancy be made? Second, if so, was the assignment made in this case a valid one? The conclusion reached in the Court below upon the first of these questions was clearly right.

At law, a valid transfer can be made of anything in actual existence. What the assignor has he may dispose of. What he has not, although he may hope or expect to acquire it, he can make no title to because he has no title himself. But such sales and assignments have been sustained in Courts of equity whenever good conscience seemed to require it, and not otherwise: East Lewisburg Lumber and Manufacturing Company *v.* Marsh et al., 91 Pa. 96; Patterson *v.* Caldwell et al., 124 Id. 455. If the consideration for such an assignment is a fair and honest one, the assignment will be treated as an agreement to transfer when the assignor's title accrues, and it will be held to take effect as an assignment when the expectant interest vests in the assignor.

The second question affords the only real ground for controversy in this case. Was the assignment to Julia Ann Kuhns good in equity? This must depend on the bona fides of the transfer and the adequacy of the consideration.

The proof on these subjects depends on the testimony of the assignor and the assignee. The learned auditor excluded both these witnesses as incompetent to testify, and then held the assignment invalid for want of proof of consideration. This appeal is thus seen to depend on the competency of these witnesses. The auditor and the learned Judge of the Court below placed the incompetency of these witnesses on sec. 5 of the Act of May 23, 1887. The persons excluded by this clause are the surviving and remaining parties to a thing or contract in action where the other party to such thing or contract is dead, or has become a lunatic, and the interest of the decedent or lunatic has passed by his own act or the act of the law to a party on the record. In such case the surviving party and "any other person whose interest shall be adverse to that of the deceased or lunatic party is declared to be incompetent to testify to any matter occurring before the death of said party or the adjudication of his lunacy."

Does this clause include Julia or Franklin R. Kuhns? It should be noticed that this question did not arise upon the trial of the cause between Newhard, or the bank, and Franklin R. Kuhns, but upon execution issued upon a judgment obtained when all the parties were living and *sui juris*. It should be noticed in the next place that the question trying was the title of F. R. Kuhns to property seized in execution which the plaintiff alleged belonged to him. The thing in action was the legacy seized. Newhard was never a party to that. It came to the defendant under his father's will, and Julia Ann Kuhns alleged that she had become the owner of it some eight months before the execution issued. The contract under examination was that under which she claimed title. Both parties to this contract were living, and both were offered as witnesses. Newhard was simply a creditor of F. R. Kuhns who had seized property alleged to be his. Julia Ann Kuhns was a claimant of the property seized, asserting her title against her brother's creditor.

If the property seized had been a horse instead of a legacy would the mouth of the purchaser have been closed by the Act of 1887, because her vendor's creditor had died after levy made upon the horse? To state this question is to answer it. Under the sheriff's interpleader Act the issue would have been made up between the creditor and the claimant. The claimant and the defendant would have been competent witnesses, and their competency would not have been affected by the death of the creditor except as to matters transpiring between the claimant and the creditor, that might come under investigation. In this case the title to the thing seized was derived through an independent channel with which Newhard had no connection. The contract, the good faith of which it was necessary to establish, was a contract to which the creditor was a stranger, and both parties to which were living; and the adverse interest existing was simply that which grows out of the mere pen-

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dency of litigation. The creditor seized, and was interested to hold, the legacy as the property of his debtor. The claimant set up a title under an assignment before the death of the father, and when the interest of the assignor was a mere expectancy.

The question, therefore, was over the honesty of the transaction and the sufficiency of the consideration, as between herself and her brother.

Upon this question both of them were competent. The decree of the Orphans' Court is reversed, and the record remitted for further proceedings. The cost of this appeal to be paid by the appellee. J. D. B., JR.

Jan. '94, 219. March 13, 1894.

Vanderpool v. Vanderpool.

Assignment of judgment—Construction of—Power of attorney—Revocation.

An assignment to A. of a judgment "to collect and account to me therefor, after deducting his fees, expenses and the fees and expenses" of B., is merely a power of attorney to collect with a pledge of the judgment as security for fees and expenses.

The property remains in the assignor, he can resume control over it, satisfy it, or terminate the authority of the attorneys at any time subject to their equity to be reimbursed their fees and expenses, and the burden is upon such attorneys to show that they incurred expenses and fees in good faith.

Appeal of Nelson Vanderpool, from the order of the Common Pleas of Bradford County, discharging his rule to open a judgment.

The record and depositions disclosed the following facts:—

On September 7, 1891, Martin Vanderpool obtained a judgment against, *inter alia*, Nelson Vanderpool for $1237.43. On June 6, 1892, he executed the following assignment:—

For value received I hereby assign the above judgment to A. B. Markham, Esq., of Mayville, Mich., he to collect and account to me therefor, after deducting his fees, expenses and the fee and expenses of James Wood of Towanda, Pa., who has been employed to prosecute said suits to completion, and collect the amount due and belonging to me upon said judgment. I do hereby also assign to said A. B. Markham all my rights and title or interest in any of the personal property bidden off by James Wood, Esq., for me at and under sheriff's sale, upon any execution issued upon either of the above judgments, or upon the decree upon which such execution may have been formed. He, the said A. B. Markham, being fully empowered by the assignment to handle, use or sell, control or dispose of said personal property as his own, in his own name or otherwise for his use, reporting to me only after having fully settled with James Wood in a fair and impartial manner, after having fully paid himself for all services and disbursements to me.

This assignment was not filed of record until June, 1893.

On March 9, 1893, Martin Vanderpool executed a power of attorney to Dennis Crimmins, to settle and discontinue all suits against Nelson Vanderpool, and expressly revoking "a certain power of attorney made by me to James Wood."

In November, 1893, Markham issued a vend. ex. on the above judgment and levied on the farm of Nelson Vanderpool, whereupon the latter obtained a rule to show cause why the judgment should not be opened as to all in excess of $120 and costs.

His depositions showed the above power of attorney to Crimmins to satisfy, that Markham had no interest in the judgment other than a collateral security for the $120, and averring that he was ready and willing to pay that sum with costs to the sheriff. Martin Vanderpool's deposition was as follows:—

"Martin Vanderpool being duly sworn, says that at the time of the hearing and decree of said auditor, Nelson Vanderpool did not owe me anything whatever, that the proceeding then had was all done by some other person other than himself, and without his knowledge and consent—that he was then over twenty-one years of age, and capable of doing business for himself, and that he never employed any one to commence legal proceedings against Nelson Vanderpool, and he did not desire it to be done. It was not necessary to make said costs, and I did not want it done."

Markham produced depositions to show that the full amount was due on the judgment.

The Court, PECK, P. J., after hearing argument, discharged the rule, whereupon Nelson Vanderpool took this appeal, assigning for error the action of the Court.

H. F. Maynard (with him *I. N. Evans* and *William Foyle*), for appellant.

A judgment will be opened when there appears to be a dispute as to facts upon which a jury should pass.

Mullen *v.* Mageoch, 14 WEEKLY NOTES, 127.

James Wood, for appellee.

Nelson had constructive notice of the assignment to Markham.

Jacques *v.* Weeks, 7 Watts, 261.

Payment of a judgment to nominal plaintiff after knowledge that it had been assigned, is not a payment to a proper person.

Guthrie *v.* Bashline, 28 Pa. 81.

Martin Vanderpool had no power to execute the power of attorney to Crimmins after the assignment, and his statement that nothing was due in it was not evidence.

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Morton *v.* Morton, 13 S. & R. 108.
Camp *v.* Walker, 5 Watts, 482.
Eby *v.* Eby, 5 Pa. 439.

July 11, 1894. MITCHELL, J. The defendant has made affidavit that there is nothing due on this judgment except the sum of $120 to Markham which he offers to pay, and there is also produced an affidavit of the plaintiff, Martin Vanderpool, that the proceeding resulting in the judgment was without his knowledge or consent, that the defendant at that time owed him nothing, and that as he was then of age, no one had any authority to prosecute the suit or obtain the judgment for him. There are also produced from plaintiff a power of attorney to Crimmins, and an order on the prothonotary to satisfy the judgment.

Prima facie on this state of facts the judgment was void from the beginning, and should not only be opened but vacated absolutely and taken off the record. But it appears that other parties have intervened on the faith of the judgment and must be considered. In June, 1893, an assignment was filed of record, dated June 6, 1892, and the whole trouble in the case seems to have arisen from the extraordinary misconception by the plaintiff's attorneys of the nature of this assignment, and their powers and duties under it. The paper is spread at large on the record, and is an assignment of the judgment by the plaintiff to A. B. Markham, "to collect and account to me therefor, after deducting his fees, expenses, and the fees and expenses of James Wood." This is nothing more nor less than a power of attorney to collect, with a pledge of the judgment as security for the fees and expenses named. The property in the judgment remains in the plaintiff, and he can resume control over it, satisfy it, or terminate the authority of the attorneys at any time, subject to the equity they have to be reimbursed their fees and expenses. It is of no consequence that, as the learned counsel for the appellee seem to think, the whole amount of the judgment is really due the plaintiff, and he is being persuaded out of it. That is his business, not theirs, and if he chooses to give away his rights for family peace, or any other reason, no objection can be heard from them beyond the protection of their interest for fees and expenses incurred before notice of revocation. As to such fees and expenses the burden of proof is upon them. Markham took the assignment with a duty to account, and to pay over after deducting fees and expenses. It is upon him to show what these were, that they are proper in nature and amount, and that they were actually incurred in good faith before notice of any of the plaintiff's acts which are equivalent to a revocation of the assignment, and especially before notice of the execution of the power of attorney to Crimmins in March, 1893, formally revoking their authority. These, if the parties cannot agree, are matters for a jury.

Order reversed, and rule made absolute; an issue to be awarded to determine how much is equitably due to the assignees, and the judgment to be satisfied as to all above such amount.

W. M. S., Jr.

Jan. '94, 85. April 24, 1894.

Assigned Estate of George E. Ernst. Hayes's Appeal.

Revival of judgment—What is sufficient notice of—Recovery only in name of legal plaintiff—Names of use plaintiffs surplusage.

Where the plaintiff parts with his interest in a judgment by assignment, recovery can be had in his name only, though for the benefit or use of the equitable plaintiffs.

The names of the use plaintiffs may change from time to time, as the interests in the judgment are transferred, and the recital of their names in the writ is mere surplusage.

When portions of a judgment are assigned to different parties, any one of them has the right to use the name of the legal plaintiff to revive it, and when the writ is issued it is for the benefit of all.

Dietrich's Appeal, 107 Pa. 174, commented on.

Appeal of W. D. E. Hayes, a creditor, from the decree of the Common Pleas of Cumberland County, in the assigned estate of George E. Ernst.

The facts are fully stated in the opinion of the Supreme Court *infra*.

The error assigned was that the Court dismissed appellant's exception to the report of the auditor, viz., "The auditor erred as follows: In concluding as a matter of law that the portion of the judgment, No. 456 April Term, 1886, (revived to No. 294 May Term, 1891) which is owned by W. D. E. Hayes, lost its lien on the land of G. E. Ernst. He should have concluded that said judgment did not lose its lien and that he is entitled to be paid in full out of the proceeds of sale of the land."

E. W. Biddle, for appellant,

The law has long been settled in Pennsylvania that it is not necessary that the names of *equitable* plaintiffs should appear upon the record.

Reigart *v.* Ellmaker, 6 S. & R. 42.
Armstrong *v.* City of Lancaster, 5 Watts 68.
McKinney *v.* Mehaffey, 7 W. & S. 276.
Beale *v.* Commonwealth, 9 Watts, 183.

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Commonwealth *v.* Lightner, 9 W. & S. 117.
Commonwealth *v.* Shuman's Administrators, 18 Pa. 343.
Lightner *v.* Commonwealth, 31 Pa. 341.
Memphis, etc. R. R. Co. *v.* Wilcox, 48 Pa. 161.
17 Encyc. of Law, 512.

The ruling in Dietrich's Appeal, 107 Pa. 174, has no application.

Appeal of Fogelsville L. and B. Assn, 89 Pa. 293.
Worman's Appeal, 110 Pa. 25.

J. M. Weakley, for appellee.

A scire facias must recite accurately the judgment which it is used to revive. The writ which is the subject of the present contention did not recite with substantial accuracy the former judgment.

A recital which tends to lead one into error is inaccurate. The present scire facias has led the appellee into error, and serious loss, unless the decision of the lower Court is sustained. This is the test of the question.

Dietrich's Appeal, *supra*, entirely justified the judgment rendered in the Court below.

The appellant in this case has no claim on the consideration of the Court. On April 1, 1891, he was the owner in trust of the part which he now claims as his own. He was bound to know that the lien of his judgment expired that day, and that duty to his trust required its revival. He failed to take any action to have it revived. By his own laches his lien fell. After the appellee had loaned his money on the condition of the record as it stood for a year, the appellant comes into Court and seeks to preserve his lien by entering a judgment on an irregular and defective scire facias, which was irregular and defective because he neglected to have himself joined as a use plaintiff at the proper time. Equity, as well as the enforcement of a long established rule of practice requires that the judgment of the appellee should receive the money appropriated by the Court below.

October 1, 1894. FELL, J. On April 1, 1886, judgment was entered by confession in favor of C. K. Rebuck, adm., against George E. Ernst, for $4,500.00. In 1887, the plaintiff assigned $1,000.00 of this judgment to Alexander Highlands, and in 1888 he assigned the remaining $3,500.00 to W. D. E. Hayes. On December 17, 1890, Hayes assigned to William Coffey, administrator, $3,140.00 of the judgment, retaining the balance of his interest, $360.00.

On March 31, 1891, a sci. fa. to revive the judgment was issued. It was entitled G. K. Rebuck, adm. etc. now to the use of William A. Highlands, adm. etc. and William A. Coffey, adm. etc. *v.* G. E. Ernst. On the next day the defendant paid to Highlands the amount of his interest in the judgment, and confessed judgment on the sci. fa. to Coffey for the amount due him, $3,140.00.

This left outstanding and unprovided for the amount due Hayes, who on October 19, 1892, caused judgment to be entered by default against G. E. Ernst for $540.74, on a præcipe entitled G. K. Rebuck, adm. etc., for use of W. D. E. Hayes *v.* G. E. Ernst and to the number and term, and under the sci. fa. to revive issued Mar. 31, 1891. In the meantime, on April 6, 1892, William Brandt obtained judgment for $1,334.00 against Ernst, who, on August 5, 1892, made an assignment for the benefit of his creditors.

The assignee for the benefit of creditors paid the judgment for $3,140.00, and the contest for the balance of the fund for distribution was between William Brandt and W. D. E. Hayes. The learned auditor held that the judgment of the former had priority of lien, and awarded the balance to him. The award of the auditor was sustained by the learned Judge of the Common Pleas, who considered the question involved as governed by Dietrich's Appeal, 107 Pa. 174. This award was based upon the conclusion that the portion of the original judgment which was owned by Hayes, and as to which a judgment of revival was entered on October 19, 1891, had lost its lien upon the land of the defendant for the reason that the revival was not in substantial conformity with the Act of Assembly.

In Dietrich's Appeal, *supra*, a judgment for $20,000.00 had been assigned to sixteen persons. Two of the assignees attempted by separate writs to revive the judgment to the extent of their separate interests. The amount of the original judgment was not correctly recited in either writ, being stated in one as $1,300.00, and in the other as $340.00. It was held that there was not a substantial identification of the judgment sought to be revived, as the amount recited in the writ did not correspond with that in the judgment, and that it was in violation of the rule that a sci. fa. to revive must substantially identify the original judgment as to parties, dates and amounts.

The judgment in this case originally stood upon the record G. K. Rebuck *v.* George E. Ernst. The plaintiff parted with his entire interest by assignment, and at the time the sci. fa. was issued to revive it, the equitable title was in three persons, who held unequal shares. The legal plaintiff, however, held the title, and in his name only could recovery be had, though for the benefit or use of the equitable plaintiffs. Their names were not upon the record as parties to the judgment, but as assignees of the plaintiff's interest; and they could revive or collect the judgment only on his title and in his name. Reigert *v.* Ellmaker, 6 S. & R. 42;

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Armstrong *v.* City of Lancaster, 5 Watts, 68; McKinney *v.* Mehaffey, 7. W. & S. 276; Com. *v.* Shuman, 18 Pa. 343; R. R. Co. *v.* Wilcox, 48 Pa. 161.

The sci. fa. recited the names of the legal plaintiff and defendant, the number and term of the judgment, its date and amount. This was an accurate recital of the record, and clearly and unmistakably identified the judgment as to the parties, dates and amount. The recital in the writ of the names of the use plaintiffs was mere surplusage. They were no part of the record, and might change from time to time as the interests in the judgment were transferred.

This case is not governed by Dietrich's Appeal. There the judgment was not properly revived, for the reason that it was not correctly recited in the writ; here the judgment was correctly recited, the addition of the names of the use plaintiffs being immaterial under all the authorities, and its revival was regular.

The writ recited the amount of the judgment as $4,500.00, and it should be considered as issued for the benefit of all parties in interest. The docket showed the real interest of each of the equitable plaintiffs. It appeared from it that after the writ issued $1,000.00 had been paid to Highlands, and his interest extinguished; that judgment had been confessed to Coffey for $3,140.00, and that the interest of Hayes was unpaid. An examination of the docket when Brandt's judgment was entered would have disclosed this, and of it he was bound to take notice.

When portions of a judgment are assigned to different parties, any one of them has a right to use the name of the legal plaintiff to revive it, and when the writ is issued by one it is for the benefit of all. Where the interests appear as they did in this case, the record is notice to subsequent judgment creditors.

There would have been no difficulty in the case if judgment of revival had been entered for the whole amount due instead of for $3,140.00, the amount of Coffey's interest; and that would have been the better practice and conserved the rights of all the use plaintiffs. Hayes was left to the alternative of issuing a separate writ, which would have been a mere duplicate, or of assessing his damages under the writ already issued.

The course he pursued was no hardship to the defendant, as it relieved him from additional costs, and he knew when he confessed judgment to Coffey that the balance of the debt was outstanding and unpaid. He would not be permitted to take advantage of this, and if he cannot, a subsequent judgment creditor, who is a mere volunteer, should not be allowed to do so.

We are, therefore, of opinion that so much of the fund as was necessary to pay the appellant's judgment should have been awarded to him. The decree is reversed at the cost of the appellee, and the record is remitted in order that distribution may be made in accordance with this opinion.

W. C. S.

May, '94, 1 and 2. May 28, 1894.

Eby's Appeal.

Commissions of trustees—Compensation for responsibility—Charges for securing bond disallowed.

The commissions paid to an administrator or other trustee are intended as compensation for the responsibility involved in the acceptance of the trust and for services rendered in the administration of it.

There is no warrant in law for charging the estate for services rendered, or time and money expended, in procuring the bond which the trustee is required to give.

Wilson's Estate, 1 C. C. R. 509, followed.

Appeals of William H. Eby, as administrator and trustee, from the decree of the Orphans' Court of Dauphin County, disallowing his claim for the charges incident to securing bonds for the faithful performance of his duties.

Elizabeth G. Eby died intestate, seized of both real estate and personal property, and leaving three children, Maurice C. Eby, William H. Eby, and Fanny M. Eby. The elder son having declined on citation from the register to administer upon his mother's estate, letters of administration were duly granted to the younger son, July 21, 1891. As his security, the administrator gave the bond of The American Surety Company in the sum of $10,000, and paid the company $110 for becoming his surety. When the administrator filed his account, he claimed credit therein for the $110 so paid by him. His brother and sister filed exceptions to this item of credit. The matter was referred to an auditor, who disallowed credit for said item. The Court, on exception, sustained the auditor, and confirmed his report. Proceedings in partition were also had in the Orphans' Court upon the real estate of the deceased, on petition of the elder son; and the children and heirs having all refused to take at the appraisement, the Court appointed said William H. Eby, trustee, to sell the real estate in partition; and he was required by the order of the Court to give, and did give, the bond of said American Surety Company in the sum of $346,000 for the faithful performance of his duties as trustee; for this bond he paid $1,530. He sold the real estate to his brother and sister for the sum of $105,100, a sum more than $60,000 less than the

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appraisement in partition, and this sale was duly confirmed by the Court. The trustee filed his account and claimed credit for the $1,530 paid for the bond. His brother and sister filed exceptions to this credit; the matter was referred to an auditor, who disallowed the credit; and on exception by the trustee the Court confirmed the report of the auditor.

The executor and trustee took these appeals and assigned as error the disallowance of the above two credits.

L. W. Hall (*Francis Jordan* with him), for appellant.

A disinterested suretyship, where the motives or sentiment of friendship do not enter, tends to promote the proper and prompt settlement of estates. The interest of the surety company is on the side of the Court, and against the trustee, for the faithful performance of his trust; and a speedy settlement of estates is a matter of great public interest, and prevents waste, bad management, and fraud. It is this principle which has compelled the Legislatures of Oregon, Rhode Island, Maine, Wisconsin, Connecticut, Massachusetts, Minnesota, Arkansas and New York, to enact statutes requiring the Courts to approve bonds of surety companies; and to allow the proper credits to the trustee for such expenditures made. In both Massachusetts and Rhode Island the uniform practice of the probate Judges was to allow trustees for such disbursements as at common law before the enactment of the statutes. There is every reason for such allowance in a case like this, where the only persons objecting are the beneficiaries in the work done by the trustee. They necessitated the large bond, the elder brother refusing to act as trustee, compelled William, the younger, to do it; and then after the estate is satisfactorily settled, endeavor to make the younger brother wholly responsible for the attending expense incurred for the common benefit of all. Neither common or statute law should sanction or encourage such conduct as this.

Miller's Estate, 2 Dist. Reports, 410.

John E. Patterson, for appellees.

The compensation which a trustee receives from the estate has hitherto been supposed to pay for all his services, and it would be a hardship to burden estates hereafter with an expense from which they have hitherto been exempt. Moreover, a trustee knows before accepting a trust whether or not it will be necessary for him to make an outlay for security, and what commission he will get for his services, and if, in his opinion, this is insufficient, he need not undertake the performance of the duties it may impose upon him. A man of known integrity in the community in which he lives, need not resort to a corporation to provide him security, but can obtain it, without cost to himself, from responsible neighbors. There is no law compelling a person to become an administrator or trustee to sell real estate under proceedings in partition. The law provides for a refusal in both cases. His act in accepting such trusts is entirely voluntary. And, therefore, the instance used as an illustration by Judge FERGUSON in Miller's Estate, *supra*, loses its force. The fact that the Legislatures of the several States mentioned in the argument for appellant have enacted statutes requiring the Courts to approve bonds of surety companies, and to allow the proper credits to the trustee for such expenditures, shows that the matter was considered a subject of legislative action, and that the practice of the courts in those States must have been against such allowance, and militates against the trend of the argument, that this Court should by its decision establish a precedent for allowances of this kind in the future.

It is well to remember, what the attorneys for appellant seem to have forgotten, that under the common law trustees did not receive commissions for their services. If, therefore, it has been the uniform practice of the probate Judges of Massachusetts and Rhode Island to allow trustees for disbursements, such as are claimed in this case, the statutes must have provided for the same, or the Judges departed from the common law practice, and in the latter case there could not be any valid reason for the allowance.

The reasons given in Wilson's Estate, 1 C. C. Rept. 509, for disallowing a credit asked by an administrator for procuring security, apply as well to the case of a trustee appointed to sell real estate under proceedings in partition.

In the case here presented, the administrator and trustee has been allowed and has received the lawful and usual commissions attached to these offices, and he should not have any further allowance for the expense incurred for qualifying for the discharge of the duties of the trust.

October 1, 1894. MCCOLLUM, J. We cannot ascertain from the paper-books what compensation the appellant received as administrator or trustee. He filed two accounts, in one of which he claimed credit for $110 paid to a corporation for becoming his surety as administrator, and in the other he claimed credit for $1,530 paid to it for becoming his surety as trustee. The sums so paid amounted to one and a half per cent. on all moneys received by him as administrator, and on all moneys realized by his sale of the real estate. As it is not alleged that the compensation he received for his services was less than the customary allowance to trustees, we may reasonably conclude that the sums

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he paid to his surety, and with which he seeks to charge the estate, are in addition to such allowance. The commissions paid to an administrator or other trustee are intended as compensation for the responsibility involved in the acceptance of the trust and for services rendered in the administration of it. The law contemplates and the Courts award in the form of commissions or otherwise, proper remuneration for both. But there is no precedent in our decisions nor warrant in the law for charging the estate for services rendered or time and money expended in procuring the bond which the trustee is required to give. The ability to give this bond is in the nature of a qualification for the office. The execution and approval of the bond constitute a condition precedent to acceptance of the responsibilities and entrance upon the duties of the trust. There is a broad and plain distinction between a claim for services rendered and money expended in execution of a trust and a claim for labor and expenditures incurred to enable a person to become trustee. Public officials who are required to give bonds for the faithful performance of their duties as such, do not furnish them at the expense of the county, State, or nation, nor should trustees who are required to give them do so at the expense of the estate or trust fund. Strictly speaking, there is no apparent reason why the latter should furnish bonds at the expense of the estate, and the former should furnish them at their own expense. The law does not so discriminate between them. In either case the bond is given to enable the principal obligor to hold a position of trust and to secure the proper performance of the duties which pertain to it.

It is probable that this litigation is due to the comparatively recent legislation which enables certain corporations to become sureties. But the privilege thus granted to them does not increase the compensation of an administrator or trustee, or in any manner affect the liability of the estate to him. The law on the subject of compensation to trustees is the same now as before the legislation referred to. We regard the language of Judge ASHMAN in Wilson's Estate, 1 C. C. R. 509, as applicable to our question, and we therefore quote it in this connection. He said: "When an administrator accepts his office, he impliedly asserts his ability to fulfil its obligations, among which the first in order is the entering of security. He also impliedly admits the adequacy of the compensation which the law has affixed to the performance of his duties. Why a compensation which has hitherto been supposed to pay for all services does not cover a service which is so personal to the accountant that until he has rendered it he could do no official act and claim no official pay we are unable to see. If the accountants in the case in hand were unable to obtain security, they were ineligible to become administrators; if they chose to incur expense in order to qualify they did so presumably because the office was worth the outlay."

We are unable to discover any reasonable ground on which to charge the estate with the money paid to the corporation for becoming surety for the appellant as trustee to sell the real estate under proceedings in partition. If it be conceded that by virtue of his office as administrator he was entitled to have and execute the order of sale, it must also be admitted that he was not bound to do so. He might have declined to execute it and thus cast upon the Court the duty of appointing some one else to make the sale. In the sense that he was a volunteer accepting the position of administrator he was a volunteer in becoming a trustee to sell the real estate. He accepted each trust with the knowledge of the compensation allowed for the proper performance of its duties, and of the conditions precedent to the possession and exercise of its powers. It would therefore be inconsistent and unreasonable to charge the estate with the money paid to the surety in one case and refuse to charge it with a like payment in another. In this case the appellant was compensated for his services as executor and trustee in the form of commissions claimed by him in the accounts filed. These have been regarded hitherto as sufficient compensation for all his services in connection with the trust. The additional charge for labor and expense incurred in procuring bonds has no sanction in the decisions of this Court, or in the legislation applicable to the administration and settlement of trust estates. For these reasons we overrule the specifications of error.

Decree affirmed and appeals dismissed at the cost of the appellant. W. C. S.

July, 1893, 99. March 12, 1894.

Appeal of First National Bank of Oswego.

Equity—Costs—Power of Court to order payment of expenses of litigation.

H., a trustee of an estate in a state of insolvency made petition to Court, to be authorized to pay certain counsel of the estate a certain sum. The amount of the sum asked to be paid was objected to as excessive by one of the creditors:

Held, The discretion in this respect rests with the Court below, and will not be reviewed on appeal.

Appeal of the First National Bank of Oswego

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from the decree of Common Pleas of Lycoming County, directing J. C. Hill, substituted trustee of the estate of Mills B. Weed, deceased, to pay $7,500 for counsel fees in certain litigation in which the estate had been involved.

J. C. Hill, substituted trustee of the estate of M. B. Weed, deceased, presented a petition for leave to pay $7,500 counsel fees for services rendered to the estate.

On the same day the petition was presented, the First National Bank of Oswego, one of the creditors of the estate, filed, by leave of Court, a protest to the order being made as prayed for.

The Court, METZGER, P. J., granted the order, as follows:

"It is, therefore, ordered that J. C. Hill be authorized and empowered to pay H. C. McCormick, S. T. McCormick, and H. W. Watson, Esquires, the sum of $7,500, out of the funds of the Trust Estate for their services, rendered in the interest of the Trust Estate in Nos. 1 and 2, September Term, 1891, in Equity. The Court reserving the right to determine in the future, whether this amount should be contributed to equally by all the creditors of said Trust Estate, or should be paid by any particular class of creditors."

Exceptions in behalf of appellant were filed as to the authority of the Court to make such order, and as to the amount being excessive.

C. Larue Munson (with him *Addison Candor*, *Rodney A. Mercur* and *W. D. Crocker*,) for appellant.

The proceeding was summary and unprecedented; a reference to a master should have been made.

Trustees *v.* Greenough, 105 U. S. 527.
Johnston *v.* Markle, 153 Pa. 189.

Or to the auditor appointed to distribute the funds.

Kennedy's Estate, 141 Pa. 479.
Hays's Estate, 153 Id. 328.

John J. Reardon (*John G. Reading, Jr.*, with him), for appellee.

The appeal in the case at bar fails, because it is not an appeal from a final or definitive decree.

Kane *v.* Whittick, 8 Wend. 242.
Parsons *v.* Robinson, 122 U. S. 112.
Coleman *v.* Nantz, 63 Pa. 178.

The Court below had the power to make the order.

Freeman *v.* Shreve, 86 Pa. 135.
Daly *v.* Maitland, 88 Id. 384.
Johnston *v.* Markle, 153 Id. 189.

October 1, 1894. MCCOLLUM, J. This is an appeal from an order of the Court of Common Pleas, authorizing the trustee of an estate to pay out of the trust funds $7,500, for services rendered by counsel in its interest. The grounds on which it is sought to sustain the appeal are, (1) the order was not within the power of the Court, (2) the evidence was not sufficient to warrant it, and (3) the allowance to counsel was excessive. The denial of the power of the Court to make the order is sufficiently answered by Trustees *v.* Greenough, 105 U. S. 527, in which it was held in an elaborate and well-considered opinion by the late Justice BRADLEY that, "One jointly interested with others in a common fund, and who in good faith maintains the necessary litigation to save it from waste and destruction and secure its proper application, is entitled, in equity, to re-imbursements of his costs as between solicitor and client, either out of the fund itself, or by proportional contribution from those who receive the benefits of the litigation." In that case, the allowance was made by the Circuit Court, and Justice BRADLEY referring to the amount of it, said, "The Court below should have considerable latitude of discretion on the subject, since it has far better means of knowing what is just and reasonable than an Appellate Court can have." We think these principles are applicable to the case before us, and that it would be an affectation of research to cite the long line of cases, English and American, which recognize and enforce them. In view of the question reserved in the order complained of, and the fact that it is squarely raised by the bank on its appeal from the decree confirming the auditor's report, we need not now consider whether it has an equity which requires that the counsel fees shall be paid by the successful litigation.

The learned Court below might have appointed a master or an auditor to report on the question of the amount of allowance proper for the services rendered, but it was not bound to do so. It might have derived some assistance from the report of a master or auditor on the question, but it would have been advisory and in no sense conclusive. Hence, if the Court was willing to hear evidence on the subject, and determine the question of compensation without the aid of a master, there could be no insuperable objections to its doing so. Such method of meeting and disposing of the question, has, at least, the merit, or advantage, of saving expense to the estate. There was a hearing by the Court, at which evidence was taken in reference to the value of the professional services rendered to the estate, and an opportunity was afforded to the appellant to introduce evidence in reply. The latter refused to do so, saying through its counsel, "We object to the form of the proceedings, and it will be incompetent for us to produce witnesses." The learned Court, upon the evidence before it, and the knowledge acquired

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by its review, upon exceptions to the master's reports, of the cases in which the services were rendered, fixed the compensation to be paid for them. In view of the principles stated, the nature of the services, and the benefits derived from them by the estate, we cannot say the allowance was excessive or unreasonable.

The specifications of error are overruled.

Judgment affirmed, and appeal dismissed at the costs of the appellant. W. D. N.

Orphans' Court.

Jan. 1884, 137.

Young's Estate.

Husband and Wife—Tenancy by entireties—Words to constitute—Chose in action—Survivorship.

A tenancy by entireties arises whenever an estate vests in two persons, who are, when the estate vests, husband and wife: it may exist in personal or real estate, in a chose in action or in possession; upon the death of either, the survivor takes the whole. Words which, in a conveyance to unmarried persons, constitute a joint tenancy, will create a tenancy by entireties in a conveyance to husband and wife.

Sur petition for further account.

The petitioner was the son of decedent. His mother was the executrix. The petition prayed for an account of one-half of a mortgage that was assigned to petitioner's father and mother, as tenants in common.

William H. Woodward, for petitioner.

William H. Fox and *David Wallerstein*, for respondent.

May 26, 1894. HANNA, P. J. After a careful consideration of the question presented, we think it is very clear that petitioner has no standing in this Court, and Elizabeth Young, widow of testator, became the owner by right of survivorship of the mortgage assigned to her and her husband in his lifetime. At his death it formed no part of his estate, and when his widow, as executrix, and individually, entered satisfaction of record, it was simply in the exercise of her own right to receive the mortgage money as her own private property.

The assignment of the mortgage is to husband and wife "in equal moieties or half parts as tenants in common." This is all that was needful to say to indicate the intention of the parties, viz., that if the mortgage was paid off in the lifetime of husband and wife, each was entitled to one-half of the mortgage debt. And if nothing further had been added, in all probability the present controversy would not have arisen. But the scrivener, out of abundant caution, and to express beyond doubt what was in the mind of both husband and wife, added these words: "That is to say, one full equal moiety or half part unto the said David Young, his heirs, executors, administrators and assigns, and the remaining one full equal moiety or half part thereof unto the said Catharine Young, her heirs, executors, administrators and assigns." And hence it is contended that the interest of husband and wife in the mortgage, one-half each, was held by them in severalty, and upon the death of either, as they did not hold by entireties, the doctrine of survivorship will not apply. But in the view we take, these words are mere surplusage, and add nothing to that already expressed in the assignment. The mortgage was to be held by husband and wife, in equal shares, as tenants in common. And the legal result by all the authorities upon the subject is, that they held the mortgage, a chose in action, as of their estate by entireties. And upon the death of either, prior to the payment thereof, the survivor takes the whole by right of survivorship: 2 Black. Com., 182; 2 Kent, 132; Stuckey *v.* Keefe's Exec'rs, 26 Pa. 401. And the rule is applicable to both real and personal estate: Gillan's Exec'r *v.* Dixon, 65 Pa. 395.

In Donnelly's Est., 7 C. C. 196, it is held, where a husband and wife deposit moneys in a saving fund in their joint names, they hold by entireties and not by moieties, and upon the death of either the survivor is entitled to the deposit. And the fact that the husband, some time before his death, gave two weeks' notice of his intention to withdraw the money, does not divest the wife of her right of survivorship. And in Bramberry's Est., 156 Pa. 628, it is again held, that a tenancy by entireties arises whenever an estate vests in two persons, who are, at the time when the estate vests, husband and wife. It may exist in personal as well as real property, in choses in action as well as choses in possession. And words which, in a conveyance to unmarried persons, constitute a joint tenancy, will create, if the grantees are husband and wife, a tenancy by entireties. As the one-half interest in the mortgage became vested in the widow, as above stated, and formed no part of the assets of her husband's estate, no reason is shown for directing any further account by his executrix. The petition is therefore dismissed, with costs to be paid by petitioner. F. B. N.

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WEEKLY NOTES OF CASES.

VOL. XXXV.] *FRIDAY, NOV. 2, 1894.* [No. 8.

Supreme Court.

July, '93, 163. March 2, 1894.

Krecker v. Shirey.

Ecclesiastical law — Jurisdiction of church Courts—Finality of decision in matters of discipline—Church property—Divided congregation—Legislative or administrative act —Evangelical Association of North America —Delegation of authority.

The organization of a denominational body or church involves the adoption of both a creed and an ecclesiastical polity; abandonment or repudiation of either constitutes secession from the body holding said creed or polity.

Where the constitution of a church provides for the fixing of a place of meeting from time to time by a certain body, the act of fixing the meeting is a matter of administration and not of legislation, and the power to perform said act may be delegated.

The title to the corporate property of a congregation which is divided, is in that part of the congregation which is in harmony with its own laws, usages and customs as accepted by the body before the division took place, and which adheres to the regular organization.

A congregation connected with any denomination must submit to the system of discipline peculiar to the body with which it is connected, irrespective of the views of the majority of the congregation itself.

Upon questions of discipline, as well as of faith, the decisions of the ecclesiastical courts are ordinarily final, and will be respected and enforced by Courts of law.

The Discipline of the Evangelical Association of North America provided that a general conference should meet once every four years, and that each said conference should fix the place of meeting of the next conference, but, should it fail to do so, the oldest of the annual conferences (subordinate bodies) should fix the place. The conference of 1889 adjourned, after referring the question of the next place of meeting to the Board of Publication, a corporation connected with the Association. The Board appointed I. as the place of meeting for 1891. The oldest annual conference, that of E., then appointed P. as the place of meeting. A large body assembled at I., a smaller one at P., in 1891. In December, 1889, B., the bishop within whose jurisdiction was the annual conference of E., was suspended by a trial conference which, under the laws of the Association, had power of suspension until the whole matter should be passed upon by the general conference. In February, 1891, a majority of the members of the annual conference of E. met at the appointed place, and refused to allow B. to take part in the meeting. B., and some members who adhered to him, met in another place. The majority body assigned one S. as pastor of a certain church at R., connected with the body and within the conference. The B. body assigned to the same place one K. In October, 1891, the conference, meeting at I., recognized the proceedings of the B. body as those of the regular annual conference, while the body meeting at P. recognised the meeting from which B. had been excluded. In the meantime S. had been admitted to and K. excluded from the R. church. On a bill being filed by K. and his adherents:

Held, 1. The general conference which met at I., in 1891, was the regular successor of that of 1887, and was the general conference of the Evangelical Association; and the annual conferences, congregations and church members adhering to it, constituted the Evangelical Association, while the adherents of the P. body had become by their own act a hostile and independent organization.

2. The property which, prior to 1891, belonged to the Evangelical Association, belonged after that time to those who still constituted the association.

3. The assignment of K. to the R. church was made by a provisional body of adherents without ecclesiastical authority, and gave him no title; but the subsequent ratification of the assignment by the general conference gave him a title good from that date.

4. The assignment of S. was by an illegally organized body, and gave him no title, notwithstanding his reception by the majority of the members and officers of R. church.

Appeal of Augustus Krecker and others, plaintiffs, from the decree of the Common Pleas of Berks County, in a suit in equity brought by them against Jonas H. Shirey and others.

The bill in this case set up the existence for over ninety years of an unincorporated religious association, known as the Evangelical Association of North America, governed by a fundamental law known as the Discipline; that by the said Discipline the countries in which the said association existed was divided into twenty-five annual conference districts, that said conferences were deliberative bodies meeting annually, composed of all the itinerant preachers of the denomination, and those who had traveled and by ordination stand in full connection with the ministry of the association, each of the said conferences comprising many organized churches, some of which were incorporated, and all of the said conferences were subordinate to the general conference.

That under the fundamental law or discipline there was a quadrennial conference of the whole association, composed of one member for every fourteen or a surplus of more than seven members of each annual conference, who were elected from among the elders by a majority of members of the said annual conference, and also certain officers of the association, including the bishops, the said quadrennial conference being known as the general conference, and constituted by the fundamental law, "The Supreme Court of Law in the Church."

That the ministers of the said association were divided into orders of bishops, elders and dea-

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cons, the members of which orders must possess certain qualifications and have certain duties to perform.

That the "Immanuel's Church of the Evangelical Association of the City of Reading, in the County of Berks," composed of members of the said religious association, was a corporation the charter whereof provided for the election of seven trustees, in whom the estate of the church was vested, and provided that the corporation should be subject to the fundamental law or discipline.

That by deed dated May 31st, 1884, certain property, being the property in question, was conveyed to the officers of the said corporation "in trust, to be kept, used and maintained as a place of divine worship by the ministry and membership of the Evangelical Association of North America, with power to dispose of and convey the same, subject to the discipline, usage and ministerial appointments of said church or association, as from time to time authorized and declared by the general conference of said association and the annual conference in whose bounds the said premises are situate."

That the said church was situate in the East Pennsylvania conference, which, during the year 1891, was under the charge of Thomas Bowman, a duly elected bishop of the said association.

That, under the fundamental law and discipline, the bishop, at the annual conference, and the presiding elders should, at a meeting of the conference, assign the preachers their respective fields of labor, and that, at the meeting of the East Pennsylvania conference, held in March, 1891, the said Thomas Bowman, bishop, and the presiding elders assigned Augustus Krecker, one of the plaintiffs, to the said church, to which church he had been duly assigned for the preceding year, and in which, at the time of his re-assignment, he was lawfully exercising the rights of pastor.

That, upon the re-assignment of the said Augustus Krecker, the defendants, with many others, conspired together for the purpose of preventing him from acting as pastor of the said church, and procured a majority of the trustees to adopt a resolution excluding him, and providing that Jonas H. Shirey, one of the defendants, should be recognized as pastor, and on the 8th day of March, 1891, actually and forcibly prevented the said Augustus Krecker from going into the pulpit.

That, on the first day of October, 1891, the general conference of the said association met at the city of Indianapolis in regular and stated quadrennial sessions, and the matter being brought before the said general conference and regularly examined, it was adjudged and decided that the assignment of the said Augustus Krecker to said church was regular, and was the only regular and valid assignment.

That on the 13th day of November, 1891, after the decision of the general conference, the said Augustus Krecker notified the said Jonas H. Shirey and the other defendants of the said decision, and demanded admission to the said church, which was refused.

The bill prayed—

First. For an injunction restraining the defendants from excluding the said Augustus Krecker from the exercise of his rights as pastor.

Second. That the defendants might be enjoined from time to time to admit to the pastoral rights of the said church, whomsoever the bishop elected by the general conference, who, with the assistance of the presiding elders and in accordance with the discipline, assigned to the said church.

Third. That the trustees who passed the revolutionary resolution aforesaid might be deposed, and an election to fill the vacancies thus created be ordered.

Fourth. General relief.

The defendants in their answer admitted the existence of the religious association as stated in the bill, but denied that it is similar to that of the Episcopal form of church government, and averred that by the discipline the powers of the bishops are restricted, and that they have only such powers as are conferred by the discipline, and declared that each local society is in subordination to the general organization only to the extent expressly determined by the discipline. They admitted that the association was, under the fundamental law, divided into annual conference districts, as alleged, but they deny that the annual conferences are subordinate to the general conference to such extent as to make the control of the latter over the former absolute. They declared that the general conference possesses only the authority given to it by the discipline.

They admitted that the general conference was constituted as averred in the bill, but declared that its powers were limited in the discipline to decide upon the legality of acts of annual conferences, and upon such cases as may arise between annual conferences, and such as may arise between any incorporated society and its officers or any annual conference, and that it had no power to decide, except in such cases as are lawfully brought before it.

They admitted that the ministers of the association were divided into orders, as alleged in the bill, but they denied that there is in the church an order of bishops, and declared that the bishop held a mere office, not being ordained as deacons and elders are.

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They admitted the organization of Immanuel's Church as alleged in the bill, but denied that it was a corporation, the charter and decree not having been recorded. They admitted the conveyance of the church property to trustees in trust for the ministry and membership of the association.

They admitted that the church property was situated in the East Pennsylvania conference district, as alleged, and that Thomas Bowman had been bishop, but denied that the East Pennsylvania conference was, during any part of the year 1891, in charge of the said Thomas Bowman. They declared that he had been previously tried in accordance with the discipline and on the 7th of March, 1881, found guilty of immoral conduct and suspended; and they set out in detail the proceedings which ended in his suspension.

They denied that under the discipline the bishop and the presiding elders should assign the preachers, but declared that it is the president and presiding elders of the annual conference who should make the assignments, and they declared that at the meeting of the East Pennsylvania conference, held in February, 1891, the said Jonas H. Shirey, one of the defendants, was assigned to the Immanuel Church; that, at the regular annual session of the said conference for the year 1891, there being no bishop present, the said Thomas Bowman having been so suspended, the said conference elected Presiding Elder C. S. Haman as president; that twenty-one members of the said conference, including the said Augustus Krecker, seceded therefrom and with the said Thomas Bowman as presiding officer held a pretended conference, at which there was not one presiding elder; that the said regular annual conference transacted the business and functions belonging to it, and that, in accordance with the discipline, the president thereof and the presiding elders assigned the preachers their respective fields of labor, and assigned the said Jonas H. Shirey to the pastorate of Immanuel's Church aforesaid. They denied that the assembly presided over by the said Thomas Bowman was the regular East Pennsylvania conference. They declared that they have no information otherwise than from the bill of the pretended appointment by the said Thomas Bowman of Augustus Krecker to the said church, and averred that such assignment, if made, was illegal.

They admitted that they excluded the said Augustus Krecker from the said church. They alleged that about two-thirds of the members of said Immanuel's Church and a majority of the trustees adhered to the conference at which the said Jonas H. Shirey was appointed, and repudiated that at which the said Augustus Krecker was appointed, and that the exclusion of the latter was in accordance with the discipline and the provisions of the said deed of conveyance.

They denied that the conference held at Indianapolis was the legal conference of the association, but averred that the legal conference was held at Philadelphia, on October 1st, 1891, at which general conference the assignment of Jonas H. Shirey to the said church was adjudged valid; that under the discipline it was provided that the time and place for the meeting of the general conference shall be appointed by the bishops, with the consent of the majority of the conference; that if no bishop be present the general conference shall do it by a majority of votes, or the oldest annual conference; that at the meeting of the general conference, in 1887, the bishops and the majority of the conference appointed the time, but left the selection of a place to the Board of Publication; and averred that the general conference had no right to delegate the appointment of a place to such board, because, under the discipline, upon the failure of the conference to appoint it, the appointment devolves upon the oldest annual conference; that the East Pennsylvania conference as such oldest annual conference, on the 26th of February, 1891, fixed Philadelphia as the place for the meeting of the general conference, of which fact a notice was sent to all the conferences except the Texas conference, whose meeting had already been held, but a notice was sent to the delegate elected by that conference to the general conference; that the general conference convened in Philadelphia and confirmed the trial and sentence of Thomas Bowman. They denied that the general conference had any jurisdiction over the appointment of preachers. They admitted that, on the 13th of November, 1891, Jonas H. Shirey and the other defendants were notified of the decision of the Indianapolis conference, and that they disregarded the same, as averred in the bill.

They averred that they and those with whom they are associated have for a long period formed the religious society known as the Evangelical Association of North America, governed in accordance with the Book of Discipline; that some years since the plaintiffs and those with whom they adhere attempted fundamentally to change the system of government of the said association; that the defendants and those with whom they are united constituting an overwhelming majority of the East Pennsylvania conference and seven other annual conferences, and a numerous minority in all the other American conferences oppose those efforts, whereupon the plaintiffs and their associates formed among themselves a religious association under the system of government which they had attempted to force upon

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the Evangelical Association of North America, and, aided by J. J. Esher and Thomas Bowman, falsely claiming to act as bishops when in fact they had been suspended, caused to be held a general conference of the new association at Indianapolis; that they procured a majority of the members of certain annual conferences to accept this new organization and send delegates to Indianapolis; that by arbitrary suspension on the part of one of the pretended bishops of a sufficient number of ministers, they procured an apparent majority of said conference to adhere to them, and having procured an apparent majority of the annual conferences except those mentioned in the answer, caused conferences to be called within the limits of the said excepted annual conference, saving only Pittsburgh and Central Pennsylvania conferences; that the said conferences so created elected delegates to the Indianapolis general conference, which, by resolution, pretended to expel from the Evangelical Association all members who refused to send delegates to the new organization, and that said conduct was illegal.

The matter was referred to Louis Richards, Esq., as examiner and master, who, after finding the facts, which sufficiently appear by the opinion of the Supreme Court, reported the following conclusions of law: (1) The trial of Bishop Bowman by the trial conference in 1890 was legal, and the sentence of suspension pronounced on him operative until the matter was disposed of by the succeeding general conference. (2) The previous examination of Bishop Bowman by three elders was wholly invalid as a disciplinary proceeding, and even if regularly conducted could constitute no bar to a subsequent examination and trial upon the same charges. (3) The East Pennsylvania annual conference of 1891, presided over by the Rev. C. S. Haman, was the only lawful and regular East Pennsylvania conference, and its ministerial appointments were regular and valid, and therefore Jonas R. Shirey was the only lawfully appointed minister of the Immanuel Church, Reading, for the conference year. (4) The action of the defendants in excluding Augustus Krecker from the charge of the church was lawful and justifiable. (5) The assemblage at Indianapolis in October, 1891, was not the lawful general conference of the Evangelical Association, because the place for holding the same was not fixed in accordance with the provisions of the discipline, which were to the effect that if not fixed by the general conference it should be by the oldest annual conference, the master holding that the general conference had no right to delegate the power of selection to the Board of Publication, by which in fact the place of meeting had been determined. (6) The assemblage at Philadelphia in October, 1891, was not a lawful conference, because there was not then present a constitutional quorum as fixed by the discipline. (7) If the Indianapolis assemblage was the lawful general conference its judgment upon the matter of Bishop Bowman was invalid because rendered in its legislative capacity and not as the Supreme Court of the Church in accordance with the requirements of the discipline and of common law, and equally invalid was its action in affirming the appointments of the minority East Pennsylvania annual conference presided over by Bowman, who had been legally suspended until the next general conference, "which shall then determine the whole matter:" Section 125 of the discipline; and, whereas Section 75 of the discipline required all appeals to be tried by a committee of nine, the conference had simply declared that there were no charges against Bishop Bowman, and adopted the report of a committee of fifteen which, apparently without evidence before it, or the presentation of the case of the accusers, confirmed the views of the bishop in every particular. (8) That the trust under which the property in question was held was valid, and that the trustees or lay members of the church were not authorized by the Act of April 26, 1855, to decide whether any particular preacher assigned to the pastorate charge should be received or rejected by the congregation.

The master recommended a decree dismissing the bill at the costs of the plaintiffs. Exceptions were filed by both sides. The decree recommended was adopted by the Court in an opinion delivered by ENDLICH, J.

The plaintiffs took this appeal, and filed forty-one assignments of error, the material effect of which sufficiently appears by the arguments and the opinion of the Supreme Court.

Cyrus G. Derr and *Edward Harvey* (with them *Augustus S. Sassaman*, *Ritchie* and *Esher*), for appellants.

The conference of 1887 had power to refer to the Board of Publication the selection of the place for the session of 1891.

State *v.* Esher, 6 Ohio Cir. Ct. Rep., 312.
Auracher *v.* Yerger, 25 Chic. Leg. N., 197.
Schweicker *v.* Husser, 44 Ill. App. 566; 146 Ill. 399.

The act of selection was not one of a distinctively legislative character, and hence could be performed by deputy, and even if regarded as legislative it was of a class which by legislative action may be performed by subordinate agencies.

The discipline is a constitution, and as such is not to receive a technical construction like a common law instrument or a statute, and its commands as to the *time* or *manner* of performing an act are to be treated as merely directory, whenever it is not said that the act shall be per-

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formed at the time and in the manner prescribed and no other.

Com'th *v.* Clark, 7 W. & S. 133.
Schlichter *v.* Keiter, 156 Pa. 119.
Miller *v.* State, 3 Ohio, 476.
Kilgore *v.* Magee, 4 Norris, 401.
Huston *v.* Clark, 112 Ill. 344.
Bladen *v.* Phila., 60 Pa. 464.
Pittsburgh *v.* Coursin, 74 Id. 400.

The action of the conference of 1887 was a construction of its own disciplinary powers in a manner and upon a matter that is conclusive of the civil Courts. The place of meeting is purely an ecclesiastical matter over which the association through its lawfully constituted authorities has supreme control; it concerns the association only, and as a matter of internal polity upon such subject the decision of church tribunals are final.

Schmeiker *v.* Husser, *supra.*
Schlichter *v.* Keiter, *supra.*
Watson *v.* Jones, 13 Wall. 679.
Smith *v.* Swormstedt, 16 How. 308.

The action of the Board of Publication in fixing the place was lawful, and even if the act were participated in by Bowman and Esher during a valid suspension, that would not invalidate the act, which was that of *de facto* if not *de jure* officers and cannot be impeached collaterally, or ignored, public interests depending on its validity.

Scadding *v.* Lorant, 5 E. L. & Eq. 16.

The mere suspension of the bishops did not oust them from membership of the Board of Publication; that board was an Ohio corporation, ouster could be pronounced only upon quo warranto proceedings by the State of Ohio.

Doremus *v.* Dutch Ref. Ch., 3 N. J. Eq. 332.
Sampsel *v.* Esher, 26 Week. L. Bul. 162.

A Court of equity cannot inquire collaterally into the validity of tenure of office of a member of a foreign corporation.

In re Sawyer, 124 U. S. 200.
Hagner *v.* Heyberger, 7 W. & S. 104.

The decision of the Indianapolis conference upon the suspension of the bishops is final and binding upon the civil Courts. That being the case, the annual conference presided over by Bowman was authorized to appoint the plaintiff Krecker, and he having been appointed he could not be lawfully excluded by a majority of the congregation, notwithstanding the Act of April 26, 1855.

Appeal of First Meth. Prot. Church, 16 WEEKLY NOTES, 245.

George T. Baer and *Jefferson Snyder*, for appellees.

The body presided over by Haman was the legal annual conference of East Pennsylvania, and not that presided over by Bowman. The discipline fixed no number for a quorum, the general rule therefore applies in that a majority of all members present in obedience to the call constitute a quorum.

St. Mary's Church Case, 7 S. & R. 517.
Craig *v.* First Presb. Church, 88 Pa. 42.
Com'th *v.* Green, 4 Whart. 598.
Pres. Cong. *v.* Johnston, 1 W. & S. 38.

The action of the Indianapolis conference, assuming it to be the legal one, did not constitute the Bowman body a lawful annual conference. The decree of a church judicatory is binding only when it is affirmatively shown that it has acted within the scope of its authority, and has observed its own organic rules.

Kerr's Appeal, 89 Pa. 112.
McGinnis *v.* Watson, 41 Id. 14.
Sutter *v.* Trustees, 42 Id. 512.
McAuley's Appeal, 77 Id. 397.

And the proceedings may be inquired into and examined to see if they have been kept within proper bounds and proceeded with duly according to rule.

Williamson *v.* Berry, 8 How. 495.
Thompson *v.* Whitman, 18 Wall. 467.
Kilbourn *v.* Thompson, 103 U. S. 168.
Schlichter *v.* Keiter, 156 Pa. 137.

Here the Indianapolis conference did not proceed regularly to overrule the trial conference as to the suspension of the bishops, and the general conference has no authority to declare the Bowman body the legal annual conference. It can declare judgment "only in such cases as are lawfully brought before it for adjudication," § 74 of the discipline. Its proceeding was not therefore judicial, but if regarded as judicial its action in exscinding the annual conference of East Pennsylvania was illegal, the exscinded persons not having been given a hearing.

Hoffman's Eccl. Law, 276.
Com'th *v.* Green, *supra.*
O'Hara *v.* Stack, 90 Pa. 490.
McAuley's Appeal, 77 Id. 397.
Kerr's Appeal, 89 Id. 97.
Jones *v.* State, 44 N. W. Rep. 658.
Smith *v.* Nelson, 18 Vt. 202.

The Indianapolis body was not the legal general conference owing to the invalidity of its call. The general conference of 1887 had no right to delegate to the Board of Publication the power to select a place of meeting. With the adjournment *sine die* the power of the conference of 1891 died, and hence the power of its delegate, as the conference could not delegate a power to survive its own. Besides this, the conference itself has but a delegated power, and *delegatus non potest delegari.* This is not a case in which the delegation of the right to appoint

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can be sustained on the ground of necessity, for the discipline itself provided for an agency to appoint, should the conference fail to fulfil its duty in that respect.

Hawley *v.* James, 5 Paige, 318.
In re Speight, 22 Ch. Div. 727.

The trust in the deed to the Immanuel Church is void. The title to the property is vested in the Pennsylvania corporation. The effect of the trust, which is without consideration, if sustained, would be to turn over the control of the property to a general denomination, composed partly of foreigners, in other words to transfer to persons not citizens of this Commonwealth, the control and use of the property of a corporate society whose membership is limited by the Act of 1840 to citizens of this Commonwealth. This cannot be done under the laws of Pennsylvania.

Methodist Ch. *v.* Remington, 1 Watts, 218.
Price *v.* Maxwell, 28 Pa. 35.
Act of April 26, 1855, P. L. 329.

The majority of a congregation must be permitted to determine for themselves where they will go when a denomination divides on matters not relating to faith or worship.

Trustees of Lutheran Cong. *v.* St. Michael's Ch., 48 Pa. 20.
Methodist Ch. *v.* Remington, *supra.*
Presby. Cong. *v.* Johnston, 1 W. & S. 40.

October 1, 1894. WILLIAMS, J. The legal questions involved in this case are interesting and important, but they are no longer open in this State. The labor which it has been necessary to expend upon the case in the Court below and in this Court has been over the facts, and the inferences that ought to be drawn from them. This labor is made no less burdensome by the character of the facts to be passed upon. The conduct of the parties and their sympathizers on both sides seems to have been hasty, uncharitable and ill-tempered. It affords a travesty, rather than an illustration, of the precepts of the religion of peace for the support and diffusion of which the church was organized, and the parties on both sides profess to have devoted their energies and their lives. But our concern is with the legal aspects of the case presented to us, and to them we turn, leaving the moral side of the controversy to the consciences of the combatants.

The Evangelical Association of North America is a religious body that had its origin early in the present century. Its history presents a rapid growth and a career of usefulness. Its statistics for the year 1891 showed a membership of about one hundred and fifty thousand. These were gathered into more than two thousand churches, and under the pastoral care of about twelve hundred and fifty preachers. Its ecclesiastical organization rests on the individual church or congregation. A convenient number of these form a quarterly conference, the sessions of which are presided over by a presiding elder. Several quarterly conferences grouped together by the action of the general conference form an annual conference, of which there were twenty-five in existence in 1891. The annual conferences elect delegates, according to a ratio previously fixed upon, to represent them in the general conference which meets once in four years, and which is the highest body legislative and judicial, in the denomination.

The bishops, of whom there were three in 1891, and certain executive officers, are ex officio members of the general conference. The powers of this body are defined by the Book of Discipline. Paragraph 74, page 57, declares it to be "the Supreme Court of Law in the Church." It has appellate jurisdiction of cases heard in the lower church tribunals and original jurisdiction over all controversies to which the annual conferences are parties, or that affect the legality or regularity of their action. It has jurisdiction over the bishops to try, suspend, depose, and expel them.

Paragraph 73, page 56, declares it to be the supreme legislative body in the church, subject, however, to two limitations upon its power. It can not disturb the articles of faith. It can not abandon the itinerancy or change the forms of church discipline. It also possesses general administrative powers which are recognized in several paragraphs of the Book of Discipline, among which are Nos. 72, 73, 76 and 93. It fixes the number of bishops needed, elects them, and directs and supervises their work. It organizes, and fixes the boundaries, and names, of the annual conferences. It conducts through boards and committees, the publication and missionary enterprises of the denomination.

In 1887, this denominational body with all its religious and ecclesiastical machinery was in harmonious and successful operation. Its general conference was in session in Buffalo, N. Y., and the several annual conferences were represented therein. In 1891, there were two bodies in session at the same time, in different portions of the country, each claiming to be the general conference of the Evangelical Association. Each elected bishops, and claimed jurisdiction over the annual conferences and the publication and missionary boards of the church.

The litigants in this case are adherents of these rival bodies; the plaintiff claiming title under one of them, and the defendants under the other. The first and the controling ques-

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tion in this case is thus seen to be one of ecclesiastical identity. Which of these contesting bodies is the general conference of the Evangelical Association? The next question is, which of the parties now before us adheres to, and derives title under, the body found to be the general conference?

Now it must be borne in mind that the organization of a denominational body or church, involves the adoption of a religious creed, and an ecclesiastical polity. Adherence to a particular body requires therefore adherence to both the creed and the polity. To abandon or to repudiate either is to abandon or secede from the body whose authority is thus disregarded.

In this case both parties claim to adhere to the creed of the Evangelical Association and it seems to be conceded that no question of religious belief enters into the controversy. The points of difference arose under the polity of the church, and rested on conflicting interpretations of provisions of the Book of Discipline. The first of these was over the meaning of paragraph 71, page 56, which provides for fixing the time and place of meeting of the general conference.

This paragraph empowers the bishops in attendance upon the general conference to name the time and place for the next meeting of the body, subject to the approval or disapproval of the body itself. If the first suggestion of the bishops is not approved they should make and submit another, and so on, until an agreement is arrived at. If the bishops are not present, the general conference proceeds to fix the time and place in the first instance. If for any reason the time and place are not fixed in either of these ways and the conference adjourns without action on the subject, then the duty falls upon the oldest annual conference; and must be discharged, and the necessary notices given to the other conferences, so as to prevent a failure of the session of general conference during the proper year.

The questions raised upon this paragraph were: first, what is the nature of the duty imposed by it? Is it legislative or administrative? Second. If administrative what shall amount to a conference?

The laws of the church provided for a meeting of the general conference once in four years; but they did not, because they could not, fix in advance the particular day and place at which these quadrennial meetings should be held. But the laws could, and did, make provision for the fixing of both time and place, by naming the instrumentalities by which these details should be settled from time to time as the circumstances then existing might seem to require. It devolved the duty of naming the time and place first on the bishops and the general conference. Next on the general conference alone. Lastly, in case neither of these instrumentalities discharged it, on the oldest annual conference. The act had the same character by whichever of these bodies it was performed. It was a settlement of a matter of detail necessary to the administration of the polity or ecclesiastical system of the church. It was therefore an act of administration, not of legislation. The general rule is that the power to perform such acts may be delegated, and that the acts, when properly done by the appointee are valid as the acts of the principal.

We proceed therefore to inquire what the Board of Publication did under the authority given it by the bishops and the general conference of 1887. It appears that a usage exists in this denomination that prevails in most, if not all religious bodies. It is to receive invitations from towns and churches willing to entertain the body, and then select from the list of places offered, that which is most desirable. In 1887, when this order of business was reached, the general conference had no offer of entertainment before it. It seemed best under the circumstances, to the bishops and to the conference, to authorize the Board of Publication to receive offers of entertainment after the adjournment, and to correspond with the annual conferences upon the subject; and after full consideration to decide upon the place for the next session. This board was one of the permanent executive agencies of the church. It included all the bishops in its membership, and eight other persons each of whom was selected from one of the eight districts into which the whole church was divided for this purpose. After considerable inquiry and correspondence this board named Indianapolis as the place, and gave notice of this fact to the annual conferences. This was a complete discharge of the duty imposed upon the Board of Publication. It fixed definitely the place for the holding of the next general conference with the same effect as though the place had been named by the conference itself, and it afforded ample opportunity to all the annual conferences to be represented therein.

Several months later the annual conference of East Pennsylvania met in Ebenezer church in the City of Allentown. Without pausing to inquire into the regularity of its organization, or its power, under the Book of Discipline, to perform the proper work of the annual conference, but treating this body as being what it claimed to be, we will consider its action. It was a subordinate tribunal whose judgments were removable by appeal to the general conference, but it assumed the right to review and sit in judgment upon the action of its superior. It pronounced the action of the general conference

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of 1887 in relation to the place of its next meeting to be a violation of the discipline and therefore absolutely null and void. It then proceeded, as the oldest annual conference, to fix upon Philadelphia as the place, and gave notice of its action to the several annual conferences.

This action was unnecessary. The time and place had been fixed by, or under the authority of, the general conference. The annual conferences had been notified in ample time to enable them to arrange for the attendance of their delegates. The place had not been objected to as unsuitable or inconvenient. If the delegation of the power to fix the place to the Board of Publication had been questionable, it had been unanimously acquiesced in at the time it was made, and under the circumstances, seemed the only practicable thing to do. It worked no injury to the ecclesiastical body and affected injuriously no interest or enterprise of the church.

But this action was not only unnecessary, it was disrespectful, irregular, and insubordinate. It put the judgment of the annual conference of East Pennsylvania, against that of the supreme judicatory of the denomination upon a question affecting the construction of certain provisions in the discipline. It not only overruled its ecclesiastical superior but it proceeded to act upon its own interpretation of the discipline in opposition to the action of its superior; and to call upon the other annual conferences to accept its decision, and reject that of the Supreme Court of Law of the Church upon the same subject.

This was not revolution within, but rebellion against, the ecclesiastical organization. Most of the annual conferences seem to have regarded the subject in this light, for eighteen of them sent undivided delegations to Indianapolis, while but two sent undivided delegations to Philadelphia. The remaining five were divided in opinion, and sent delegates to each place. The general conference meeting in Indianapolis, had not only a quorum, but a decided majority of all the delegates to which the annual conferences were entitled. It had also the two acting bishops, and the other ex-officio members of the body.

The alleged general conference that met in Philadelphia did not have a quorum of those entitled to sit in general conference and, as the master has well found, was incompetent under the Book of Discipline to transact business. It nevertheless assumed to set aside the authority of the body that met in Indianapolis and to exercise the powers and functions of a lawful general conference. In fact, it claimed to be the lawful successor of the general conference of 1887, and the supreme authority in the Church.

This, as we have said, was an open revolt. The churches and conferences that participated in it have from that time kept up an independent organization, and refused obedience to the conference that represented the majority, and maintained the ecclesiastical organization of the denomination. The result has been a divided body and, what is more to be regretted, divided local congregations, creating discord, litigation, and personal bitterness throughout the East Pennsylvania and several other annual conferences, in which the Philadelphia general conference had its supporters. It follows necessarily that those who adhere to the Indianapolis general conference constitute the Evangelical Association. Those that adhere to the hostile body that met in Philadelphia are, by their own acts, put on the outside of the ecclesiastical organization, and must remain there until they recognize once more the authority of the body from which they have separated. Winebrenner et al. *v.* Calder et al., 43 Pa. 244; Kerr *v.* Trego, 47 Id. 292; Roshi's Appeal, 69 Id. 462. The title to the church property of a congregation that is divided, is in that part of the congregation that is in harmony with its own laws, usages and customs as accepted by the body before the division took place, and who adhere to the regular organization. McGinnis *v.* Watson et al., 41 Pa. 9; McAuley's Appeal, 77 Id. 397; Landis' Appeal, 102 Id. 467.

It does not matter that a majority of any given congregation or annual conference is with those who dissent. The power of the majority as well as that of the minority is bound by the discipline and so are all the tribunals of the church, from the lowest to the highest. McAuley's Appeal, 77 Pa. 397; Sutter et al. *v.* The Reformed Dutch Church, 42 Id. 512; Stack *v.* O'Hara, 90 Id. 477; Schlichter et al. *v.* Keiter et al., 156 Id. 119. The laws of the ecclesiastical body will be recognized and enforced by the civil Courts when not in conflict with the Constitution and laws of the State. A sufficient reason for this is that they have been made or assented to by the parties who have agreed with each other by the act of uniting with the body to be governed by its laws and usages. Tuigg *v.* Tracy, 104 Pa. 493. An independent congregation may be governed by the majority of its own membership, but a congregation connected with any given denomination must submit to the system of discipline peculiar to the body with which it is connected. Ehrenfelt's Appeal, 101 Pa. 186; Fernstler et al. *v.* Seibert et al., 104 Pa. 196.

Upon questions arising under the discipline, as upon those arising under the articles of faith the decisions of the ecclesiastical courts are ordinarily final, and they will be respected and enforced by the Courts of law. German Reformed

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Church *v.* Seibert et al., 3 Pa. 282; Stack *v.* O'Hara, 90 Id. 477; Schlichter *v.* Keiter, 156 Id. 119. But if such decisions plainly violate the law they profess to administer, or are in conflict with the laws of the land, they will not be followed. Commonwealth ex rel. *v.* Cornish, 13 Pa. 288; Stack *v.* O'Hara, *supra*.

Now the itinerant plan for pastoral supply of the churches is a distinguishing feature of the polity of the Evangelical Association. The individual congregation may not select for itself, but is bound to accept the ministerial supply provided for it by the proper authorities under the discipline. Their action in this regard affords a distinct test of obedience, and of adherence to the ecclesiastical organization. Henderson *v.* Hunter, 59 Pa. 335. Those congregations or parts of congregations that refuse the supply sent them by authority of the regular ecclesiastical agencies acting in accord with the general conference, and receive the supply sent under the authority of an irregular, minority body, do not adhere to the organization but put themselves in open revolt against it. By such action they subject themselves, as individuals, to suspension or expulsion from the church; as congregations and annual conferences, they expose themselves to punishment by excision from the body with which they have ceased to be in harmony, and against the authority of which they have arrayed themselves.

Upon the facts, as they appear in the evidence, the learned master should have found that the general conference meeting in Indianapolis in 1891, was the regular, and the duly constituted general conference of the Evangelical Association of North America. And that the body which met the same year in the City of Philadelphia, was an irregular and hostile body; having no ecclesiastical authority whatever under the provisions of the Book of Discipline.

He should then have found that those who adhere to the regular general conference and submit to its authority, constitute the Evangelical Association. He should also have found that those who adhere to the irregular and hostile body have, by their own conduct, placed themselves outside of the denomination whose authority they reject.

These conclusions we reach independently of the various questions which relate to the trials of the bishops, and the organization of the East Pennsylvania Conference in 1891. But these questions are fairly before us, and we have no disposition to decline an examination of them; indeed, the reasons for the conclusions already reached will be made the more apparent by a brief discussion of those questions.

Bishop Dubbs was tried before a properly-constituted trial conference, found guilty, and sentenced to suspension from office until the next general conference. He denied the justice, but not the validity, of his conviction; and he acquiesced in the sentence pronounced upon him. No question affecting this trial and sentence is presented by this record, and an examination into the subject is unnecessary and irrelevant. The charges on which Bishop Dubbs was tried were formulated in November and December, 1889. The trial took place in February, 1890.

In December, 1889, Bishops Esher and Bowman were separately examined by three elders on charges which had been made in certain religious periodicals, and brought to the attention of the examining elders by one who acted as a prosecutor. The examining elders found the charges to be without foundation in each case, and prepared a certificate showing the nature of the charges, the examination made by them, and their finding acquitting the accused thereon, and delivered a copy of such finding to each of the bishops.

A few weeks later, substantially the same charges were made by another prosecutor; another examination was made by three elders summoned by him. This examination resulted in a finding that the charges were well founded, and the calling of a trial conference for the trial of each of the bishops upon them.

From the beginning of this second proceeding both Bishop Esher and Bishop Bowman set up the former examination and acquittal as a conclusive bar against it, and insisted that the second board of examiners, and the trial conference convened by their direction, were without jurisdiction. The examining elders, however, and the respective trial conferences called by them, promptly overruled the point raised by the bishops, asserted their jurisdiction, and proceeded with the trial.

The bishops declined to appear; but in their absence, and with full knowledge of the previous examination and acquittal of each on substantially the same charges, the trial conferences heard testimony, found the accused guilty, and sentenced each to suspension from the Episcopal office until the next general conference. Neither of the bishops acquiesced in the sentence. On the contrary each insisted that his second examination, and the proceedings of the trial conference following it, were illegal and void; that the sentences were without authority, and might properly be disregarded by them and by the whole church.

The decision of the question thus raised by the bishops depended upon the proper interpretation of certain provisions of the Book of Discipline. It was therefore a question of ecclesiastical law to be decided by the highest eccles-

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iastical tribunal in the denomination. The trial conferences took the responsibility of deciding it in favor of their own jurisdiction. The bishops took the responsibility of deciding it the other way. The trial conferences knew that if the general conference overruled them upon this point all their proceedings must necessarily be held to be illegal and oppressive. The bishops knew that if the general conference did not sustain their point their conduct in refusing to appear, and in disregarding the sentence pronounced upon them, must be held to be insubordinate, and their subsequent official acts to be invalid. Both sides were willing to take the risks, and to act upon their own interpretation of the discipline. The result was widespread discussion throughout the church, diverse conclusions, bitter dissensions, and finally, as we have seen, a disruption of the ecclesiastical body. For these unhappy consequences which a more conciliatory course might have avoided, an impartial public will hold both the bishops and the trial conferences responsible.

When the general conference met in 1891, it took notice of the dissensions and divisions that had grown up in the annual conferences, and in the congregations of which they were composed, and made inquiry into the causes that had led to such unhappy consequences. The result was an exposition of the discipline in accordance with the contention of the bishops, an endorsement of their conduct in disregarding the sentences imposed upon them, and an authoritative deliverance that the second examination, the trial, conviction, and sentence of each of the bishops was irregular, illegal and void. This validated all the official acts of both the bishops, and invalidated the acts of the annual conferences, and others, done on the theory that the convictions and sentences were legal.

We have before us, therefore, the decision of the "Supreme Court of Law" of the Evangelical Association, upon the meaning and effect of one of the provisions of the Book of Discipline. This decision can not be said to violate the Constitution, or the law of the land. It does not violate any law or usage of the ecclesiastical body. It is therefore binding on the Evangelical Association and its membership, and it must be respected by this Court.

Whether the general conference disposed of this question in the wisest manner is not now for consideration. Its decision settled the law for the Evangelical Association and we must recognize and apply it in this case. Here again the body that met in Philadelphia in 1891, put itself in open rebellion against the authority of the Evangelical Association. It decided that a charge preferred against a bishop, an examination into its truth by three elders, and an acquittal by them, had no significance whatever; but that the charge might be renewed and the examination repeated as often as a prosecutor could be found, or until a conviction and sentence could be obtained. It then approved the conviction and sentence on Bishops Esher and Bowman, and expelled both from the association. At the same time it reversed the proceedings in the case of Bishop Dubbs, which had been approved by the Indianapolis general conference, relieved him from the sentence, and re-elected him to the office of bishop. In what manner the Philadelphia body could have made its antagonism to the general conference more open and pronounced it is not easy to see.

It only remains to consider briefly the claims of the rival East Pennsylvania conferences. The time and place for the meeting of the annual conference of East Pennsylvania, in 1891, had been regularly fixed. The place was Ebenezer church in the City of Allentown. The time was the 26th of February. This was about one year after the trial and sentence of Bishop Bowman, and after his own position and that of a large part of the church upon the question of the legality of his suspension were well known. Bishop Bowman came to Allentown to preside over the conference. The board of trustees of the Ebenezer church although without any ecclesiastical jurisdiction over the subject. met and decided that Bishop Bowman was incompetent to preside over the conference because of his suspension by the trial conference. They then undertook to enforce the sentence of suspension by preventing him from entering the church edifice. A majority of the members of the conference was in active sympathy with this action, and co-operated with the trustees for the purpose of carrying it into effect. They signed a paper denying his right to preside, and by a committee from their number presented this paper, and a copy of the action taken by the trustees, to the bishop. At the hour fixed for the meeting of the conference the bishop approached the doors of Ebenezer church. He was intercepted by the trustees and others, and prevented, by the use of force, from entering. Meantime the members of conference assembled in the building, and a majority of them, well knowing that the bishop was at the door, and prevented by force from entering, treated him as absent and organized the conference by the election of a president to discharge his duties.

They were well aware of the point raised by him affecting the legality of his sentence, and of the fact that a considerable portion of the whole church concurred with him in opinion. They knew also that the general conference would be in session within a few months and that the question could then be decided. Notwithstand-

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ing all this, these persons acted, as the trial conferences had done, on their own exposition of the discipline, and took the risk of being overruled by the general conference. They deliberately staked their official action, and their ecclesiastical position, upon their own decision of a question that was not within their jurisdiction, and they lost.

The general conference sustained the point taken by the bishops, held their sentence and conviction illegal, and the action of the conference of East Pennsylvania to be disorderly and in violation of the Book of Discipline. The organization effected by the forcible exclusion of the bishop was declared to be illegal, and the body itself while so organized to be without ecclesiastical character or authority. It is clear that the regularity and legal effect of the organization of the conference, in the manner in which it was accomplished, raised an ecclesiastical question. Its decision depended upon an exposition of certain provisions of the discipline which it was the duty of the general conference to make. The decision actually made does not violate the laws of the State or of the church, and is conclusive upon the ecclesiastical body of which the general conference is the chief tribunal. For this reason it should be followed by the civil Courts. Whatever authority may be conceded to the action of the East Pennsylvania conference by those who adhere to it, the judgment of the general conference leaves it without authority in the body with which it had been formerly connected. Its appointments therefore confer no right, and impose no duty, on preachers, church members, or congregations adhering to the general conference; and we can not recognize a title derived, like that of the defendants in this case, from the action of that body as good against the general conference or its adherents.

On the other hand the action of Bishop Bowman and a few friends in organizing a rival conference was wholly unauthorized by the discipline; and the body so organized, not having a quorum of those entitled to sit as members of the East Pennsylvania conference, was an irregular body, without authority or ecclesiastical character under the discipline. The annual conference may sit without a bishop, and its acts be valid in all respects. A bishop cannot sit with less than a quorum and make by his presence a legal conference out of that which would not have been such in his absence. If present he presides, but he is not a necessary part of the body; and his presence therefore with those who without him would be without authority, can add nothing to them. If there had been no division in the conference the presence of the bishop could not have given to a few of its members the character and power of a quorum. His conduct and that of his friends in suspending and expelling presiding elders and others was a clear usurpation of power, and the sentences so pronounced had no force or effect.

The situation in Allentown in February, 1891, was certainly remarkable. A majority of the members of the annual conference was in one place, refusing the bishop admission and proceeding upon the assumption that he was absent. The bishop and a handful of adherents were in another place assuming the powers of a quorum and fulminating their orders and judgments with the utmost self complacency and in plain disregard of the discipline. The appointments made by this body gave no legal right to the appointees and imposed no legal duty on the congregations concerned. But the meeting presided over by the bishop was a meeting of those who adhered to the ecclesiastical body whose legislative and judicial head was the general conference. Its members were confronted by a state of things for which the discipline made no provisions, viz: the revolt of a majority of the members of the conference with which they were connected. They were compelled to choose between adherence to the bishop and the body with which they had been connected, and adherence to the annual conference of East Pennsylvania, which had undertaken to put itself in an attitude of independence and hostility to that body. They chose the former. They were as a consequence practically outside of the annual conference to which they had belonged, and compelled to seek recognition in some capacity from the general conference. Their organization was therefore necessarily provisional. Their authority depended, in the first instance, on their own consent and that of the congregation and individual members whom they represented; and their only appropriate business was to provide temporarily for the religious and ecclesiastical care of those who adhered to the organization until the general conference could meet and take appropriate action.

The general conference met in October of the same year at Indianapolis. Its attention was drawn to the condition of the Church in the East Pennsylvania conference, and to the action of the rival bodies claiming jurisdiction over the congregations within its bounds. It made a thorough investigation into the action and attitude of the majority body, and was led to recognize the revolt made by it as an accomplished fact. The Philadelphia conference, called by the East Pennsylvania annual conference, it recognized as a rival and hostile body, and declared officially that it was "a gross offence against our church," and that the persons engaged in holding and sustaining it had "thereby

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thrown off their allegiance to our church and disentitled themselves to any of the privileges of membership therein."

So far the action of the general conference seems to have been regular. But when it came to consider the provisional gathering of its adherents it exceeded its powers under the discipline. It declared the minority body under the presidency of Bishop Bowman to be the only lawful and regular conference of the Evangelical Association in and for the conference district of East Pennsylvania for 1891, and pronounced all its acts and proceedings regular and lawful.

In so far as these acts related to the temporary care and supply of the congregations represented in the body, they were, as we have already seen, justified by the necessities of the situation; and their ratification by the general conference cured their original want of authority under the discipline, and clothed them with the authority of the general conference. But in so far as these acts dealt with the ecclesiastical positions or functions of those not members of the provisional body, or with congregations not represented therein, they were unauthorized assumptions of power that the general conference could not ratify because, like the annual conferences, it was bound by the frame of government contained in the Book of Discipline. Out of the provisional body the general conference could create an annual conference, assign its boundaries, and give it a name, and thereafter it would become one of the regularly constituted Church tribunals. But until this was done it was a body for which the polity of the Church had made no provision; which had no legislative or judicial power, and no ecclesiastical standing. Its assumption of authority over those represented in the body could be ratified and affirmed by the general conference. Its assumption of authority over those not represented in the body was incapable of ratification and affirmance. As to such persons and congregations the want of jurisdiction was apparent and incurable.

We formulate our conclusions as follows:

First. The general conference that met at Indianapolis in 1891 was the regular successor of that of 1887, and was the general conference of the Evangelical Association of North America.

Second. The alleged general conference that met in Philadelphia in 1891 was an unauthorized body; and its assumption of ecclesiastical authority was an act of rebellion against the organization with which its members had been connected, and whose name it adopted.

Third. Those annual conferences, congregations, and individual church members that adhere to the general conference constitute the Evangelical Association.

Fourth. Those annual conferences, congregations, and individual church members that adhere to the Philadelphia body are not within the Evangelical Association, but have become by their own acts an independent and hostile association.

Fifth. The property which prior to 1891 belonged to the Evangelical Association now belongs to, and must be controlled by, those who still constitute that organization.

Sixth. The assignment of the plaintiff Krecker to the pastorate of the Immanuel Church in the city of Reading having been made by a provisional body of adherents without ecclesiastical authority, gave him no title capable of enforcement under the law of the Church or the law of the land; but the subsequent ratification and adoption of the assignment by the general conference gave him a title from and after that date good under the law of the Church, and therefore good under the law of the land.

Seventh. The assignment of the defendant Shirey to the same pastorate by the illegally organized annual conference of East Pennsylvania, or by the president of that body sitting without right, and the presiding elders, conferred no title upon him under the discipline and laws of the Church as expounded by its Court of last resort. He has shown therefore no title capable of enforcement under the law of the land against the Evangelical Association or its adherents.

Eighth. The question is thus seen to be, not where is the majority of Immanuel Church, or of the East Pennsylvania conference, but which of the parties to this litigation adheres to the general conference. Ecclesiastical standing, and not numbers, determines the title to, and the right of control over property held for the use of the Evangelical Association.

The decree of the Court below is reversed, and it is now ordered, adjudged and decreed, that an injunction be issued to restrain the defendants from exercising control over the church edifice of the Immanuel Church in the city of Reading, and from excluding the plaintiff or any other person appointed to the pastorate of said church, under the discipline of the Evangelical Association and the decision of the general conference, from the pulpit of the said church and from the exercise of his pastoral functions therein.

It is further ordered that the defendants pay the costs accrued in this case. H. B.

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Jan. '94, 359. April 10, 1894.

Wilkinson v. Colley.

Equity—Jurisdiction—Contract in restraint of trade—Construction of—Penalty—Liquidated Damages.

An injunction will lie to restrain a defendant from practicing as a physician within a limit of eight miles, when he has agreed in writing with another physician for a consideration, to abstain from practicing within such limit for ten years.

Whether a clause in such an agreement whereby the vendor binds himself in a penal sum, for the faithful performance of his part of the agreement, is to be treated as a penalty or liquidated damages, must be determined by the facts of each case. The controlling elements being the intent of the parties and the circumstances of the case.

In most cases the intent will determine the question but in arriving at the equities of a particular case, the relation which the sum bears to the extent of the injury provided against will be considered.

Even where an action at law will lie for the breach of covenant, yet if there is an utter uncertainty in any calculation of damages from the breach and the measure of damages is largely conjectural, equity will intervene, because of the inadequacy of the remedy, and restrain a continuing breach by injunction.

Appeal of E. L. Wilkinson from the decree of the Common Pleas of Luzerne County, dismissing his bill for an injunction.

His bill alleged a violation on the part of H. G. Colley, of the following agreement:

Articles of agreement made this 6th day of February, A. D. 1888, between H. G. Colley, of Lehman, in the County of Luzerne, State of Pennsylvania, of the one part, and E. L. Wilkinson, of Lehman, aforesaid, of the other part:

Whereas, each of the parties aforesaid, are practicing physicians at Lehman Township, and the vicinity adjacent thereto. The said H. G. Colley, in consideration of two hundred dollars to him in hand paid by the said E. L. Wilkinson agrees that the said H. G. Colley, shall and will not practice as a physician at Lehman or in that adjacent country within eight miles of Lehman Centre for the term of ten years from the date hereof, except in case of accident or other cause of extreme necessity, then in such case said H. G. Colley may render assistance as a physician, but the compensation for such medical assistance is to go to the said E. L. Wilkinson. The said H. G. Colley further agrees to use his influence in favor of said E. L. Wilkinson, and if necessary to remain at Lehman for a period of three months from the date hereof in order to prevent opposition to said E. L. Wilkinson, the said H. G. Colley further agrees that he shall not manufacture or have put on sale any medical preparation or compound during the period named in this contract.

And for the true performance of all and every the covenants and agreements aforesaid, the said H. G. Colley bindeth himself in the penal sum of Four Hundred Dollars firmly by these presents.

In witness whereof, the parties to these presents have set their hands and seals this day and year first above written.

E. L. WILKINSON, [SEAL]
H. G. COLLEY, [SEAL]
C. O. LEARN, [SEAL]

Signed, sealed and delivered in presence of
S. C. HOLLY.

And prayed for an injunction and damages. Other facts appear in the opinion of the Supreme Court, *infra*.

The Court, WOODWARD, J., was of opinion that the penal sum mentioned in the contract was liquidated damages, and that plaintiff had an adequate remedy at law, and entered a decree dissolving the preliminary injunction.

Plaintiff appealed, assigning for error, *inter alia*, this action of the Court.

Q. A. Gates, for appellant.

Such an agreement is binding.

McClurg's Appeal, 58 Pa. 51.
Hull's Appeal, 60 Id. 458.
Palmer *v.* Graham, 1 Pars. Eq. 476.

Damages having been shown he was entitled to the relief prayed for.

Walters *v.* McElroy, 151 Pa. 549.

W. H. McCartney, for appellee.

The bill was regularly dismissed if the penal sum is to be regarded as liquidated damages.

Streeper *v.* Williams, 48 Pa. 450.

The intention of the parties is the controlling element in deciding the question.

Shreve *v.* Brereton, 51 Pa. 175.
Keck *v.* Bieber, 148 Id. 645.
Bigony *v.* Tyson, 75 Id. 157.

The evidence clearly showed what the intention was.

October 1, 1894. DEAN, J. The bill in this case was for an injunction to restrain defendant from practicing as a physician within eight miles of Lehman Centre, in Luzerne county, for a period of ten years from 6th of February, 1888.

It appeared from the bill, answer and testimony, that Dr. Colley, the defendant, had been a practicing physician at Lehman Centre, from 1876 until 6th of February, 1888. Dr. Wilkinson, the plaintiff, was a younger man, and had commenced the study of medicine with Colley in the spring of 1883, when only twenty-two years of age; afterwards, in March, 1885, he graduated from "The College of Physicians and Surgeons," at Baltimore. He then returned to Lehman Centre, and formed a partnership with Colley in the practice of medicine. At the expiration of a year, the partnership was dissolved, and Wilkinson continued in practice for

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himself, down to the 6th of February, 1888; Colley also practicing for himself until July, 1886. Three years before, he had sold out his practice to one Dr. Hise, stipulating verbally that at the end of three years he would cease practicing. Hise's purchase included, besides Colley's practice, his property in Lehman Centre, valued at $1,525, and Hise for the same consideration sold to Wilkinson. Colley at the end of the three years, stopped practicing about three months, then, disregarding his agreement with Hise, commenced again, and continued to February, 1888. On the 6th of that month, he and Wilkinson entered into another agreement, this time in writing, whereby, in consideration of two hundred dollars Colley covenanted: (1) That he would not practice as a physician at Lehman Centre, or within eight miles thereof, for a period of ten years. (2) That he would use his influence in favor of Wilkinson, and remain at Lehman for three months, so as to prevent opposition. (3) That he would not manufacture or put on sale any medical preparation or compound during the ten years. (4) And, for the true performance of the covenants of the contract, bound himself in the penal sum of four hundred dollars.

Wilkinson paid the full consideration, and Colley removed to Columbia County, but in less than four years returned to Lehman Centre, and commenced again to practice medicine there. Wilkinson notified him that he was violating his contract, and requested him to stop practice, but Colley persisted; even sent cards to a number of Wilkinson's patients, inviting their patronage. Thereupon Wilkinson filed this bill, averring the facts as stated, and praying for an injunction.

The answer of Colley admits the execution of the agreement, and the payment of the consideration; admits that he resumed practice in Lehman, and the manufacture and sale of medicine; but sets up a parol understanding or agreement with Wilkinson, that he was to return if he paid back the consideration, and averring the four hundred dollars designated as a penalty in the agreement, is liquidated damages, and further averring his readiness and ability to pay the same.

When the bill was filed, a preliminary injunction was awarded, which was afterwards, in an opinion filed by Judge WOODWARD, dissolved, and the case sent for a hearing to a master, who, on the authority of the opinion already filed, dissolved the injunction, and reported against the plaintiff; on exceptions being filed, they were overruled by the Court, and the bill dismissed at costs of plaintiff. From this decree, plaintiff appeals.

The decree of the learned Judge of the Court below is based upon two conclusions: (1) That the penal sum of four hundred dollars in the contract, is to be treated as damages liquidated by the parties. (2) That the plaintiff has an adequate remedy at law for the breach of the contract. It follows that if the first conclusion, that the penalty of $400 is liquidated damages, be correct, the second is also correct. For all difficulty in liquidating damages, which from the very nature of the contract is otherwise great or impossible, is removed by the express stipulation of the parties, that the damages shall be fixed at $400. The remedy at law for the recovery of a sum certain is complete and adequate.

The question then recurs, was it the intention of the parties that Colley was not to practice again for ten years, or that he was to have the privilege of practicing on payment to Wilkinson of $400?

It is said by AGNEW, J., in delivering the opinion of the Court in Streeper *v.* Williams, 48 Pa. 450, where the contention was as to whether the words "forfeit the sum of $500, in case either party fail to comply with the terms of this agreement," was a penalty or liquidated damages, that, "Upon no question have Courts doubted and differed more. It is unnecessary to examine the numerous authorities in detail, for they are neither uniform nor consistent. No definite rule to determine the question is furnished by them, each being determined more in direct reference to its own facts than to any general rule. In the earlier cases, the Courts gave more weight to the language of the clause designating the sum as a penalty or liquidated damages. The modern authorities attach greater importance to the meaning and intention of the parties. Yet the intention is not all-controlling, for in some cases the subject matter and surroundings of the contract will control the intention, where equity absolutely demands it."

An examination of the cases in this State since Streeper *v.* Williams, decided thirty years ago, only confirms the correctness of the statement made by Justice AGNEW, that each case is determined by its own facts; no definite rule to determine whether the stipulated sum is a penalty or liquidated damages, is or can be laid down, without, in many cases, disregarding the principles on which equity is administered.

In Moore *v.* Colt, 127 Pa. 289, the contract was the sale of a stage line, with a stipulation that the vendor should not engage in the business. The words were: "And each party is hereby held and fully bound in the sum of $300 for the faithful fulfillment of the above contract." This was held a penalty, the Court saying, the defendant has no equity that language which technically provides a penalty shall be treated as liquidated damages. That, where the parties

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call it a penalty, it will be so construed, unless equity demands otherwise.

In March *v.* Allabough, 103 Pa. 335, Justice CLARK says, in delivering the opinion of the Court, we must consider the relation which the sum stipulated bears to the extent of the injury which may be caused by the several breaches provided against, and the ease or difficulty of measuring a breach in damages.

In Keck *v.* Bieber, 148 Pa. 645, Justice MITCHELL, after approving the language of Justice AGNEW, in Streeper *v.* Williams, says, the presumption is that a lump sum named by the parties to a contract is a penalty rather than liquidated damages; the name by which it is called is of slight weight, the controlling elements being the intent of the parties and the special circumstances of the case. Where there are numerous covenants of the most varied kinds and importance, and yet the sum named is payable for a breach of any, even the least, it is a penalty.

The sum of the authorities in our own State is, that the intent of the parties in most cases, but not in all, will determine whether the sum stipulated is a penalty or liquidated damages. Calling it a penalty is some evidence that it was so intended, but this is overcome, if equity demands it shall be treated as liquidated damages. And that, in determining the equities of the particular case, the relation which the sum bears to the extent of the injury provided against, will be considered. That where there are a number of covenants, and the sum named would be payable for a breach of any of them, even the least, it is a penalty.

Take now the circumstances under which this agreement was made, and the terms of it, to discover the intent. It is called a penalty, which is some evidence, though slight, that it was so intended. Colley, by the death of his father, found it necessary to remove and locate in Columbia County. In consideration of $200, he covenants not to practice in Lehman Centre for ten years. He was a physician forty years of age; his practice was well established and valuable to another physician, especially to a young man, who had graduated but a short time before; it was of but small value to Colley, for he must abandon it, and take up his residence in another county, even if he gets nothing for it. Its sole value to the purchaser, however, depends on Colley remaining away, in which event it is of very great value. It is of no value at all, if Colley soon returns. Is it reasonable to suppose, that Wilkinson intended Colley should have the privilege of resuming practice on payment to him of a sum equal to $40 per year, about the value of the patronage of a single patient? Colley admits in his testimony, that many of his old patients have come back to him since his return, and he was there less than a year before testifying. The sum is so out of proportion to the whole damages which Wilkinson would sustain by a breach of it, that it seems to us improbable that it was intended as liquidated damages by him. But, change the action to one for damages, and suppose that Wilkinson had brought suit against Colley for selling a single phial of medicine for a dime, which Colley covenanted not to do; would Colley have submitted to a judgment of $400 in liquidated damages for the breach, or would he have invoked equity to relieve him from the gross extravagance and hardship of the full penalty, wholly out of proportion to the nature and extent of the injury? Or, if he had returned four days before the end of the ten years, and commenced practice, would the $400, or at the rate of $100 per day, have been the liquidated damages for the violation of the covenant? Yet the sum named here is payable for the breach of any one, even the least, of these covenants.

There is nothing in the nature of the contract or the circumstances attending it, which points to an intent of the parties to treat this sum other than what they call it, a penalty.

While there is much variance in the authorities on this question, the equities of the particular case often determining the construction put upon the language, nevertheless the defendant has shown no equity which should move a Court in his favor. He first sold out his property and practice for a large sum to Dr. Hise, and Wilkinson bought from Hise. Then defendant resumed practice; then again, by the most explicit agreement in writing, he sold to Wilkinson, and deliberately violated his covenants, to the manifest injury of Wilkinson, and on his own showing, he did this because it paid him better to break his contract than to keep it. The equities of the case, therefore, are all with the plaintiff. We hold that the $400 stipulated here, is a penalty only. The contradictory parol evidence is without significance, in view of the plain terms of the contract, and the circumstances surrounding the parties when they entered into it; we do not attempt to reconcile it, because the contract itself is not ambiguous, and the circumstances under which it was made are undisputed; these are the controlling facts in settling its interpretation.

As to the second proposition held by the learned Judge, that plaintiff has an adequate remedy at law, his decision is grounded mainly on the interpretation, that the contract stipulates for liquidated damages. As we do not concur with him in this view, the question remains, whether, treating it as a penalty, in equity the plaintiff is entitled to a specific performance of the contract. That plaintiff could maintain an

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action at law for damages, for breach of the contract, there is no doubt. But it is a well-settled rule, that although the action at law will lie, yet if there is an utter uncertainty in any calculation of damages from the breach of the covenants, and the measure of damages is largely conjectural, equity will intervene because of the inadequacy of the remedy. The plaintiff claims damages to the amount of one hundred dollars per month, up to the hearing of the case before the master, and offered evidence to establish this claim. But there was no full hearing on the merits of this branch of the case, nor any finding of fact by the master, and we pass no opinion on this evidence. It remains open for further proceedings in the Court below to determine the amount of damages sustained by plaintiff, between the return of the defendant to Lehman Centre and the issuing of this injunction. We only determine, that from the very nature of this contract an action at law is a wholly inadequate remedy for its persistant violation during the ten years, and therefore equity will specifically enforce performance of it by injunction. Palmer *v.* Graham, 1 Parsons, 476.

Therefore, the decree of the Court below dismissing the bill is reversed at costs of appellee, and the bill re-instated; it is further ordered that an injunction issue directed to defendant, restraining him from practicing as a physician at Lehman Centre, and within eight miles thereof, until the 6th day of February, 1898, and from manufacturing or putting on sale any medical preparation during the same time. W. M. S., Jr.

Jan. '94, 252. January 31, 1894.

Reck v. Hatboro Mutual Live Stock and Protective Insurance Co.

Insurance policy—Construction of—Forfeiture.

A by-law of a live stock mutual insurance company provided as follows: "The insurance of this company shall be confined to a distance not exceeding twelve miles from the borough of Hatboro." The policies did not describe the insured live stock as located at any particular place, nor provide that they should remain within the twelve-mile limit. In an action upon a policy for the death of a horse, which the owner had permanently removed with him beyond the limit:

Held, that the law does not favor forfeitures, and the by-law in question fairly admits of a construction which prevents forfeiture.

Insurance Association *v.* Evans, 102 Pa. 281, commented upon.

Appeal of John H. Reck, from the judgment of the Common Pleas of Montgomery County.

On the trial, before WEAND, J., plaintiff showed that he had insured his horse in the defendant company, at Jenkintown, about seven miles from Hatboro, in May, 1889; that in November, 1891, he removed permanently to West Philadelphia, about seventeen miles from Hatboro; that on November 11, 1891, his horse's leg was broken and the animal had to be killed.

Defendant moved for a compulsory non-suit, for the reason that their by-laws provided, "The insurance in this company shall be confined to a distance not exceeding twelve miles from the borough of Hatboro."

The Court granted the non-suit, which the Court in banc refused to take off, and the plaintiff appealed, assigning for error this action of the Court.

William F. Dannehower, for appellant.

The by-law simply meant that at the time of the insurance the applicant must reside within the twelve-mile limit.

A policy containing a stipulation which has been violated will not be construed to be forfeited unless it also contains a stipulation that such shall be the effect.

Ins. Co. *v.* Shoe Factory, 80 Pa 407.
Insurance Association *v.* Evans, 102 Id. 281.

N. H. Larzelere (*M. M. Gibson* with him), for appellee.

That a company can make contracts limiting its liability is unquestioned, and so held by this Court in London, etc., Insurance Company *v.* Lycoming Ins. Co., 105 Pa. 431, and other authorities. Whether the reason be good or bad, the question is: does it constitute the contract? In this case the best reasons existed for such a stipulation in the contract. But the case of Coventry, etc., Insurance Association *v.* Evans, 102 Pa. 281, clearly establishes that when such a contract is made a permanent removal cannot take place without ending the contract. In that case the fact was that only a temporary removal for a lawful purpose took place, and the Court held that did not violate the policy *ipso facto*, unless the temporary removal increased the risk, which was a question of fact for the jury. In this case it is conceded the removal was permanent and therefore falls directly within the ruling of that case, which sustains the judgment in this.

October 1, 1894. McCOLLUM, J. This is an appeal from the refusal of the Court below to set aside a compulsory non-suit in an action on a policy of insurance. The action was brought to recover compensation for the loss the plaintiff sustained in the death of his horse in a stable in Philadelphia, from an injury received there, and the non-suit was entered on the ground that by removing his horse from Jenkintown where the

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insurance was effected, to the place where the injury was received and the death occurred, he forfeited his right to the indemnity guaranteed by the policy. Two questions are raised by the appeal. They are (1) whether there was a forfeiture, and (2) if there was, whether there was evidence of a waiver of it by the company. The first question turns on the construction of section 14 of the by-laws which is as follows: "The insurance of this company shall be confined to a distance not exceeding twelve miles from the borough of Hatboro." The learned Judge of the Court below construed this by-law to mean that the property must be kept within the distance limit to entitle the insured to indemnity in case of loss, and he cited 95th American Decisions, 751; Wood on Insurance, sec. 47; London Ins. Company *v.* Lycoming Ins. Co., 105 Pa. 424, and Insurance Asso. *v.* Evans, 102 Id. 281, as in accord with and supporting his construction. In all the cases cited except in Ins. Co. *v.* Evans, *supra*, the location of the property was designated in the policy. In some of them the designation of the location of it was held to be merely descriptive; in others it was regarded as constituting a continuing warranty that the location of the property should not be changed. This seeming inconsistency in the decisions is due to the fact that the question whether the designation in the policy of the location of the property is descriptive only or a warranty that it shall not be removed, depends to some extent on the nature and uses of it. In Ins. Association *v.* Evans, as in this case, there was no statement in the policy in respect to the location of the property. In that case the insured lived in the district to which the business of the association was confined. On the 23d of April, 1879, he obtained from the association a policy of insurance on his two horses then within the charter limit. On the 2d of May, 1880, he took them to Philadelphia for the purpose of selling them, and in pursuance of this purpose he left them there in a livery and sale stable until the 25th of June, when one of them died. In a suit for the loss it was contended by the insurer that the policy was forfeited by the action of the insured in removing the horses to Philadelphia and keeping them there for the purpose above stated, but it was held that in the absence of any prohibition in the contract, such action did not forfeit it, or prevent a recovery upon it. We think therefore that Insurance Association *v.* Evans does not sustain the defendant company's contention in this case. It did not decide that the horses were temporarily in Philadelphia for a purpose necessary or incident to the ordinary use and enjoyment of them, or that the provisions in the charter restricting the business of the association to the counties of Chester, Montgomery and Berks would have avoided the policy if the insured had moved to Philadelphia and kept his horses there. It simply determined that upon the facts appearing in the case there was no violation or forfeiture of the contract. We have made particular reference to the decision in Ins. Association *v.* Evans, because the by-law limit in this case is of the same nature as the charter limit in that. We have then to decide as an original question, whether the plaintiff in moving to Philadelphia and taking his horse with him violated sec. 14 of the by-laws and thereby forfeited his policy. It is by no means clear that he did so. There is, at least, room for doubt whether the by-law was intended to prohibit such removal of the property, or to attach such consequences to it, and as forfeitures are not favorites of the law the doubt should be resolved against the insurer.

We think the by-law in question fairly admits of a construction which prevents a forfeiture. There need be and should be no ambiguity in a contract of insurance. The prohibitions and conditions in it are prepared and inserted by the insurer, and they ought to be clearly expressed. In the case at bar if the defendant company had intended that a removal of the property beyond the twelve-mile limit should avoid its policy it could easily have said so and saved litigation.

The specifications of error are sustained. Judgment reversed and procedendo awarded.

W. M. S., Jr.

Jan. '94, 92. March 6, 1894.

Rohn v. Odenwelder.

Charge on land—Construction of deed—Charge not divested by sheriff's sale—Interest on arrears—When question for jury.

Where a deed creates a charge upon the land by reserving an annuity to the grantor in a clause in the habendum beginning "Under and subject nevertheless, to the payment," etc., and by a further provision of the same clause reserves an annuity of less amount to his widow after his death, the second annuity is also a charge upon the land.

Such a charge is not divested by a sheriff's sale upon a subsequent lien.

Whether interest should be allowed upon arrears of such an annuity is a question to be decided by the jury in view of all the facts in the case.

Appeal of Tilghman Odenwelder, defendant, from the judgment of the Common Pleas of Northampton County, on verdict for plaintiff, Levina Rohn.

Assumpsit to recover arrears of an annuity charged on land.

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At the trial, before REEDER, J., it appeared that in 1873, Daniel Rohn, by deed in which his wife (the plaintiff) joined, conveyed to his son Jacob P. Rohn, a farm for the consideration of $6,204.38. This deed contained the following clause:

"Under and subject nevertheless, to the payment of the sum of two hundred and fifty dollars yearly and every year unto the said Daniel Rohn during his natural life on the first day of April in each year, the first payment to be made on the first day of April A. D. 1875: and after the death of the said Daniel Rohn, if his wife survives, then the sum of one hundred dollars for each and every year shall be paid to her on the first day of April in each and every year, the first payment not to become due until April 1, 1875, in any event: with the right and privilege of the use of three rooms such as the said Daniel Rohn and wife shall choose to occupy, at their option during his natural life; and if his wife survives she shall have the same privilege to use the same rooms, so long as she remains a widow and does not marry again; but in case of her marriage she is to lose her right thereto; and after the death of the said Daniel Rohn and the death or second marriage of his said wife, the principal sum or purchase money of said farm, to wit the sum of $6,204.38 shall become due and payable in one year to the five children of the said Daniel Rohn their heirs and legal representatives in equal shares, the said Jacob to have his equal share thereof as one of the said children, the said principal sum or purchase money to be without interest for one year after the death of the said Daniel Rohn and the death or second marriage of his said wife."

Daniel Rohn died in 1874. His widow occupied the premises under the deed. April 16, 1892, the sheriff sold the premises, by virtue of a writ of lev. fac. against Jacob P. Rohn, to the defendant, for $740. At that time there was a mortgage of Jacob Rohn executed in 1882 on the premises. After the execution of the sheriff's deed to the defendant, plaintiff brought this action to recover sixteen instalments of $100 each with interest, under the above provisions of the deed.

Defendant contended that the charge on the land in favor of plaintiff was discharged by the sheriff's sale. The defendant submitted, *inter alia*, the following point:

"5. That the plaintiff is not entitled to recover interest on said annuity from the date that the same was payable annually."

"*Ans.* This point I deny." (Fifth assignment of error).

The Court charged that the annuity was a charge upon the land, which was not discharged by the sheriff's sale on account of the intervening mortgage; that the undisputed evidence in the case was that not a dollar of the annuity had been paid; and "that there is nothing for you to do but under the direction of the Court to render a verdict in favor of the plaintiff for the amount of the arrearages on the charge of one hundred dollars annually in her favor in the deed to Jacob P. Rohn."

Verdict for plaintiff for $2,673.76 and judgment thereon. Defendant appealed, assigning as error the instruction of the Court that the annuity was a charge not discharged by the sheriff's sale, the direction to find for the plaintiff, and the answers to points.

R. C. Stewart and *O. H. Meyers*, for appellant.

The provision for the plaintiff in the deed constituted a personal covenant, not a charge on the land.

Heister *v.* Green, 48 Pa. 101.
Strauss's Appeal, 49 Id. 353.
Heist *v.* Baker, 49 Id. 11.

Even if the charge was a lien on the land, arrears were discharged by the sheriff's sale.

Devine's Appeal, 30 Pa. 348.
Bantleon *v.* Smith, 2 Binn. 146.
Reed *v.* Reed, 1 W. & S. 235.

The allowance of interest was a question to be passed upon by the jury.

Obermyer *v.* Nichols, 6 Binn. 159.
Buchanan *v.* Montgomery, 2 Yeates, 73.
Gaskins *v.* Gaskins, 17 S. &. R. 390.
Heller's Appeal, 116 Pa. 534.
Smyser *v.* Smyser, 3 W. & S. 437.

A. B. Longaker, (*A. S. Knecht* with him), for appellee.

The reservation in the deed was a conditional estate.

Bear *v.* Whisler, 7 Watts, 144.
Helfrich *v.* Weaver, 61 Pa. 390.
Eichelberger *v.* Gitt, 104 Id. 73.

A sheriff's sale upon a subsequent lien cannot defeat an estate.

Irwin *v.* Bank, 1 Pa. 349.
Zeigler's Appeal, 35 Id. 173.
Schall's Appeal, 40 Id. 170.
Hacker *v.* Cozzens, 92 Id. 461.

Again a fixed lien, or a lien standing in the title, and a covenant running with the land, will not be affected, or discharged by a sheriff's sale made upon a second mortgage while a second and intervening mortgage remains undischarged.

Dewalt's Appeal, 20 Pa. 236.
Wertz's Appeal, 65 Id. 306.
Eichelberger *v.* Gitt, 104 Id. 73.
Strauss's Appeal, 49 Id. 353.

The same rule applies to ground rent estates.

Hacker *v.* Cozzens, *supra*.
Devine's Appeal, 30 Pa. 348.

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Each annual payment was a principal debt on which interest is demandable.

Tospon *v.* Sipe, 116 Pa. 599.
Mickelwaite *v.* Bartman, 1 Chan. Rep. 184.
Batten *v.* Earnly, 2 P. Wms, 163.
Bantleon *v.* Smith, 2 Binn. 150.
Sopp *v.* Winpenny, 68 Pa. 81.
Buck *v.* Fisher, 4 Whart. 516.
De Haven *v.* Bartholomew, 57 Pa. 126.
Obermyer *v.* Nichols, 6 Binn. 159.
Gaskins *v.* Gaskins, 17 S. & R. 390.
Smyser *v.* Smyser, 3 W. & S. 437.
Heller's Appeal, 116 Pa. 534.
Addams *v.* Heffernan, 9 Watts 529.

The statute of limitations has no application to the case.

De Haven *v.* Bartholomew, 57 Pa. 128.
Diefenderfer *v.* Eshleman, 113 Id. 305.
Briggs's Appeal, 93 Id. 485.
Com. *v.* Snyder, 62 Id. 157.

July 11, 1894. GREEN, J. We think the learned Court below was correct in the construction given to the clause of the deed creating the charge. It is not really disputed that the charge of $250 annually, in favor of Daniel Rohn, was a fixed lien, or charge, upon the land by virtue of the words, "Under and subject nevertheless to the payment of the sum of two hundred and fifty dollars yearly and every year unto the said Daniel Rohn," etc. We think the case of Heist *v.* Baker, 49 Pa. 9, settles the character of such a charge. The words there were, "Under and subject nevertheless to the payment of the sum of $932.52 at the decease of the said Elizabeth Gross, unto the above named Ann Eliza and Rachel Gross or to their legal representatives." Mr. Chief Justice WOODWARD, delivering the opinion of this Court, said of these words, "According to the cases cited in the argument, as well as according to the reason of the thing, these words created an express lien upon the land for the sum mentioned, which was not divested by the sheriff's sale, because during the life of Mrs. Gross, it was a lien of indeterminate value, and was manifestly intended to run with the land." To the same effect in Eichelberger *v.* Gitt, 104 Pa. 64, in which we said, "Henry Gitt conveyed the land to Abdiel F. Gitt on Dec. 21, 1853, 'subject to the payment of five thousand nine hundred and fifteen dollars, the purchase money.' These are apt words for imposing a lien, the grantee took the estate, conditioned for the payment of a certain sum, and performance of the condition may be enforced by action of ejectment." We do not think that there is anything in Hiester *v.* Green, 48 Pa. 101, which conflicts with either of the foregoing cases. On the contrary that case recognizes that, "parties may by clear and express words, in deeds of conveyance create liens upon land either for purchase money, or for the performance of collateral conditions, which will be binding between themselves and their privies, and such liens will be divested by subsequent sheriff's sales unless they are in the nature of testamentary provisions for wives and children, or are not capable of valuation, or are expressly created to run with the land." In the present case the charge comes within all of these excepted conditions and is therefore not divested by the sheriff's sale.

The contention of the appellant, however, turns chiefly upon the provision for the widow. During the life of Daniel Rohn the sum of two hundred and fifty dollars was to be paid to him annually, and after his death the sum of one hundred dollars was to be paid annually to the widow. It is argued that because the words, "Under and subject," are not immediately associated with the direction to pay the widow the annual sum provided for her, it is not a lien or charge upon the land. It is true that the words, "Under and subject," are not repeated in the direction to pay the annuity of the widow, but we do not think this circumstance fairly operates to dissociate the annuity from the charging words. If we consider the intent of the grantor alone, it would be hardly possible to conceive, that he did not mean to confer the same security for the payment to the widow, that was given to secure the payment to himself. Apart from her more helpless condition and the smaller sum provided for her, the absence of any motive to make a distinction in the grade of the security for the respective payments forbids the thought that such could have been intended. But apart from these considerations, the order and connection of all the words of the grant which create the double charge, or rather the successive charges, do not require such a construction. The clause of the deed which creates these charges for the grantor and his wife, is one continuous clause commencing with the words, "Under and subject," and not terminating until both are fully provided for, and it may well be held that in the mere rhetorical sense, as well as in the mental sense, both of the annual payments described in the succeeding words were intended to be equally affected by the opening words of the sentence. There is no question that the words, "Under and subject," apply directly to the annual sum of $250 to be paid to Daniel Rohn, for they are in immediate juxtaposition. But the provision for the wife follows directly after the provision for the husband and as a part of the same sentence, and is upon the same subject, and separated only by the difference in the contingency, to wit, the payment to the husband during his life and thereafter to the wife during her life. The whole sentence is

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thus, "Under and subject nevertheless to the payment of the sum of two hundred and fifty dollars yearly and every year unto the said Daniel Rohn during his natural life, on the first day of April in each year, the first payment to be made on the first day of April, 1875, and after the death of the said Daniel Rohn, if his wife survives, then the sum of one hundred dollars for each and every year shall be paid to her on the first day of April in each and every year, the first payment not to become due until April 1, 1875, in any event." The payment of the one hundred dollar annuity, is simply the alternative of the payment of the two hundred and fifty dollar annuity, when the latter has expired by the death of the annuitant. We think it would be doing violence to the plain meaning of the words, as well as to the obvious intent of the grantors, one of whom was this very widow herself, to hold that the husband was to have the security of the land for his annual sum, and that the other grantor was to have no security at all, and was to be bound to look only to the personal liability of any stranger who happened to own the title. We are confirmed in this opinion by the words of the rest of the clause. Immediately after the provision for the widow is a direction that both the husband and wife, grantors, in the deed, shall have the right and privilege to occupy three rooms of the house during their joint lives and the life of the survivor. As this is a palpable charge upon the title, into whomever's hands it might fall, it is entirely consistent with the idea that the grantors intended to have the security of the land for all the reservations in the deed in their favor.

For the reasons herein stated we dismiss all the assignments of error except the fifth. This assignment relates to the question of interest on the arrearages of the annual payments, from the time they severally matured. The learned Court simply denied the defendant's point on this subject but gave no specific direction to the jury, though in the concluding sentence of the charge the jury was directed to render a verdict for the plaintiff for the amount of the arrearages only, at the rate of one hundred dollars per annum. The jury allowed interest as claimed by the plaintiff. The defendant's fifth point did not call the attention of the Court to the subject of interest, as being an open question which might be affected by the facts one way or the other, but requested a general instruction that the plaintiff was not entitled to interest. This the Court simply declined, and strictly the answer was not error because, under the authorities, interest may be allowed on such charges. But we have held that the liability for interest depends upon the facts of the given case and perhaps the ends of justice would be best subserved by directing another trial to have that question determined.

In the case of Heller's Appeal, 116 Pa. 534, interest was asked for, in a case similar to this, but was refused by the master and Court below, and we declined to interfere. There, as here, it appeared that the widow never demanded her dower and died without having done so. It is true her dower had never been assigned, and there was no fixed amount due upon which interest could accrue for non-payment. The master held there was no authority for the payment of interest in such circumstances, and this Court sustained his ruling.

In the case of Gaskins *v.* Gaskins, 17 S. & R. 390, a testator bequeathed to his widow an annual sum of fifty dollars and charged it upon his land, which he devised to his sons. After eleven years, an action was brought to recover the annual payments, and interest on them. The Court below decided that interest could only be recovered from the time of suit brought, there being no evidence of any previous demands. HUSTON, J., delivering the opinion of this Court, said, "The case before us presents the naked question of the plaintiff not asking for principal or interest, until the interest on the first years became equal to two-thirds of the principal; and we have on authority and on principle come to the conclusion that the decision of the Court below was right. . . . When an annuity is growing from land of a yearly value sufficient to pay it, and nothing said of it by him to whom it is due, the fair presumption is he does not want it. There is no ground to suppose the occupiers of this land agreed to pay or expected to be charged interest for it, and the decision is that if the land is resorted to, interest is not due until demanded or suit brought. Here then we are stopped by authority and we do not feel disposed to overrule that case."

In Smyser *v.* Smyser, 3 W. & S. 437, proceedings in partition were instituted on the land of a decedent, which was accepted by a son, who entered into recognizance to secure the widow and heirs their shares of the valuation money. The mother died without having collected her dues and her administrators brought suit for the amount, and claimed interest on the annual sums from the time they were respectively due. The Court below allowed the whole claim and was reversed by this Court. In a per curiam opinion we said, "*Prima facie*, annual payments to the widow of an intestate, charged on his land as an equivalent for her dower at the common law, bear interest from the day they are due. But in this instance there may perhaps be enough in the relation of the parties to convince a jury that the money was left in the defendant's hands on deposit, because not immediately

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needed. In the case of a stranger no such presumption would arise; but between a parent and child, it might in some cases be implied. In any case, however, it must depend on particular circumstances. . . . It is a presumption purely of fact, however, which can be drawn on either side only by a jury, according to the strength of the circumstances; and as it is not a legal inference from the facts found, we are compelled to remit the cause for another trial."

There is so much analogy between the facts of these two cases and the case at bar, and so much justice in the rulings upon those facts, that we are disposed to follow them with a similar ruling in the present instance. This plaintiff never collected and so far as is known never seriously demanded, the annual sums due her, and of course, she never claimed or received any interest on those sums. Presumably she left the money with her son because she did not need it and was content that it should so remain. When appealed to by the defendant who had a right to know what her claim was she evaded his inquiry and gave no answer. She testified that she had money of her own and that she at one time loaned to Jacob $700, which he afterwards paid back to her with interest. She said she asked him for this money sometimes and that he said he could not pay it, he had no money and that she said nothing in reply. Without our deciding whether interest ought to be allowed on the state of facts as they now appear of record, we think it should be referred to a jury to determine the question under the authority of Smyser *v.* Smyser. It is true that in Addams *v.* Heffernan, 9 Watts, 529, we held that interest should be allowed upon an unpaid annual sum, but the circumstances of that case were different and did not raise the present question.

As a matter of course any judgment that may be entered against the defendant will be a judgment *de terris*. We affirm the judgment of the Court below on all points but the one relating to interest, and we only reverse on that in order that the verdict of a jury may be taken on that question.

Judgment reversed and new venire awarded.

J. D. B., Jr.

July, '93, 77. January 16, 1894.

Weigman v. Jones.

Party wall—Grant of easement of light and air.

Where a grantor conveys a portion of his premises immediately adjoining premises already owned by the grantee, the consideration recited being, *inter alia*, the grant of an "easement for light and air" for the grantor's remaining property, and the grantee for himself and his assigns agrees by deed not to build upon the said conveyed premises to a height greater than sixteen feet, and executes a covenant running with the land, assuring to the grantor the before mentioned easement of light and air, a wall afterwards erected by the grantor on the line between his land and the piece of land granted is not to be regarded as an ordinary party wall, and the grantor will not be restrained by injunction from leaving windows or openings therein, at a height above the said sixteen feet.

Appeal of Joshua R. Jones, defendant, from the decree of the Common Pleas No. 2, of Philadelphia County, ordering him to close up certain openings in a party wall between his premises and those of John H. Weigman, plaintiff.

A bill was filed to compel the closing of windows in a party wall; the answer set up a conveyance by the plaintiff to the defendant of an easement of light and air. The facts appear fully in the opinion of the Supreme Court. The Court of Common Pleas granted an injunction as prayed and the defendant appealed.

H. E. Garsed and *George Tucker Bispham*, for appellant.

The plaintiff having granted an easement of light and air, the ordinary rule that a party wall can have no openings does not apply.

A contract for the erection of a party wall which provides that the person on whose land it is to be partly built shall "not have the right to obstruct the light for any window which the other party shall build into said wall" gives such other party by implication the right to build windows into such wall.

Grimley *v.* Davidson, 133 Ill. 116 (1890).

J. Martin Rommel, contra.

October 1, 1894. Sterrett, C. J. In October, 1880, and prior thereto, the parties to this contention each respectively owned a lot on Cherry street below Eighth in Philadelphia. Plaintiff's lot, fronting eighteen feet eight and one-half inches on Eighth street, extended back easterly along the southerly line of Cherry street one hundred and five feet nine inches to the westerly line of defendant's lot fronting on said last mentioned street. The westerly face of the wall of defendant's building was five and three-quarters inches from the line dividing said lots.

The first and second paragraphs of the bill contain full descriptions of said lots respectively with averments of title in fee thereto. The third paragraph charges that defendant is causing to be erected on his lot a seven-story building, and for that purpose has built a party wall on the division line between said lots. The fourth paragraph avers that said party wall to the height of the first story is about twenty-four inches in thickness, of which six and one-half inches stands upon plaintiff's ground in accordance

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with the Acts of Assembly relating to party walls, in such cases made and provided. The fifth paragraph charges "that, in violation of law and plaintiff's rights, the said defendant has caused to be built or opened in said party wall six windows overlooking the premises of plaintiff, to his great detriment and injury, notwithstanding notice to desist therefrom was given to said defendant while said wall was being erected."

The prayers are for, (1) an order compelling defendant to build up said openings or windows; (2) an injunction restraining the further maintenance of said openings or windows, and (3) further relief.

The averments, etc., contained in the first, second and fourth paragraphs of the bill are admitted. The third and fifth paragraphs are denied; and, for further answer to the latter, the averment of the defendant is "that under and by virtue of a certain deed, made between myself and the complainant and others, dated the 12th day of October, 1880, I had the right to put the windows in the western side of my wall." A copy of said deed is appended to and made part of the bill. The case was heard on bill and answer, and the learned Court without filing any opinion, or so far as appears assigning any reason for its action, granted the relief prayed for and entered the decree from which defendant took this appeal.

If the structure complained of, with the openings therein, were merely a party wall, erected under the law relating to that subject and without reference to the rights granted and acquired under the deed relied on by defendant in his answer, there would be force in the plaintiff's contention; but, without wholly ignoring defendant's right under said deed, the case cannot be treated as involving nothing more than a question under the party wall law. The deed referred to is tripartite, the defendant and his wife being parties of the first, plaintiff and his wife parties of the second, and John Craig and George Craig, mortgagees of plaintiff's lot, parties of the third part. After reciting defendant's seizure and possession of his lot, and fully describing the same by metes and bounds, etc., and as abutting on the easterly end of plaintiff's lot for the distance of eighteen feet eight and one-half inches, the deed contains, *inter alia*, the following further recitals:—

"And Whereas, the said John H. Weigman is desirous of erecting an addition to the building situate on his said lot, so that its eastern wall shall be built upon the boundary line between the two above described lots of ground; and by the statute in such case made and provided for the erection of party walls, the said Weigman would have the right to build, for the purposes of party walls, four and one-half inches upon the land of said Jones for the space of eighteen feet eight and one-half inches, which said addition, if so erected, would greatly damage the said Jones by cutting off the second and third story of said Jones' building from light and air.

"And Whereas, it hath been agreed by said Jones and Weigman that the said Jones shall convey unto the said Weigman the said five and three-quarters inches lying between the western wall of said Jones' building and his boundary line for the length of eighteen feet eight and one-half inches, and shall also pay unto said Weigman the sum of four hundred dollars; in consideration of such conveyance and payment the said Weigman is to execute a covenant running with his said land to preserve the easement for light and air unto the said Jones, his heirs and assigns, and those claiming by, through or under him, them, or any of them, and also that he the said Weigman, shall use the said five and three-quarter inches so conveyed to him for the purpose of erecting a wall to the eastern end of the proposed addition of only sixteen feet in height, measured from the surface of the ground, and that he neither will, nor any person or persons, natural or artificial, claiming or to claim by, through, from or under him, will make, cause, or suffer to be made, any erection, wall, building, part of building, or obstruction whatever upon his said lot, or the strip hereby conveyed higher than the said sixteen feet unless there shall be left between the buildings a clear space of at least thirty-six inches between the faces of the two walls from the height of sixteen feet upwards, the starting point for this measurement being the face of the wall as now erected upon the lot of said Jones."

As expressed in the granting clause, the conveyance of said five and three-quarters inches wide strip, is "as well for and in consideration of the premises, and of the easement for light and air hereby created as of one dollar to them in hand paid," etc. Habendum, etc., "subject to the restrictions for building as herein contained."

This is followed by plaintiff's covenant provided for in the second of the foregoing recitals, running with the land and securing to defendant the said easement of light and air; also Mrs. Weigman's release of any dower interest she may have in said easement, and the release of said mortgagees of their interest in the same.

It is difficult to conceive how the easement claimed by defendant could be more effectually secured to him, his heirs and assigns than is done by the tripartite deed upon which he relies. In view of the provisions of that instrument, plaintiff has no case.

Decree reversed and bill dismissed, and it is ordered that the costs including the costs of this appeal be paid by the plaintiff. H. B.

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Jan. '94, 307, 326, 368. April 3, 1894.

Morris et al. v. The Metalline Land Company et al.

Brooking's Appeal.

Stevens's Appeal.

Miller's Appeal.

Joint-stock association—Rights of shareholders determined by articles of association—Forfeiture of stock for non-payment of assessments—When regular, equity does not relieve—Absolute observance of provisions of articles necessary—Notice by publication—Necessity of, not supplied by actual notice—Acquiescence in forfeiture—Laches.

So far as the shareholders are concerned, the articles of association of a joint-stock company constitute the law governing the rights of the members or stockholders, and the business of the association must be conducted in accordance with the provisions of such articles.

Forfeiture of the shares of a stockholder for failure to comply with a call for an assessment duly levied by the managers of the company in compliance with the terms of the articles of association is one of the forfeitures against which equity does not relieve.

Hence the terms of the articles must be most strictly complied with, and all provisions in regard to notice absolutely observed.

When the articles provide for notice by publication in certain newspapers, and also for notice by mail, a failure to comply with the provisions in regard to publication in a particular newspaper avoids the forfeiture, even if it be shown that actual notice of the assessment called was given to the stockholder affected.

The cases in which a shareholder has been held in equity to have acquiesced in the forfeiture of his shares will be found on examination to be cases in which either the excuse for non-compliance was held insufficient, or the delinquent stockholder held aloof while others were furnishing means to carry on the business, or there was clear evidence of intentional abandonment of the stock after full notice of forfeiture proceedings. In these cases it would be inequitable to allow the delinquent stockholder to participate in profits subsequently secured.

When the articles of association required publication in a certain newspaper, and provided for forfeiture in case of failure to pay after thirty days, in default of such publication there was no time at which the shareholder was in default for failure to pay, hence the forfeiture proceedings were totally invalid, and the shareholder never guilty of laches.

Appeal of Roope Brooking, one of the defendants, from the decree of the Common Pleas No. 2 of Philadelphia County, in the case of Morris et al. *v.* The Metalline Land Company et al.

Appeal of William H. Stevens, another of the defendants, from the same decree.

Appeal of Sarah Miller, executrix of Frederick Miller, who was another of the said defendants, from the same decree.

The trustees of the Metalline Land Company having sold forty acres of land in Michigan held by them for the said association for the sum of $500,000 to the Calumet and Hecla Mining Company, filed a bill to determine the parties entitled to participate in the proceeds of the said sale. The character of the company was considered by the Supreme Court in Oliver's Estate, 136 Pa. 43.

Testimony under this bill and the answers filed thereto was taken before Joseph J. Broadhurst, Esq., examiner and master. Before him it was shown that, besides those persons who were admitted to be stockholders of the land company, because all the assessments ever made by the managers of the company (amounting in all to the sum of $1.90 per share) had been paid by them, and who were referred to as "Class I.," the defendants comprised persons who, as this first class of stockholders alleged, had forfeited their shares for non-payment of calls made in 1872 (Class II.), and in 1874 (Class III.), and in 1878 (Class IV.). The litigation was practically between the defendants of the first class on one hand, and those of the second, third and fourth classes on the other. The master decided that all the forfeitures declared by the managers for failure to pay these several calls had been regular and valid, and that the parties affected thereby were not entitled to participate in the distribution of the fund. The report of the master was confirmed by the Court, no opinion being filed. Of the appellants, Brooking and Miller were the holders of stock declared to have been forfeited for failure to respond to the call made in 1878, and Stevens was the holder of stock declared to have been forfeited for non-payment of the call of 1874, and of other stock declared to have been forfeited for non-payment of the call of 1878.

The principal contention was as to the regularity of the call made in 1878. The articles of association (recited in the opinion of the Supreme Court) required publication of notice of the call in a newspaper published in the City of Philadelphia and a newspaper published in the City of Detroit, and also that notice of the call should be sent by letter through the postoffices addressed to all stockholders whose residence was known by the secretary. It was shown that notice of this call of 1878 was published in a Philadelphia newspaper, but was not published in a newspaper published in Detroit. It was also shown that notice was sent to the stockholders upon a postal card.

BROOKING'S APPEAL.

Roope Brooking, an English citizen, had not been in America since 1870. The postal card

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notice addressed to him was sent to a firm in New York City with which he had formerly been connected. There was a dispute as to whether notice reached Mr. Brooking, but the master found that there had been sufficient testimony "to leave no doubt in the mind of the master that Mr. Brooking did have knowledge of what was done by the trustees in regard to the stock about the time of the forfeiture and sale, as well as the knowledge communicated to him by the secretary by letter of April 12, 1884, in answer to a letter from Mr. Brooking of January 18, 1884."

STEVENS'S APPEAL.

William H. Stevens is a citizen of the State of Michigan, residing in the City of Detroit. From 1866 until he was removed in 1875 he was one of the trustees of the Metalline Land Company. As such trustee he signed the forfeiture resolution of the call of 1874, and was subsequently removed at the annual meeting of the company from his office of trustee, and 550 shares which had been held by him were sold in 1875 for failure to comply with the assessment of 1874. For his failure to comply with the later call of 1878, 1,500 shares of his stock were treated as forfeited, and were sold to the Metalline Land Company, and so transferred on the company books. The testimony as to whether Mr. Stevens had actual knowledge of the call of 1878 was conflicting. In 1885 he wrote to the secretary of the company in regard to his stock, and received a reply that it had been forfeited and sold. In 1886 he wrote again to the secretary, stating that he had no knowledge of any assessment being called, and did not hear of any advertisement and was ignorant of the cause of his name not being on the list of the present owners.

MILLER'S APPEAL.

Frederick Miller, who held fifty shares of the company's stock, died in 1885, six and a half years after the alleged forfeiture of his shares. The testimony of his executrix was that she found his certificate of stock, notices of calls of 1872 and 1874 and receipts for payment of the same, but no other papers relating to the Metalline Land Company. It did not appear that she ever made any inquiry about these shares, and she testified that in 1878 there were at least two other Frederick Millers residing in Buffalo, and also that in 1878 her husband had ample means to have paid the instalment.

The master having found that there had been substantial compliance with the provisions of the articles of the association, held that the forfeitures declared by the company had been valid in all cases, and his report having been confirmed by the Court appeals were taken by the above parties.

Hampton L. Carson, for appellant Brooking.

That the provisions of the articles of association in relation to notice of an assessment must be complied with strictly, and that a failure of compliance will avoid the forfeiture was decided in Tomlin *v.* Tonica & Petersburg R. R. Co., 23 Ill. 429.

Rutland, etc., R. R. Co. *v.* Thrall, 35 Vt. 536.
Hughes *v.* Antietam Mfg. Co., 34 Md. 316.
Macon, etc., R. R. Co. *v.* Vason, 57 Ga. 314.
Westcott *v.* Minnesota Mining Co., 23 Mich. 145.
Passenger R. W. Co. *v.* Fitler, 60 Pa. 130.
Alabama, etc., R. R. Co. *v.* Romley, 8 Fla. 508.
Pulford *v.* Fire Department, 31 Mich. 458.
Insurance Co. *v.* Stewart, 39 N. J. L. 486.
Sparks *v.* Liverpool Water Works, 13 Ves. Jr. 427.
Johnson *v.* Lyttle's Iron Agency L. R., 5 C. D. 687.
Watson *v.* Eales, 23 Beav. 294.
Clarke *v.* Hart, 6 H. L. 633.

The facts are, as shown by the testimony, that Mr. Brooking did not receive notice in conformity to the fundamental articles of association, and his stock could not be legally forfeited unless he received such notice. The provisions of the articles were not complied with:—

a. Because of a failure to advertise as required.

b. Because of the sending of a postal card instead of the letter required by the articles.

c. In point of fact Mr. Brooking did not receive notice in any manner in 1878.

Mr. Brooking never had that full knowledge of the circumstances declared by the authorities to be necessary to work an estoppel, and it would be the height of inequity to present his conduct in the light of an abandonment. He did not stand by and acquiesce in what had been done, for when he inquired as to what had been done he was deceived. He was not informed of the details of the alleged forfeiture.

There is no such merit in the conduct of the remaining shareholders as to entitle them to consideration such as was extended in the English cases cited by the master. They made no large expenditures for the development of the common property.

T. Elliott Patterson, for appellant Stevens.

On the point of the necessity for strict compliance with the prescribed mode of forfeiture, beside the cases *supra*, he cited:—

Pierce on Railroads, 86.
Redfield on Railways, 214.
Morawetz, Private Corporations, 127.
Goulton *v.* London, etc., Tile Co., L. R., 5 C. D. 141.
Pitcher *v.* Barrows, 17 Pick. 365.
Lincoln *v.* Wright, 23 Pa. 80.
Kellogg *v.* French, 15 Gray, 354.
Irvin *v.* Gill, 155 Pa. 8.

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There was nothing in Stevens's conduct which amounts to an estoppel against him.

Pickard *v.* Sears, 6 Ad. & El. 469.
Freeman *v.* Cooke, 2 Exch. 654.
Leating *v.* Orne, 77 Pa. 93.
Lawrence *v.* Luhr, 65 Id. 236.
Halleck *v.* Bresnahen, 3 Wyoming, 73.
Merrimac Mining Co. *v.* Levy, 54 Pa. 230.
Hill *v.* Epley, 31 Id. 331.

Or to laches, showing an abandonment of his stock.

Etting *v.* Max's Ex'r, 4 Fed. Rep. 681.
Cranmer *v.* McSwords, 24 W. Va. 601.
Partridge *v.* McKinney, 10 Cal. 183.
Crandall *v* Woods, 8 Id 144.
Shaw *v.* Spencer, 100 Mass. 382.
2 Peery on Trusts, sec. 850, 867.
3 Lewen on Trusts, p. 923.

It is submitted that where no interest of third parties has vested in the stock of Mr. Stevens, and the trustees with full notice are vendors and interested as vendees in the violation of their by-laws, no Court of equity at the instance and prayer of the wrong-doers will render a decree depriving the respondent in this case of over $29,000 for the non-payment without notice of an irregular call of five cents a share, amounting only to eighty-six dollars and eleven cents.

James E. Hood (*Francis I. Gowen* with him), for appellant Miller.

The sending of a postal card addressed to "Frederick Miller, Buffalo, N. Y.," cannot be considered notice. Such a case does not come within the rule regarding the deposit in the mails of a letter "properly addressed."

Walter *v.* Haynes, 1 Ry. & Moody, 149.

Richard C. Dale and *John G. Johnson* (*William D. Neilson* with them), for appellees.

The defendants of class I. being those shown by the records of the association to be members, rest on their apparent title, and need no further proof. The defendants of the other classes, having no apparent title, seek to obtain the aid of the chancellor to change the existing status and to secure admission to the privileges of membership. This they seek to accomplish by showing that at one time they were members and that their loss of membership was accomplished by proceedings in which there was a formal irregularity.

Having acquiesced in proceedings under which their interests were forfeited for a period exceeding the statute of limitations, these parties should not be aided by a Court of equity.

"Invalid forfeitures may subsequently by acquiescence, express or *tacit*, be so far confirmed that they cannot be opened."

Green's Brice's *Ultra Vires*, 188, and cases cited.
Garden Gully Min. Co. *v.* McLister, L. R. 1 App. Cases, 39.
Lawrence's Case, L. R. 2 Ch. App. 412.
Hart *v.* Clarke, 19 Beav. 356.
Clegg *v.* Edmonson, 8 De G. M. & G. 787.
McConomy *v.* Reed, 152 Pa. 42.

October 8, 1894. GREEN, J. The proceeding in this case is a bill in equity filed by certain trustees of a fund arising from the sale of lands owned by the defendant land company. "The company is unincorporated and is a partnership organized on the joint stock plan by a contract entered into by the members": Oliver's Estate, 136 Pa. 58. It is composed of numerous members whose interests in the company are represented by certificates of stock of which there were to be twenty thousand of five dollars each. The business of the company was to be the purchasing of lands, developing mines of copper and other valuable mineral, and disposing of the same, situated in the Lake Superior Land District, Upper Peninsula, State of Michigan. The funds and property of the association were vested in three trustees to be held by them as joint tenants, and they were to have the entire control and disposal of the property real and personal and to make purchases, conveyances, sales and contracts. In the exercise of their authority they sold forty acres of the lands of the company for $500,000, and the distribution of this money is the object of the present proceeding. Certain of the stockholders had failed to pay calls or assessments made by the trustees, and the shares of a number of stockholders, including the appellants, had been forfeited for non-payment of the calls. If these forfeitures were lawfully made the appellants have no case, and the decree of the Court below should be sustained; if they or any of them were not lawfully made, the appellants are entitled to participate in the distribution, from which they were excluded by the master and Court below. Three calls were made prior to the forfeitures involved in the present contention, one in 1872, one in 1874 and another in 1878. As to the call made in 1872, no question arises here, as all the appellants paid the amounts called for at that time. There are three appellants, Roope Brooking, Sarah Miller, executrix, and William H. Stevens. The shares of Brooking and Miller were forfeited under the call of 1878 only. Of the shares of Stevens, five hundred and fifty were forfeited for non-payment under the call of 1874, and fifteen hundred for non-payment under the call of 1878. In regard to the forfeiture of the 550 shares under the call of 1874, we are of opinion that the provisions of the articles of association which authorized a forfeiture, were strictly and precisely followed in every particular, and therefore that forfeiture was a valid and binding act fully authorized by the articles, and it must be sustained.

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We are of a different opinion in regard to all the forfeitures under the call of 1878, and therefore do not sustain them. The authority to make any forfeitures is found in the fourth section of the articles of association, which is in the following words, viz:

"The original shares of this company shall be issued to the proprietors of the lands in proportion to their respective interests in said lands, liable to no more than five dollars per share assessments, and the board of trustees shall have authority to make a requisition upon their several stockholders for the payment of such instalments upon the shares held by them whenever they may deem it necessary or expedient by giving thirty days previous notice of the same in one or more newspapers published in the City of Philadelphia and Detroit, specifying in such notice the amount of such instalment per share, and the time and place of payment of the same; provided, however, that no instalment shall be called in, which with the amount already paid on the share, shall make the total amount exceed the sum authorized by the articles of this association; and provided also that notice of the call for any instalment shall be sent by letter through the post office, addressed to all stockholders whose residence is known to the secretary, and it shall be competent for the trustees after the expiration of thirty days from the period at which any instalment shall become due, to forfeit the stock of such parties as may fail in paying such instalment and the interest thereon from the time such instalment shall have become due, and the stock so forfeited shall be sold at auction in accordance with the general laws of the State of Michigan."

It will be perceived that in order to make a forfeiture which should be in accordance with the power conferred by the foregoing article, it would be necessary for the trustees to make a requisition for the amount called, "by giving notice of the same in one or more newspapers published in the City of Philadelphia and Detroit. Specifying in such notice the amount of such instalment per share and the time and place of payment of the same." In point of fact such a notice was published in the City of Philadelphia, but no publication of any kind was made in Detroit, and the master has so found, and that it was an irregularity, in fact a non-compliance with the requirements of the articles of association. It was not only necessary that there should be a publication in a newspaper published in Detroit, but before an act of forfeiture could be performed by the trustees it was essential that thirty days should elapse after the first publication before the instalment would become payable. But if there was no publication at all in a Detroit paper then there was no period of thirty days which commenced to run prior to the day of payment, and by necessary consequence no day of payment. Hence the instalment was not due at any time and the stockholders were in no default for not paying. Therefore two primary, elemental pre-requisites to any right of forfeiture were altogether absent, to wit: first, the publication in a Detroit newspaper, and next, the lapsing of an interval of thirty days between the publication of the notice and the day of payment. Both of these requirements were indispensable, but the second of them is so manifestly and so fatally indispensable that the mere statement of the proposition is its own proof. If the thirty days of grace are absent from the case the power to declare the forfeiture never arose, never came into existence, and the subsequent declaration of the forfeiture was simply a void act, altogether nugatory and of no effect whatever.

If authority were wanting for so plain a proposition, a perfect and authoritative illustration is found in the case of the Northampton Mutual Live Stock Insurance Co. *v.* Stewart, 39 N. J. Law Report, 486. The company brought an action against a member to recover an assessment. In the Court below a judgment was obtained which was reversed by the Court of Errors and Appeals, who said, "The plaintiff is a Mutual Insurance Company. Its scheme of organization draws each holder of its policies into its society as a member thereof. This suit is instituted against the defendant as a member of the corporation; as such he is subject to its constitution and bound by its by-laws and proper corporate regulations, which he is presumed to know and understand. . . . And he is entitled in his relations to the company to whatever aid and protection they provide for him. . . . How and when the tax is to be levied is provided for in the thirteenth article of the by-laws, as follows, 'If the funds in hand be insufficient to pay all losses, the directors shall by resolution, levy a tax on the members of the company . . . on the amount insured, and they shall publish such levying in two newspapers of the county, and all persons insured at the time of such levying of tax shall pay his amount of tax to the treasurer or his order, within sixty days from the date of such public notice.' The fourteenth article provides that if any member neglect or refuse to pay his tax for sixty days from the day public notice shall be given, the company may sue for and recover the same with interest and the costs of suit. The delinquent must be in default sixty days after publication of the tax levy in two newspapers. . . . There was nothing to show that such publication had ever been made by the company. The demand contains no allegation, and the evidence fails to show that such

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public notice was given before the suit was brought. The fact even, that personal notice of the assessment was served by the company upon the defendant is not sufficient answer to his objection." The Court said further that it might even be admited "that personal notice served to apprise him better than public notice would have done, but sixty days of grace were not to be computed from the time when personal notice should be given him, but from the giving of public notice, an event equally within the company's control, and adopted in its law."

If all this is true of a mere call to pay in an assessment, which can easily be recovered after another and proper assessment has been made, with how much greater force does it apply when the consequence of non-payment is the forfeiture and absolute loss of an immensely valuable interest, in this case worth, in one instance, $29,000 and upwards, for the failure to pay $86.11.

In the case of Stevens it was undoubtedly the fact that he had no knowledge whatever of the call of 1878 until in 1885, when he wrote to the secretary, making inquiry in regard to his stock, and was informed that it had been forfeited. for non-payment of the calls of 1878. He and his family lived in Detroit, but he was absent a great part of the time in the Rocky Mountain territories, engaged in geological explorations and mining. If the notice had been published in Detroit his family might have seen it and informed him of it. The publication in Philadelphia was obviously of no service, and a publication in Detroit would be of far greater importance to him and his rights, than publication anywhere else. But while this consideration affects the merits of his case on the facts, his right to the Detroit publication is one of the conditions of his contract, and he is therefore entitled to have it rigidly and strictly enforced.

In the case of Germantown Pass. R'y *v.* Fitler, 60 Pa. 130, we said, SHARSWOOD, J., "We must look to the charter for the power of the directors to forfeit the stock. No doubt the power given must be strictly pursued, and if any restrictions or limitations therein provided have been disregarded, the alleged act of forfeiture must be declared invalid. This is so for the special reason that it is one of those forfeitures against which, if regular, equity does not relieve."

In Westcott *v.* The Minnesota Mining Co., 23 Mich. 145, Mr. Justice COOLEY, delivering the opinion of the Court, said, "Assuming, however, that the first and second conditions to valid assessments were complied with, it is very clear, we think, that notice of the meetings, as required by the articles, is not shown to have been given. . . . The parties, in associating, clearly had a right to stipulate for any notice they saw fit; and we cannot say that a different one would have been equally effectual, and therefore must be held sufficient. There were reasons which they might have regarded of much force for insisting upon a written notice in every instance, and when proceedings *in invitum* were taken against them, they were not bound to give heed to any other. . . . The right to forfeit shares in any joint-stock undertaking must come from the law, and can only be exercised in the manner provided by the law. In this case the articles of association were the law governing the right of forfeiture, and all the conditions precedent which were made by them must have been strictly complied with or the proceeding would be void."

In 1 Redfield on Railways, 211 (1887), the author says, "The company in enforcing the payment of calls by forfeiture of stock, must strictly pursue the mode pointed out in their charter and the general laws of the State. This is a rule of universal application to the subject of forfeiture, and one which the Courts will rigidly enforce, and more specially where the forfeiture is one of the prescribed remedies given to the party, and against which equity does not relieve when fairly exercised."

In Tomlin *v.* Tonica and Petersburg R. R. Co., 23 Ill., 374, the eleventh section of the charter required notices of calls to be published for thirty days in two newspapers, published in the vicinity of the road. An action of assumpsit was brought for unpaid calls and a certificate was filed stating that notice had been duly given by publishing. The Court said, CATON, J., "We are inclined to think that the averments of notice in the first and second counts are insufficient. . . . . The eleventh section of the charter positively requires notice of the calls to be published for thirty days in two newspapers, published in the vicinity of the road. We are inclined to think that this notice required by the charter could not be dispensed with by giving actual notice to the subscriber." To the same effect is Rutland & B. R. R. Co. *v.* Thrall, 35 Vermont, 536, in which the Court said, "The subscriber by incorporating this (newspaper notice for 30 days) into his subscription secures the notice as a condition precedent without compliance with which he is not liable to suit." In Hughes *v.* Antietam Manfg. Co., 34 Md. 316, the Court said, "The manner of giving notice is prescribed by the law under which the calls were made and it was the plain duty of the directors to have complied strictly with its requirements in this respect. They had no right to dispense with the mode and manner of notice thus prescribed, and where by positive law, personal notice is required, a written notice through the mail is not a compliance with the statute."

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The same doctrine is enforced in Macon & Augusta R. R. Co. *v.* Vason, 57 Ga. 24; Ala. & Florida R. R. Co. *v.* Romly, 8 Fla. 508, and Pulford *v.* Fire Department, 31 Mich. 458, and in many other cases unnecessary to be cited.

The English cases are equally clear and positive to the effect that in order to sustain a forfeiture of property every condition precedent must be strictly and literally complied with. In Johnson *v.* Lyttles Iron Agency, L. R. 5 Ch. Div. 687, it was said by JAMES, L. J., "I am of opinion that the notice of December 21, did not comply strictly with the provisions of the contract between the company and the shareholders, which is contained in the regulations of Table A. It is the established rule of the Courts of chancery and of the Courts of common law that no forfeiture of property can be made unless every condition precedent has been strictly and literally complied with. A very little inaccuracy is as fatal as the greatest. Here the notice is inaccurate. It is therefore bad and the forfeiture is invalid." MELLISH, L. J., in the same case said, "I think that if the notice departs in any respect from the statutory form it is impossible for us to go into the question how much it departs. It is a bad notice, and the subsequent resolution, which is founded upon it, is invalid. In this case the notice was inaccurate in demanding the payment of interest from the date of the call." One of the provisions of Table A. directed that interest should be due on calls from the date of payment, and for this small variance in the notice it was held that the subsequent resolution of forfeiture of the shares in question was void. Other English cases to the same effect are Sparks *v.* Liverpool Water Works, 13 Ves. Jr. 427; Watson *v.* Eales, 23 Beav. 294; Clarke *v.* Hart, 6 H. L. 633. In the last case Lord CHELMSFORD said, "It is unnecessary to advert to the principle that forfeitures are *strictissimi juris*, and that parties who seek to enforce them must exactly pursue all that is necessary in order to enable them to exercise this strong power."

It is not necessary to pursue the citations farther. They are really not in controversy. The learned master admitted their correctness and their force. But he was misled into refusing the proper effect of absolute invalidity of the forfeitures declared under the call of 1878 by a theory of acquiescence and of laches on the part of these appellants in seeking to set aside the forfeitures. The cases he cites in support of his conclusions are all well enough in their way, but they are inapplicable to the facts of this case. In Sparks *v.* The Water Works, 13 Ves. Jr. 428, the calls were made, and the proceeding to forfeit was conducted in strict accordance with the rules of the company, and the forfeiture was sustained upon the insufficiency of the excuse for non-compliance with the call on the part of the delinquent shareholder. In Prendergast *v.* Turton, 1 Younge & Collier, 109, the stock was paid in full, but the original articles of agreement authorized the directors to call for additional shares to carry on the operations of the company. Such a call was made in accordance with the articles, and the plaintiff did not comply but temporized, and finally refused to pay. The company being a mining company and requiring contributions from its members to conduct the business, and the other members having constantly paid their contributions until the business became profitable, it was inequitable that the plaintiff should stand aloof while others were furnishing the means to proceed with the business, and be permitted to participate in the profits thus earned by means of a restoration to their forfeited shares. Clarke *v.* Hart, 6 H. L. 649, was an application of the same principle in somewhat different circumstances. It was held upon all the facts in the case there was an intentional abandonment of the enterprise by the plaintiff, after a full knowledge of the forfeiture and an opportunity to join in the further necessary expenditures to maintain the existence and business of the company.

Rule *v.* Jewell, L. R. Ch. Div. Vol. 18, p. 660, was quite similar in its leading facts, being an absolute refusal to pay not only previous calls, but subsequent necessary contributions to enable the business to be carried on, and the Court held, that both intentional abandonment and persistent laches and lying by to take chances, after full notice of forfeiture proceedings, were developed by the testimony, and they refused to restore the forfeited shares.

But there are no such facts in the present case. The Metalline Land Company was not engaged in any mining or manufacturing business, requiring constant contributions from its members to sustain either its existence or its business. The proceedings to forfeit the shares of the appellants were absolutely void for a fatal want of compliance with an essential pre-requisite to any forfeiture. There was no lying by for chances while others were keeping the company alive by constant contributions which were essential to that end. There was no intentional abandonment of their interests in the enterprise and no conscious laches, after full knowledge of the forfeiture proceedings. On the contrary there was only an illegal and void forfeiture of their shares set up against their claim to a continued ownership of the shares which were originally their property, and which ownership had never been legally divested. This being their legal status their original ownership continued notwithstanding the declaration of forfeiture. That declara-

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tion was founded upon a default of which they had never been guilty. For there never was a time, thirty days after a notice to pay a call published in two newspapers, one in Philadelphia and one in Detroit, at which they could have paid the sum demanded, or any sum. Such a time never arrived because there never was such a publication. Hence they never were in default and there was no power to forfeit their shares, and they remained the owners of their shares as fully and as lawfully in all respects, after the declaration of forfeiture as before. They were not bound to take any notice of it, or to seek to have it set aside. They already held their shares, and they continued to hold them and to be capable of asserting their ownership in any circumstances and for any purpose. They are not the actors in the present proceeding. They were the original owners of the shares in question, and if any other persons assert such ownership they must show it affirmatively and obtain a judicial decree to that effect. This they cannot do by setting up a void declaration of forfeiture.

There is much discussion of other matters in the paper books, but we do not deem its consideration essential in consequence of our views upon the leading subject which lies at the foundation of the entire contention. We are of opinion that the appellants are entitled to participation in the distribution to the extent of the shares held by them at the time of the call of 1878, and to that extent the decree of the learned Court below must be reversed.

The decree of the Court below is reversed at the cost of the appellees, and the record is remitted with instructions to distribute the fund in the hands of the trustees in accordance with this opinion. J. D. B. Jr.

Oct. '94, 65, 66, 67. March 9, 1894.

McCleary v. County of Allegheny.

Von Bonnhorst v. Same.

McGunnegle v. Same.

Legislation—General and local acts—Salaries—Acts March 31, 1876, P. L. 13; June 13, 1883, P. L. 113—Authority of Decision.

The Act of 1872, providing for compensation of certain county officers in Allegheny County, by salaries and fees, is supplied by the General Act of March 31, 1876, and its supplement of June 13, 1883, providing for the compensation of the same officers in counties, within whose description Allegheny County falls, by salaries alone; the manifest intent of the later legislation being to abolish compensation by fees, and not merely to fix the amount of salary to be paid certain officers.

Bell *v.* County of Allegheny, 149 Pa. 381, distinguished.

Appeal of W. H. McCleary from the judgment of the Common Pleas No. 1, of the County of Allegheny, in an action of assumpsit brought by him against the County of Allegheny, to recover salary as Sheriff.

Appeal of George M. Von Bonnhorst from the judgment of the same Court in an action brought by him against the same defendant, to recover salary as Recorder of Deeds.

Appeal of David K. McGunnegle from a judgment of the same Court, in an action brought by him against the same defendant, to recover salary as Clerk of the Courts.

The above three appeals involved the same questions, and were argued together.

The statement filed by W. H. McCleary was as follows, that filed by Von Bonnhorst and McGunnegle being the same except as to name of plaintiff, the description of the office, and amount of money mentioned in each.

"The plaintiff, William H. McCleary, was duly elected sheriff in and for the County of Allegheny, at the last general election, to wit, on the fourth day of November, 1890, and was duly qualified and commissioned as such officer, and entered upon the discharge of the duties of said office on the first Monday in January, 1891, and has ever since acted as such officer. He has kept a special account book in the form prescribed by the controller of said county, in which has been entered all the moneys received for fees and all the moneys earned and chargeable upon the county, specifying the day and date and title of the case, for what service and from whom received, and on the first Monday of each of the months of February, March, April, May, June, July and August, has paid to the treasurer of said county all the fees so received the preceding month, and has taken the proper receipts therefor, one of which he has deposited with the county controller, together with a transcript in detail, of his fee account book for the preceding month, duly verified by oath required by the statute in such case made and provided.

"The amounts accounted for and paid in in behalf of said plaintiff or earned by him and chargeable upon the County Treasury, amount for the month of January, 1891, to three thousand and forty-seven and $\frac{90}{100}$ dollars, for the month of February, to three thousand, seven hundred and fifty-seven and $\frac{49}{100}$ dollars, for the month of March, 1891, to two thousand, nine hundred and fifteen and $\frac{42}{100}$ dollars, for the month of April, 1891, to three thousand, three

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hundred and nineteen and $\frac{20}{100}$ dollars, for the month of May, 1891, two thousand, three hundred and sixty-six and $\frac{81}{100}$ dollars, and for the month of June, 1891, to three thousand, two hundred and seventy-four and $\frac{20}{100}$ dollars, and for the month of July, 1891, to two thousand and eighty-two and $\frac{22}{100}$ dollars, and the said plaintiff has in all other matters duly performed the duties devolving upon him as such officer.

"That after ascertaining the amounts due the deputies and clerks in said office of sheriff there remains of the said sum paid in and accounted for as aforesaid, for fees received by the said plaintiff, for the use of the said county, in the month of January, 1891, the sum of eighteen hundred seventy-one and $\frac{97}{100}$ dollars, for the month of February, 1891, the sum of twenty-four hundred and seven and $\frac{49}{100}$ dollars, for the month of March, 1891, the sum of fifteen hundred, sixty-five and $\frac{42}{100}$ dollars, for the month of April, 1891, the sum of nineteen hundred and sixty-nine and $\frac{20}{100}$ dollars, for the month of May, 1891, the sum of nineteen hundred and ninety-one and $\frac{81}{100}$ dollars, and for the month of June, 1891, the sum of seventeen hundred, seventy-four and $\frac{20}{100}$ dollars, and for the month of July, 1891, the sum of six hundred and thirty-two and $\frac{22}{100}$ dollars as the net amount of fees received and earned by him as aforesaid during such months.

"That by the 11th decennial census of the United States, and by the enumeration of the population of the County of Allegheny taken pursuant thereto, in the year 1890, and prior to the election of the said sheriff, the population of the County of Allegheny was 551,959.

"That on the second Monday of each month succeeding that in which his services were rendered as aforesaid, he has demanded of the proper officer a warrant for his salary for the proper month, but the said warrant and payment of said salary has been refused.

"Wherefore, the plaintiff says that there is due and owing him from the defendant, the sum of eight thousand, seven hundred and fifty dollars, and therefore he brings this suit."

In response to a rule to specify, the plaintiff in each case specified the Acts of March 31, 1876, P. L. 13, and June 13, 1883, P. L. 113, as the law under which he claimed to recover.

The defendant demurred in each case.

The Court sustained the demurrers, STOWE, P. J., filing the following opinion:—

"So long as Bell *v.* Allegheny County, 149 Pa. 381, remains unreversed, I can see no possible reason why the sheriff should recover a salary under the Act of March 31st, 1876, and its supplement of June 13, 1883.

"The Act of April 6, 1871, was special for Allegheny County, and fixed the salaries of the sheriff, recorder, clerk of Courts, and some others. If the special Act of 1861 and its supplement of 1870 were not repealed by the Act of 1876 and its supplement of 1883, as the Court has held in Bell *v.* The County, by the same token, it follows that the Act of 1871 was not repealed by them.

"I can discover no difference in principle between this case and that of Bell. For the reasons given by the Supreme Court in that case, (which are equally applicable to the other cases of the recorder and clerk of Courts,) the demurrers in this case and in Nos. 19 and 20, March term, 1892, are sustained, and judgments are now directed to be entered therein in favor of defendant with cost of suit."

The plaintiff took these appeals.

John F. Sanderson and *D. T. Watson*, (with them *Walter Lyon* and *Charles H. McKee*), for appellants.

This case is distinguishable from Bell *v.* Allegheny County; in that case the question was whether a local Act providing for the payment of a salary was supplied by the general Act providing for a larger salary. In this case the question is whether a local Act, providing for compensation by salary and fees, is supplied by an Act providing for compensation by salary alone.

The rule that a previous local statute is not repealed by a subsequent general statute inconsistent with it, unless there are words of repeal, is only one adopted to settle legislative intent in the absence of words declaring intent; in the classification Acts the intent is fully declared. The intent of the Act of 1876 was to totally abolish the fee system as an evil. The Act of 1872 provided for fees, therefore the Act of 1876 and its supplement of 1883, govern this case.

Com'th *v.* Grier, 152 Pa. 176.
Com'th *v.* Macferron, Id. 244.

N. S. Williams, for appellee.

A general Act does not repeal previous particular one, unless there is an express reference to the previous legislation, or a necessary inconsistency in the two Acts standing together.

Bounty Accounts, 70 Pa. 96.
Rounds *v.* Waymart Boro., 81 Id. 395.
Seifried *v.* Com'th, 101 Id. 202.
Com'th *v.* McCallin, 10 WEEKLY NOTES 520.
Kilgore *v.* Com'th, 94 Pa. 495.
Rymer *v.* Luzerne Co., 142 Id. 108.

This case is ruled by

Bell *v.* Allegheny Co., 149 Pa. 381.

M'CLEARY V. THE COUNTY OF ALLEGHENY.

October 1, 1894. DEAN, J. The plaintiff is sheriff of Allegheny County. He was elected

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at the general election in 1890, and entered upon the duties of his office the first Monday of January, 1891. Acting on the assumption that his office was a salaried one, under the Act of June, 1883, a supplement to the general Act of 1876, and that he was not entitled to any of the fees taxed by the fee bill for the sheriff, he kept an itemized monthly account of all fees earned and received by him, and promptly paid those received each month into the county treasury, and on the second Monday of each month demanded from defendant his monthly salary for the previous month. For the first seven months he earned and paid into the county treasury, fees $20,763.33. After deducting pay of sheriff's deputies and clerks, there still remained a net balance to the county's favor for the seven months of $8,550.02.

The Act before noticed, purports to be an Act fixing salaries of all county officers in counties containing over 500,000 inhabitants, and directs that the sheriffs of such counties shall be paid an annual salary of $15,000. Under the decennial census of 1890, Allegheny County had a population of 551,959. The sheriff claimed, that under this Act, the county should pay to him one-twelfth of $15,000 each month. While admitting that the office was a salaried one, the county denied that the amount of the salary was fixed for Allegheny County by the Act of 1883, but alleged it was determined by the special Act of March 6, 1872, passed for Allegheny County before the adoption of the new Constitution. By this Act the salary of the sheriff was $6,000 and mileage.

While the Court below evidently was of opinion that the sheriff's salary was $15,000, as fixed by the later Act, yet, believing that the law, as decided by this Court in Bell *v.* The County of Allegheny, 149 Pa. 381, ruled the case against plaintiff, entered judgment on demurrer for defendant. As a consequence, we have this appeal by plaintiff.

The record does not show what would have been the annual compensation of the sheriff at a salary of $6,000 and mileage; it may be safely assumed the whole would not have amounted to $15,000, otherwise he would have had no motive in making claim under the Act of 1883. The stand taken by the county, in effect, avers the source of his compensation is a mixture of the two systems, salary and fees. One of the grievances of the people, before the adoption of the Constitution of 1874, was the large compensation of county officers in counties having a large population; this (see debates of Constitutional Convention, pages 304 and 332, vol. 8) was especially prominent in Philadelphia and Allegheny Counties, where it was alleged the receipts from fees were out of all proportion to the services rendered or responsibilities entailed; so it was declared, in Section 5 of Article XIV., that "In counties containing over one hundred and fifty thousand inhabitants, all county officers shall be paid by salary, and the salary of any such officer and his clerks, heretofore paid by fees, shall not exceed the aggregate amount of fees earned during his term, and collected by or for him." This section was a mandate to the Legislature to provide by law a salary for all county officers in counties whose population made them subject to the constitutional provision: Perot's Appeal, 86 Pa. 335. Therefore, the Legislature passed the Act of March 31st, 1876, entitled "An Act to carry into effect Section 5, Article XIV. of the Constitution, relative to the salaries of county officers, and the payment of fees received by them into the State or county treasury, in counties containing over one hundred and fifty thousand inhabitants."

The first section of the Act enacts: "That in all counties in this Commonwealth containing over one hundred and fifty thousand inhabitants all fees limited and appointed by law to be received by each and every county officer therein elected by the qualified voters of their respective counties, or appointed according to law, or which they shall legally be authorized, required or entitled to charge or receive, shall belong to the county in and for which they are severally elected or appointed. . . . . and none of said officers shall receive for his own use or for any use or purpose whatever, except for the use of the proper county . . . . any fees for any official service whatever."

The second, third and fourth sections of the Act then specify, in elaborate detail, how the accounts of the fees shall be kept and verified.

The fifth section declares that: "All county officers within the counties to which this Act applies . . . . and their several deputies and clerks, shall be paid for their services by fixed and specified salaries, which shall be a charge upon the treasury of the county to which each shall respectively belong, to the extent of the fees collected and paid in by each officer respectively, or earned where fees are chargeable upon the county treasury."

The sixth, seventh, eighth, ninth, tenth and eleventh sections relate to the adjustment of the salaries of the officers and clerks, where the fees do not reach the amount of salaries, and provide that the county commissioners and controllers shall constitute a board for supervision and adjustment, and further provide for an appeal from their decision to the Court of Common Pleas.

The twelfth section fixes the annual salary of the sheriff in counties containing over three hundred thousand inhabitants at $15,000. In

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those under three hundred thousand and over two hundred and fifty thousand at $6,500. In those under two hundred and fifty thousand and over one hundred and fifty thousand, the same amount was fixed for the sheriff, but the salary was put at a lower figure than in the second classification for some other of the county officers.

Section fifteen enacted that the salary so fixed should be in lieu of all fees and mileage now received.

Sections sixteen, seventeen and eighteen provide that certain officers shall be paid quarterly, who shall be deemed county officers, and also when the Act shall take effect.

The plain command of the Constitution in Section 5, Article XIV., to the Legislature, was to fix by law salaries for county officers in counties containing over one hundred and fifty thousand inhabitants. That in obedience to this command, the Act of 1876 was passed, we think no lawyer now doubts, or ever has doubted.

After the census of 1880, on May 11, 1881, there was a supplement to the Act of 1876 passed, which modifies the classification, so as to make a class between three hundred thousand population and five hundred thousand. Then came the Act of June 13, 1883, entitled "An Act to fix the salaries to be paid county officers in counties containing over five hundred thousand inhabitants, being a supplement to an Act approved March 31, 1876, entitled 'An Act to carry into effect Section 5, Article XIV. of the Constitution, relative to salaries of county officers . . . . in counties containing over one hundred and fifty thousand inhabitants.'" The Act contains but two sections:

"Section 1. Be it enacted, that in counties containing over five hundred thousand inhabitants, the annual salaries of county officers shall be as follows, namely: Of the sheriff, fifteen thousand dollars;" and further, along with the sheriff's, a schedule of the salaries of all other county officers.

Then, section 2 particularizes all the salaries to be paid under the Act of 1876, so far as relates to counties containing over three hundred thousand inhabitants, and expressly repeals so much of said Act as embraces that class; and further directs that the supplement shall only affect officers elected after its passage. By the census of 1890, Allegheny County had a population of 551,959, so that as far as population is concerned, it came within the terms of this supplementary Act, and within the terms of the unrepealed provisions of the original Act of 1876.

But it is argued, the Act of 1876 does not apply to Allegheny County, because all the county officers of that county were salaried under the provisions of the Act of 6th of March, 1872, relating to Allegheny County, and the former being a general affirmative statute, does not, without positive repugnancy, repeal the particular or local statute. That this is a settled rule of construction cannot be questioned; and, although, it is manifest the Constitution of 1874, sought to enforce uniformity of compensation of county officers in counties of the same class, the end must be attained by laws which leave no doubt of their intent to repeal local laws not in conformity with the general law. The rule of construction on this subject, has been stated in Johnston's Estate, 33 Pa. 511, where it is held, following Harcourt *v.* Fox, 1 Shower's R. 520, an affirmative statute introductive of a new law on the same subject does imply a negative of the former law, if they are repugnant. Or, as stated in Dillon on Municipal Corporations, Section 54, for which he cites cases in our own and many other States: "It is a principle of very extensive operation, that statutes of a general nature do not repeal by implication charters and special Acts passed for the benefit of particular municipalities; but they do so, when this appears to have been the purpose of the Legislature. If both the general and the special Acts can stand, they will be construed accordingly. If one must give way, it will depend upon the supposed intention of the law-maker, to be collected from the entire course of legislation, whether the charter is superseded by the general statute, or whether the special charter provisions apply to the municipality, in exclusion of the general enactments."

We do not understand that the law, as thus stated, is dissented from by either of the parties to the present suit; the contention turns on the application of it to the issue here; the plaintiff contending, that the manifest intention of the Legislature, from the course and language of the legislation on the compensation of the sheriff, was to repeal the provisions of the Act of 1871, at least so far as related to this officer; the defendant denying that any such intention appears, and averring that all the Acts can stand without defeating the legislative intent.

If, under the Act of 1872, the office of sheriff of Allegheny County was a purely salaried office, there would be no such inconsistency between it and the Act of 1876, as would work a repeal of the former; for, the mere fact, that under the last, a higher compensation was awarded sheriffs, than under the first, would only indicate a legislative intent, that other sheriffs should be paid more. But in ascertaining the legislative mind, we must take into consideration first, the moving cause of the general law. The members of the general assembly were bound to enact the necessary laws to carry into

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effect the Constitution of 1874. That said in unmistakable terms, "You must regulate by law the compensation of all county officers, and in all counties having over 150,000 population, they shall be paid by salaries, and they must pay all fees into the State or county treasury." Here was a positive command, that in this class of counties, these officers must be paid by salaries and not by fees; it was not to compensate them by part salary and part fees, but wholly by salary. As shown by the debates, the very object of the provision was, to relieve the public in large counties from obnoxious exactions, and exorbitant and vexatious charges, prompted by the self-interest of the officer, when the fees went into his own pocket.

And in the same spirit, as shown by the first words of the first section of the Act of 1876, the Legislature obeyed this mandate: "All fees . . . received by each and every county officer . . . . shall belong to the county." It then fixes the salaries which they were to receive, and this was all they were to receive. Now take the Act of 1871 to which that of 1872 is a supplement. The first section, is almost word for word, the first section of the Act of 1876, but it is followed by this significant qualification: "Provided that the sheriff and coroner shall be authorized to receive and retain for their own use the mileage allowed by law, in all cases where mileage is chargeable."

Every lawyer familiar with the taxation of sheriff's costs under a fee bill, knows what a large proportion of his charges, especially in a county of the area of Allegheny, was made up of mileage, and the abuses which inevitably grew up under this practice. The fee for serving a writ could be verified by an inspection of the fee bill; the number of miles the sheriff or his deputies traveled to serve it, was, in many cases, incapable of verification, and conscious wrong was often submitted to. Did the Legislature intend by the Act of 1876, that in the second most populous county in the Commonwealth, the most prominent county officer should retain a large part of his fees, and a large part of his power of exaction, in the face of the constitutional command? Or did they intend to embrace him, and all sheriffs receiving fees in counties of like population, in the language, "In all counties in this Commonwealth containing over one hundred and fifty thousand inhabitants, all fees . . . . received by each and every county officer . . . . shall belong to the county"?

In this essential particular, the two Acts are fatally repugnant; by the first, his compensation is part salary and part fees; by the last, wholly salary, and all fees belong to the county. They cannot stand together. The general Act being in complete harmony with the Constitution, and clearly passed to carry it into effect, the local Act, as respects the sheriff, must give way to the general Act.

This is substantially the same construction, as was put upon this legislation by President Judge EWING in Com. *v.* Grier, 152 Pa. 176, in a case involving the compensation of the district attorney for the County of Allegheny. In that case, by the Act of 1871, and supplement of March 6, 1872, this officer was to receive an annual salary of $4,000, and in addition fifty per cent. of the fees and percentages allowed by law on all forfeited recognizances. It was held, in an opinion approved by this Court, that the district attorney, under the Act of 1876, was entitled to a salary of $5,000, and all fees were payable into the county treasury; on the ground that the Acts of 1871 and 1872 were irreconcilably inconsistent with the Act of 1876, and were clearly intended to be repealed by the last mentioned Act.

It is argued by appellee, that this view of the law is not in accord with that of Bell *v.* The County of Allegheny, 149 Pa. 381. That case involved the compensation of the county treasurer, which was fixed by the local Acts of May 1, 1861, and March 11, 1870. As presented in the Court below, and on appeal in this Court, the sole question was, whether the salary of this officer was fixed by the local Act of 1870, or by the general law. Under either Act, it was assumed by counsel and by the Court below, that he would be paid a salary. Not whether he should be paid fees and salary under a local Act or wholly salary under a general Act.

The local Acts referred to, provided only a smaller salary than the general Act; there was no repugnancy between them which negatived either. Here there is irreconcilable hostility between the principles on which the statutes are founded; one is passed to strike down the fee system with its abuses; the other clings to and nourishes it. In the Bell case, as argued, both statutes accomplished the same end; that sought for by the fundamental law, compensation wholly by salary; in the case before us, if affirmed, the worst feature in the fee system, sheriff's mileage, will be retained.

In the opinion of this Court, delivered by Justice HAYDRICK in Bell *v.* Allegheny County, *supra*, it is assumed throughout, that the question was whether a local salary Act was impliedly repealed by a general salary Act passed since the adoption of the Constitution. The paper books give no intimation that the compensation of that officer was partly fees. In Com. *v.* Grier, *supra*, President Judge EWING distinguishes that case from Bell *v.* Allegheny County, because, in Bell's case, the salary of the county

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treasurer had been definitely fixed without any fees, at the date of the adoption of the new Constitution. It is suggested now, by appellee's counsel, that the county treasurer, under another local Act, that of 1872, was entitled to receive one dollar fee for each printed bond in license cases. Whether the preparation and printing of this bond was intended to be an item of expense to be thus charged for, or a fee for services, is not clear. But, however this may be, this Court and all others, hear and decide cases on the issues presented of record; the judgments in them are authority for what is passed on and decided. They are not precedents for issues not raised until two years after final judgment. Bell *v.* Allegheny County is the law of that case and all others like unto it. It is not authority in the cases of other county officers, where the contention is on radically different facts. It is not clear to us from the computation of fees earned and received that the whole of plaintiff's claim is allowable, therefore the judgment of the Court below sustaining the demurrer, is reversed at costs of appellee, and the record is remitted that the cause may be proceeded in to final judgment.

VON BONNHORST *v.* THE COUNTY OF ALLEGHENY.

October 1, 1894. DEAN, J. The plaintiff was elected Recorder of Deeds for Allegheny County on 4th November, 1890, and was sworn into office first Monday of January, 1891. For the first seven months of that year the fees belonging to the county and received and earned by him amounted to the sum of $34,587.25; deducting the amounts payable to his deputies and clerks, the balance in favor of the county was $19,902.50. The plaintiff claimed salary for the seven months, $5,833.33⅓, being seven-twelfths of an annual salary of $10,000, under the general Act of 1876 and supplement of 1883. The defendant demurred, averring that plaintiff's salary was fixed by the Act of 1871 at $4,000, and this was all he could claim at law. By the Act of 2d of April, 1873, in addition to the salary allowed by the Act of 1871, the Recorder was entitled to fees in certain cases. The learned Judge of the Court below sustained the demurrer and entered judgment for defendant, believing his decision was in accord with Bell *v.* Allegheny County, 149 Pa. 381. We do not think that case rules this one, and have given our reasons therefor in McCleary *v.* Allegheny County in an opinion filed this day. Therefore, the judgment sustaining the demurrer is reversed at costs of appellee, and judgment is entered for plaintiff.

M'GUNNEGLE *v.* THE COUNTY OF ALLEGHENY.

October 1, 1894. DEAN, J. The plaintiff is clerk of the Courts of Oyer and Terminer and Quarter Sessions of Allegheny County, and, as a county officer, claimed he was entitled to be paid under the Act of 1876 and its supplements an annual salary of $5,000. The defendant demurred to the claim on the ground that plaintiff's compensation was fixed by the Act of 6th of April, 1871, at $3,000, and he could lawfully claim compensation only under that Act. His claim covered salary for the seven months ending 31st July, 1891, during which time the fees earned and received by the county amounted in gross to $20,036.84. After deducting amounts payable to his deputies, there was a balance in favor of the county of $5,171.24. His claim for the seven months was $2,916.-66⅔.

In addition to the $3,000 salary allowed by the Act of 1871, the Act of 4th of April, 1872, allowed the clerk of Quarter Sessions certain fees.

The learned Judge of the Court below, being of opinion that this case was ruled by Bell *v.* The Count of Allegheny, 149 Pa. 381, sustained the demurrer, and gave judgment for defendant. We think this case is not ruled by that, as appears by our opinion in McCleary *v.* this same defendant, herewith filed. If the office of clerk of the Courts had been compensated wholly by a salary, the judgment in this case would have been right; but as a considerable part of the compensation is made up of fees, Bell *v.* Allegheny County is not authority.

Therefore the judgment sustaining the demurrer is reversed at costs of appellee, and judgment is entered for plaintiff. H. B.

Common Pleas.

C. P. No. 3. Sept. 17, 1894.

Hays v. The Mantua Hall and Market Co., McCarthy, Garnishee.

Attachment—Execution—Master in Partition.

A fund in the hands of a Master appointed by the Court to make partition is not attachable at the instance of a judgment creditor of a party who has obtained a judgment against one of the defendants in a partition suit, though the Master has set apart a fund as the property of the defendant in the partition suit and against whose interest the attachment issued.

Sur rule to dissolve attachment execution.

Plaintiff recovered judgment against the defendant corporation and also subsequently recovered a judgment against John Brooks, who had an undivided interest in realty which the

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judgment bound. A partition suit was brought in the Court of Common Pleas No. 4 to divide such realty, in which Brooks was one of the defendants, and Henry J. McCarthy, Esq., was master.

In the meanwhile, Brooks took an appeal to the Supreme Court, and pending this appeal the master sold the property in the partition suit, filed his report, and distributed all the money except $3,000, which he held to await the result of Brooks' appeal. The judgment against Brooks was affirmed, and an attachment execution was then issued against Henry J. McCarthy, Esq., as master.

E. S Sayres, for rule.

The proper practice is to move to dissolve. I have been able to find no cases on this point; but in McFillan *v.* Brown et al., 15 WEEKLY NOTES 416, sur exceptions to master's report, Judge LUDLOW said, "We have no doubt that the attachment will not lie, but we cannot decide this question."

Henry J. Hancock, contra.

Whenever the question involved here has been before the Court it has been held that the funds in the hands of a master in partition may be attached. It is not in such *custodia legis* as to prevent an attachment, nor is it against public policy. In Pennsylvania even a surplus in the hands of the sheriff may be attached.

Herron's Appeal, 29 Pa. 240.

Funds in the hands of a master in partition may be attached.

Weaver *v.* Davis, 47 Ill. 235.

When money is paid into the Court.

Wilbur *v.* Flanneery, 60 Vt. 581.

Or where an accepted draft is deposited with the Court clerk in lieu of an appeal bond.

Ealer *v.* McAllister, 14 La. An. 821.

Or money deposited in lieu of an appeal bond.

Dunlop *v.* Patterson Fire Ins. Co., 12 Hun. 627; and 74 N. Y. 145.

Or the proceeds of a partition suit deposited with the clerk of the Court.

Gaither *v.* Ballew, 4 Jones 448.

Or with the register of a Court of Chancery.

Langdon *v.* Lockett, 6 Ala. 727.

Or a trustee appointed to sell real estate.

Van Reswick *v.* Lamon, 2 MacArthur 172.

Eo die. THE COURT. "Rule absolute."

Orphans' Court.

July, 1893, 134.

Heckman's Estate.

Landlord and tenant—Alienation—Assignment of lease—Liability of lessee after—Assignee—Priority of estate—Agent of lessor in relation of confidence to lessees—Secret profit by—Fraud—Vitiation of contract by.

The right of alienation is a separable incident of an estate for years; in the absence of a restriction in the lease creating it, the lessee may, therefore, assign the term without the consent or joinder of the lessor.

In such a case, the lessee continues liable upon all the covenants of the lease; but as between himself and his assignee, the latter is the principal debtor.

The dealing of the lessor with the assignee and receiving the rent from him as tenant does not discharge the lessee from liability.

The assignment, of itself, brings the assignee into immediate privity with the lessor. An assignment differs from a sub-lease in this respect.

Where a lease is made to an individual to secure a property for a company about to be chartered, or in a like case, the knowledge of the lessor's agent that the lease is so taken is the knowledge of the lessee himself, and he cannot avail himself of the provisions of the lease to enforce a personal liability.

Where the agent of the lessor occupies a position of trust and confidence toward the lessees, the stipulation for a secret profit to himself is sufficient fraud to vitiate the contract.

Sur exceptions to adjudication.

When the estate of Archimedes Heckman, this decedent, was called for audit, Joseph H. Ward presented a claim upon a written lease by the decedent as lessee, with the claimant as lessor, dated March 13, 1890, for ten years, of a certain brickyard, at a rent of one dollar for every thousand bricks manufactured and burnt on said premises, the number of bricks for the first year to be not less than two million five hundred thousand, and for every subsequent year not less than four millions. The claim admitted the payment of rent up to May 1, 1892.

The accountants resisted this claim for the reasons given in the subjoined finding of ASHMAN, J., the auditing Judge. The facts of the making of the lease, and the relation of one Shafto to the parties thereto, are stated by the auditing Judge as follows, upon re-adjudication:

"The position assumed by the accountants was that the claimant made the lease to the decedent with the full knowledge and understand-

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ing that the latter was simply the representative of the Philadelphia Brick Company; that the corporation was understood to be the actual lessee, and was then in the process of formation; that the decedent never took possession under the lease, but that the brick company, as soon as it was organized, entered upon the land, and thereafter paid rent to the claimant, who was the original landlord. The evidence submitted by the accountants to this effect was that on March 13, 1890, the persons who were afterwards corporators of the brick company met at the office of W. Heckman, Jr., and discussed the provisions of the lease and the details of the proposed organization in the presence and hearing of the claimant, who was there by appointment, and that the lease to Heckman was then and there prepared and executed. The company was chartered under the laws of New Jersey on March 24, 1890, and on March 26, 1890, it accepted an assignment by Mr. Heckman of the lease. The corporation thereupon entered into possession, received from the claimant bills for rent made out in its corporate name, and paid the same directly to him. In July, 1892, the company assigned the lease to A. Milton Shafto, and he in turn paid rent directly to the claimant. During his tenancy the rent having fallen largely in arrears, the claimant fell back upon the estate of the original lessee, the lessee himself having died.

"If the auditing Judge could find that these were the only facts in the case he would at once dismiss the claim. They would make out not simply the case of an acceptance by the lessor of a surrender of the lease and a recognition of the sub-tenant, but of a lease directly to the assignee through the medium of a party who never took, and never intended to take possession, and who held the title for the mutual convenience of the parties actually interested. But unless the auditing Judge has misread the testimony, these were not all the facts. The decedent, who was a man of reputed wealth, desired to put his son into a profitable business. He accordingly, after carefully examining them, leased the premises of the claimant, and took steps to organize a company, with which his son could be identified, for the manufacture of brick from the clay upon the land. The lease was written and signed in the office of Mr. Heckman, Jr. At the time of its execution all the corporators of the proposed company were present. They were five in number: Mr. Heckman, Sr., Mr. Amweg, Mr. Ballinger, Mr. Shafto, and Mr. Heckman, Jr. It can hardly be said that they were there by appointment. The place of meeting was the business office of a firm composed of Heckman, Jr., Amweg, and Ballinger, and it was the headquarters of Heckman, Sr. This circumstance, therefore, accounts for the presence of four out of the five corporators. None of the witnesses was able to say that Mr. Ward (the claimant) took any part in the conversation relating to the company, or even heard it; and two of them declared positively that they themselves could not remember that any such conversation took place at all. Mr. Ward, accompanied by his counsel, met Mr. Heckman, Sr., there on that day; and after arranging the preliminaries, agreed with him upon the provisions which were to be incorporated in the lease. The paper was there upon drawn up by Mr. Ward's counsel in one of the two communicating offices occupied by the firm, and was executed on the spot. It was offered in evidence, and purported to be a lease to Mr. Heckman, Sr., individually, for five years from that date.

"It is apparent that the lease was entered into by the decedent with the design of operating the brick works through a company; that he communicated this purpose at the time to the claimant may be doubted. The counsel who drew the paper asserted that he said jokingly to the decedent that it was a pretty big undertaking for a man of his years, and that the decedent replied that he was accustomed to big undertakings. But whether notice was given or withheld does not affect the question. To do that the claimant must be shown to have accepted the notice, and to have accepted it, moreover, in a double sense; first, as a notice of the sub-tenancy, and, second, as a notice of surrender by the old tenant. Neither fact was established. The written contract must be held to express the ultimate intention of the parties, and on its face it was made with Heckman, and by him as an individual. There was nothing about it to provoke suspicion or comment. Mr. Heckman was wealthy, or supposed to be wealthy, and the company was not in existence. In addition to all this Mr. Heckman was himself the company. He held all the shares of stock except three, one each being in the names of Amweg, Ballinger, and Heckman, Jr. On the day the charter was obtained he gave sixty-six shares to Shafto in consideration that the latter should act as manager of the works. His agreement with Shafto recited that the company had been formed at the instance of the decedent, and had purchased the lease from him. The decedent and his son absorbed between them all the offices in the new corporation, Mr. Heckman, Sr., becoming the president, and Mr. Heckman, Jr., the secretary and treasurer. If these incidents do not show an intention on the part of the claimant to make the testator personally responsible, and a corresponding intent on the part of the testator

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to accept the responsibility, it is very difficult to imagine what would. Why, if the lease to Heckman was a temporary contrivance by which to bridge over the few days' interval which elapsed before the company was formed, did not the lessor join in the assignment? The fact that he did not, taken in connection with what preceded the assignment, to say nothing of what followed it, ends the matter in the opinion of the auditing Judge. That he sent in bills for rent to the brick company was nothing; the assignee of a lease, in respect of liability for rent, stands in the same situation as the lessee: Jones *v.* Gundrim, 3 W. & S., 531, and the lessor does not release the assigning lessee by the mere act of accepting rent from the assignee: Frank *v.* Maguire, 6 Wr., 77. There was, moreover, affirmative proof that the decedent admitted his responsibility. In September, 1891, he gave to the claimant his individual promissory note for $2,113.52, the amount of royalty due and unpaid by the brick company. It was attempted to be shown that this was a loan to the corporation; but it was not shown that the claimant accepted the note as anything else than a payment by Heckman of rent due by him personally as lessee. If the decedent had given the note as president of the company, which it was perfectly competent for him to have done, the transaction would have worn, perhaps, a different aspect, but would not, even then, have been inconsistent with the theory that he was primarily liable to the claimant. Indeed, the fact that the same persons were at the same time executors of the decedent's will and officers of the corporation has led to much of the confusion which has prevailed in this case, and explains some of the contradictions in the testimony. The claimant alleged that he dealt with the representatives of the decedent as executors, while they alleged they dealt with him in their capacity as officers of the brick company, and both parties were probably honest in their assertions. It is entirely possible, and even probable, that in their many interviews with each other the claimant never formally addressed the accountants as executors, and that they never formally replied to him as president or secretary, and both, in this way, may have acted unconsciously at cross-purposes. It is only necessary to advert to a single additional circumstance. Much force was attributed to a notice sent by the claimant on September 5, 1893, to the brick company and their sub-tenant, requiring them to quit the possession of two or three small houses on the tract for non-payment of rent. This notice recited that the claimant had leased the premises to these tenants. But the fact was abundantly proved that the houses in question were expressly excepted from the premises conveyed to Heckman by the lease. It was in evidence that a plan or map was prepared contemporaneously with the lease, and intended to be attached to it, showing the boundaries of the tract and excluding the three houses; and this plan, although it was not proved to have been physically attached, unquestionably formed part of that instrument. It was so recognized by the parties, because after the company had gone into operation a proposition was made to the claimant by one of its officers offering to take the houses at a rental for each house of five dollars per month.

"The accountants presented a petition asking that a precept might be sent to the Common Pleas for the trial by a jury of the facts involved in the dispute. The petition must be refused. In disregard of all precedent (the auditing Judge means nothing offensive by the phrase) the accountants have been accorded two distinct opportunities after the original hearing to supply any evidence which may have been overlooked, or which may have been required to rebut the testimony produced by the claimant. The testimony has been patiently heard and attentively considered, and it has been reduced to writing; and the findings of fact are open to the scrutiny and action of the Court in banc. No very serious failure of justice, therefore, need be feared."

To this finding the accountants filed exceptions, the principal exception being:

"6. Because although the agent of the lessor, who procured this lease. had a secret agreement with the said lessor that he, the said agent, should receive twenty-five per cent. of whatever rent could be obtained, and the lessor's agent was also the business manager of the Philadelphia Brick Company, and procured the lease to be made, and concealed from the Brick Company this secret agreement made with the lessor, the learned Judge held that such facts made no difference to the liability of the decedent's estate."

A. T. Freedley, for exceptants.

Where the lessee, by written assignment, assigns his term to an assignee who goes into possession, and the landlord deals with such assignee as an original tenant substituted in place of the former lessee, then such landlord cannot thereafter recover against the lessee for rent accruing while the premises are in possession of the assignee.

2 Woods Landlord and Tenant, sec. 495.
Smith *v.* Niver, 2 Barbour, 181.
Thomas *v.* Cook, 2 Barnwell and Alderson, 119.
2 Reed on Statute of Frauds, sec. 799.
2 Reed on Statute of Frauds, sec. 791.
McKinney *v.* Reader, 7 Watts, 123.
All the above cases were cited and approved in People's Saving Bank *v.* Alexander, 140 Pa. 22.

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I. H. Mirkil and *J. A. Hinkson*, contra.

June 16, 1894. PENROSE, J. The right of alienation is an incident of an estate for years, though not, as in the case of an estate of inheritance, an inseparable one; and hence, in the absence of a restriction in the lease creating it, the lessee may assign the term without any assent or joinder by the lessor. In such case, however, he continues liable, by reason of his express contract, upon all the covenants in the lease—though as between himself and his assignee, the latter who becomes liable to the lessor by privity of estate is the principal debtor. As the lessor cannot prevent the assignment, his dealing with the assignee and receiving from him, as tenant, the rent accruing during his occupancy, has no effect in discharging the lessee from liability. It does not operate as an implied acceptance of surrender. The assignment, of itself, brings the assignee into immediate privity with the lessor: differing, in this respect, from a sub-lease, where the lessee, retaining an interest, intervenes between his tenant and the lessor, and where, consequently, if the lessor undertakes to deal directly with the sub-tenant, a surrender may be implied on the part of the original lessee, who is thus discharged (4 Kent, 96; 1 Cruise's Dig., Tit. VIII, Ch. 2, § 45; Fisher *v.* Milliken, 8 Barr, 120; Thomas *v.* Cook, 2 Barn. & Ald. 119, etc., etc., etc.). In the present case the lease contained no provision in restraint of the power of alienation, and if there were no other fact than the lessor's knowledge of the assignment, the rendering of bills to the assignee, and the acceptance of payment from him, the exceptions, so far as they are based upon the failure of the auditing Judge to find that the lessee's obligation was thus terminated, would have to be dismissed.

But there is much more than this. It is very clear, as between the decedent and the brick company, that the purpose of the lease to him was simply to secure the property until the company could receive a charter and thus become capable, itself, of taking possession. It was never contemplated that he should carry on the business for which alone the lease was obtained, or that he should hold for a moment as actual tenant. It may be that the idea of a company originated with him, and that his chief motive was to establish his son in a profitable business; but this was to be accomplished through the agency of a corporation, and with the protection thus afforded. The organization of the company took place at least as early as March 6, 1890; and among the promoters was one Shafto, who alone, of them all, had any knowledge of the business about to be started, and upon whose judgment in the selection of a proper place for carrying it on the others relied implicitly. He, of course, was fully aware of the plan of operation and of the sole purpose for which the lease was to be taken in the name of the decedent. But he was also the secret agent of the lessor, though this was carefully concealed from his lessee associates, and the lease was effected through his agency. His knowledge was, therefore, the knowledge of his principal—the lessor; and the latter, no more than could his agent, ought not to be permitted to avail himself of the provisions of the lease for the purpose of enforcing a personal liability not contemplated under the arrangement by which the property was accepted on the terms offered (Mundorff *v.* Wickersham, 13 Smith, 87; Insurance Co. *v.* Woodworth, 2 Norris, 223; Keough *v.* Leslie, 11 Norris, 424. See also Markley *v.* Quay, 8 W. N. C. 145; Seyfert *v.* Lowe, 7 Id. 39). There is little reason, indeed, to doubt that the lessor had actual knowledge, through his emissary thus acting with the intended lessees, of the plans of the company, and that he was fully aware that the real lessees were the company and not an individual. This is indicated in a significant manner by the language of the agreement for Shafto's compensation, executed the day before the signing of the lease by the decedent, who was to be the president of the company. It is clear when this agreement was made the terms of the lease had been fully agreed to, so that what occurred the next day when they were simply reduced to writing is of little importance, except as showing the want of fidelity on the part of Shafto to his associates in the company, and his anxiety to have carried out a project in which, on the part of the lessor, he had so large an interest.

If it be conceded, however, that in spite of the knowledge of his agent, the lessor, assuming his own ignorance, could avail himself of the lease to enforce personal liability on the part of the nominal lessee, there still remains the fact that the agreement to take the lease at all was procured by the fraud of the lessor's agent. Concealing his agency, and going into the proposed company as one of its organizers, he availed himself of the confidence of his associates in his knowledge and experience as a practical brick manufacturer, to induce them to believe that the terms of the lease were advantageous, while at the same time he knew that the lessor was to receive but seventy-five per cent. of the stipulated royalties, and that the difference was to go into his own pocket. Moreover, by reason of his relation of trust and confidence toward his associates, the stipulation for a secret profit to him was in itself a fraud which vitiated the contract altogether, and, under well settled

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principles of equity, prevented any recovery upon it by the principal, for whom, adversely to them, he was acting as agent: Simons *v.* The Vulcan Mining Co., 11 Smith, 202; Short *v.* Stevenson, 13 Id. 95; Rice's Ap., 29 Id. 168; Phosphate Co. *v.* Erlanger, 3 Appeal Cases (House of Lords), 1218. The fraud was not discovered until after the decedent's death, and no laches can therefore be attributed to him by reason of his not having repudiated the contract at an earlier date.

There are other objections to the claim as allowed, though as there can be no recovery at all they are no longer of importance: (1) The evidence seems to show that part, at least, of the amount claimed as balance due May 1, 1893, viz, to March 1, 1893. was paid in full (Testimony, pp. 1, 3, 52, 53, 57); (2) The portion of the claim, subsequent to May 1, 1893, is allowed at the full contract rate, though Shafto, himself, who had become sub-tenant of the company, was the party in default and, under his agreement with the lessor, was entitled to a deduction of twenty-five per cent.; (3) The royalty is apportioned to the date of the presentation of the claim (December 14, 1893), though under the lease it is only payable quarterly.

Whether the payments made to Shafto, prior to his becoming sub-tenant, may not be set off against the balance of the claim, under the principle of which Com. *v.* The Press Co., 156 Pa. 516, is an illustration, need not be considered.

It may be remarked, in conclusion, that while the amounts to be paid under the lease are called rents, they are not rents in the proper sense of the term, nor in the sense of the Act of Assembly relating to debts to be preferred in the settlement of the estate of a decedent. They are payments in consideration of the actual use or consumption of the property itself, viz, of the clay required for the manufacture of bricks: See Stoughton's Ap., 7 Norris, 198. The lease is, in effect, the grant of part of the corpus of the property and not of a mere incorporeal right. Whether, irrespective of this, the preference given by the Act extends to a year's rent accruing after the death of the tenant; whether it applies where the lessor has ceased to be an occupant of the property, and his liability is merely by reason of his contract *qua* covenant and not *qua* rent, may well be doubted: See Mickle *v.* Miles, 1 Grant, 320; Gandy *v.* Dickson, 3 District Reps. 411.

The exceptions are sustained to the extent indicated by this opinion, and the claim against the estate of the decedent upon the lease of March 13, 1890, dismissed.

Eo die. ASHMAN, J., dissenting. The conclusions of law which are reached by the opinion are based upon a conception of facts which can be justified only by throwing out the testimony of the claimant's son and of his counsel, upon the ground that it was perjured. Both of these witnesses were with the claimant in his negotiations with the decedent for the leasing of the brick works, and one of them prepared the lease and was present at its execution; and nothing can be more clear cut than the declarations of both that the claimant dealt with the decedent in his individual capacity, and accepted his individual liability, and not the liability of a company as yet unformed, and which, when formed, was neither more nor less than himself. The opinion assumes, in the teeth of this testimony, that the claimant perpetrated the meaningless blunder of accepting a formal lease from an individual lessee of reputed wealth, with a parol understanding that the real lessee was to be a corporation, of whose solvency he could know little or nothing, and for whose acts the lessee could be held responsible only to the extent of his corporate holdings; and it also assumes that the decedent was guilty of the more egregious folly of binding himself as an individual, when he meant only to be held as a corporator. If the claimant regarded the lease to the decedent as a temporary expedient for securing the premises to the company, and the decedent himself as the mere conduit through which the transfer was to be effected, why did he not himself assign the lease to the company, or at least formally assent to its assignment? It hardly needs the sworn statements of witnesses, which the opinion overlooks, to answer this question; the very fact that the claimant did not join in the assignment is proof that he always regarded the decedent as the principal debtor. But the evidence went further and showed as conclusively as can well be predicated of a negation, that the project of the formation of a company was never communicated to the claimant at all. It was said that, when the decedent signed the lease, the promoters of the company were present and discussed the enterprise in his hearing; but when one of those promoters was called to the stand he asserted that, to the best of his recollection, the affairs of the company were not even mentioned. Yet the majority of the Court is able to say in its opinion that "there is little reason to doubt that the lessor had actual knowledge through his emissary, thus acting with the intended lessees, of the plans of the company, and that he was fully aware that the real lessees were the company and not an individual." This "emissary" was one Shafto, who professed to be an expert in the manufac-

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ture of brick, and whom the claimant had promised a commission, in the shape of twenty-five per cent. of the royalty, if he would secure a tenant. That the premium was high, and even extravagant, did not make it unlawful; and that the agent did not announce its amount to the lessee did not necessarily make him an emissary; it being within the knowledge of most lessees that the brokers through whom they effect their leases frequently receive a premium of some sort, and sometimes a continuing one, from the landlords. The subsequent dealings of Shafto with the company, in which, as a member affecting to bear an equal share with his associates of its burdens, that person sought to profit by the dual capacity in which he actually stood, could have no bearing upon the question of the liability of Heckman. Shafto was in no privity of relationship with the decedent, owed him no allegiance, and was dealt with by him at arm's length. And whether he owed fealty to Heckman or not, it is morally certain the claimant did not. The citation of cases which, upon this point, is made in the opinion, is singularly unfortunate. Simons *v.* The Vulcan Mining Co., 11 P. F. S. 202, Short *v.* Stevenson, 13 Id. 95, Rice's Ap., 29 Id. 168, and Phosphate Co. *v.* Erlanger, 3 Appl. Cas. (H. of L.) 1218, were all of them cases in which one of the several associates, claiming to act with his fellows on the same footing, was making a secret profit out of what purported to be a mutual transaction. In each of them it was decided that the parties upon whom the fraudulent concealment had been practiced could recover against the party who had deceived them. Thus, in Simons *v.* Mining Co. and Short *v.* Stevenson, *supra*, A. purchased land, formed a company, and induced others to take shares therein at a valuation based on a higher price, which he falsely represented he had paid. The contract was avoided as to A., but the right of the original vendor to recover the price at which he had sold, was unaffected. So, in this case, we are not dealing with the rights of the brick company as against Shafto, but with the rights of the claimant as against Heckman; an inquiry with which these authorities, and a host of similar ones which might be added, have no more to do than has the rule in Shelly's case. F. B. N.

O. C. October, 1893, 252.

Snyder's Estate.

O. C.—Practice—Accounts showing balance due executor.

When an account shows a balance due from the estate to the executor, the practice is merely to audit and settle the account and ascertain its correctness. Claims against the estate must wait until there is a fund for distribution.

Sur exceptions to adjudication.

Upon citation of a legatee, the executors of the will of testator appeared and filed an account which showed that the estate was indebted to them. Subsequent proceedings are recounted in the opinion.

John Shallcross, for accountants.

Crawford and *Loughlin*, for legatee.

July 7, 1894. HANNA, P. J. The claim to recover the legacy, and which forms the subject of the exceptions, was, through inadvertence, both prematurely presented by counsel and considered by the auditing Judge. The account shows no balance for distribution; but, on the contrary, a balance due from the estate to the executors. When this appears the proper practice is merely to audit and settle the account and ascertain its correctness. If, in the course of these proceedings, however, a balance is ascertained to be in the hands of the accountants, either by way of a surcharge, or disallowance of credits, a fund is created for distribution, and it is proper to hear and determine the claims of creditors, legatees and distributees. But otherwise they must wait until there is actually a fund for distribution.

This is declared to be the correct practice in Hamill's Est., 36 Legal Intell. 137, and Jones' Est., 39 Id. 129.

The exceptions are accordingly dismissed, without prejudice to the right of the legatee to present her claim for the legacy upon the filing of a further account by the executors. And the present account and award thereon of the balance due the executors is confirmed.

F. B. N.

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WEEKLY NOTES OF CASES.

VOL. XXXV.] *FRIDAY, NOV. 9, 1894.* [No. 9.

Supreme Court.

May '94, 27. May 30, 1894.

Commonwealth v. Edgerton Coal Company, Limited.

Taxation—Act of June 8, 1891, P. L. 229—Corporation—Appraisement of actual value of stock.

Since the passage of the Act of June 8, 1891, P. L. 229, all corporations are taxable upon the actual value in cash of their capital stock, and in determining the amount upon which a corporation is to be taxed, the amount and rate per cent. of dividends made and the amount carried to surplus and sinking fund during the tax year do not furnish an absolute indication or measure of the actual value in cash of the capital stock, but are to be considered with all other relevant facts in determining what is its actual value in cash.

To arrive at the actual value, possibilities and probabilities, as well as things certain, are properly considered.

Appeal of the Commonwealth of Pennsylvania from the judgment of the Common Pleas of Dauphin County, upon an appeal by the Edgerton Coal Company, Limited, from the account settled by the auditor-general and State treasurer for tax on capital stock for the year ending the first Monday in November, 1892.

The case was tried before SIMONTON, P. J., without a jury. The facts and conclusions of law appear by his opinion as follows:—

"This is an appeal by the corporation defendant from the settlement of an account against it by the auditor-general and State treasurer for tax on capital stock for the tax year 1892, and it was tried by the Court without a jury under the Act of April 22, 1874.

FINDINGS OF FACT.

"1. The corporation is and was during the tax year, 1892, a limited partnership legally organized and doing business in this State. Its officers on December 27, 1892, made to the auditor-general, under the sanction of the prescribed oath, the capital stock report and appraisement required by the Act of June 8, 1891, Section 4 (P. L. 229). It appeared from this report that the par value of defendant's capital stock was $20,000.00, divided into 200 shares of the par value of $100 each; that the net earnings of the corporation for the tax year were $46,938.43; that one dividend of 20 per cent., amounting to $4,000, had been paid during the tax year, and that the rest of the net earnings had been applied to the reduction of its floating debt, and there had not been any amount carried into surplus or sinking fund. In the appraisement returned with the report, defendant's president and secretary declared that after having duly sworn 'that they will with fidelity, according to the best of their knowledge and belief, estimate and appraise the capital stock of said company at its actual value in cash, as it exists on the first Monday of November, 1892, not less, however, than the average price for which said stock sold during the year ended on said date, and not less than the price or value indicated or measured by net earnings or by the amount of profit made and either declared in dividends or carried into surplus or sinking fund of said company, they did in pursuance of their aforesaid oaths estimate and appraise the capital stock of said company at its actual value in cash as follows, viz: Two hundred shares at two hundred dollars per share, amounting in the whole to forty thousand dollars.'

"2. No evidence was introduced by the Commonwealth on the trial, other than the report above referred to, tending to show the actual value in cash of the capital stock. Testimony was given on behalf of defendant, from which we find as a fact that it was in 1892 engaged in mining anthracite coal on leased land at a certain royalty per ton; that it mined about 240,000 tons during the tax year 1892, and that at the end of the year not more than 400,000 tons of coal remained in said land, and at the same rate of mining it will be exhausted within two years; that the coal is of inferior quality, and the cost per ton of mining increases as the mine becomes more nearly exhausted; that defendant has no contingent or other fund to make good losses or depreciation in value of its said leasehold property, and when the coal has been entirely removed, as it will be in the next two years at the present rate of mining, the company will own nothing except a small amount of personal property; and we find, as an inference of fact from the evidence, that the actual value in cash of defendant's capital stock was not, between the first and fifteenth of November, 1892, the time as of which the appraisement is required by law, to be made, greater than $40,000, the sum at which it was appraised.

"The question raised by the objection to the settlement specified in the repeal, will be practically decided when we have determined the principle on which the taxing Act of June 8, 1891, requires defendant's capital stock to be

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appraised. The fourth section of the Act (P. L. 229), after requiring a detailed report of the financial operation and standing of each corporation during the preceding tax year, to be made by its officers to the auditor-general, enacts as follows:

"'The president, chairman, secretary and treasurer, after being duly sworn or affirmed to do and perform the same with fidelity and according to the best of their knowledge and belief, shall, between the first and fifteenth days of November of each year, estimate and appraise the capital stock of the said company at its actual value in cash. Not less, however, than the average price or value indicated or measured by net earnings or by the amount of profit made and either declared in dividends or carried into surplus or sinking fund, and when the same shall have so truly estimated and appraised they shall forthwith forward to the auditor-general a certificate thereof, accompanied with a copy of their said oath or affirmation, signed by them and attested by a magistrate or other person duly qualified to administer the same.'

"As stated in the findings of fact the officers of the corporation defendant reported to the auditor-general that having taken the prescribed oath they appraised the capital stock at $40,000, which was twice its par value. But the auditor-general construed the Act to require the capital stock to be appraised at not less than a principal sum, 6 per cent. of which would equal the net earnings for the year, and as it appeared from the report that the net earnings of the corporation for this period had amounted to $44,938.48, he did not accept the appraisement made by defendant's officers, but substituted his own appraisement, made on the principle above stated and settled the account appealed from on that basis.

"[We have recently decided in an opinion filed in Commonwealth *v.* Sharon Coal Company, 23 June Term, 1893, that the construction then put upon the Act by the auditor-general is incorrect, and that only so much of the income of the corporation—whether called net earnings or amount of profit made—as is declared in dividends or carried into surplus or sinking fund, is made the measure of the maximum price or value of the capital stock; and, following that decision, we must hold that defendant's net earnings not divided nor carried into surplus or sinking fund, but applied to the payment of its debts, did not measure the value of its capital stock.]

"But in this case there was a 20 per cent. dividend made, amounting to four thousand dollars ($4,000), and the learned attorney-general contends that the minimum value at which defendant's capital stock can be appraised must be a sum 6 per cent. of which would equal the amount of this dividend. In his very able brief he argues that the officers have a right to appraise the stock, but they are subject to the limitation that its value must be measured by the amount of profit made; not by contingencies past or present; not by actual value or cost; but by the arbitrary standard of net earnings construed to mean 'the amount of profit made and either declared in dividend or carried into surplus or sinking fund.'

"On the other hand, it is contended, on behalf of defendant, that the amount of net earnings divided or carried to surplus or sinking fund is not to be taken as a fixed or arbitrary measure of value, but is to be considered, with all other pertinent facts, by the officers of the corporation to assist them in arriving at a correct estimate of the 'actual value in cash,' of the capital stock; and, as we have already suggested, the case will practically be decided when we have determined which of these constructions is correct.

"It is manifest that the conclusion to be reached must depend largely on the relative weight to be given, in construing the clause of the Act above quoted to the one or the other expressions 'actual value in cash,' and 'the price or value indicated or measured by net earnings or by amount of profit made and either declared in dividends or carried into surplus or sinking fund.'

"For if the capital stock is, in point of fact, to be appraised at 'its actual value in cash,' the appraisers must consider all the facts within their knowledge which will aid them to determine what the actual value is, and must appraise the capital stock at what they believe to be its actual value in cash; but if the amount at which it is to be appraised must be indicated or measured by taking the sum of the dividends made during the year as one term, and 6 per cent. as another, in order to find the third, by the arithmetical rule of proportion, then, certainly, while the appraisement would be easily made, the appraisers might well hesitate to make oath that it represented the 'actual value in cash' of the capital stock.

"An examination into the purpose and language of the Act will perhaps enable us to ascertain which of these apparently antagonistic constructions was in the mind of the Legislature. A brief reference to the prior Acts may help us to understand its purpose. The latest of these, which on this subject was identical with those that preceded it, was the Act of June 7, 1889, (P. L. 420), which provided that where dividends of 6 per cent. or more were declared in any tax year, the tax was to be assessed at the rate of one-half mill for each one per cent. of

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dividend; and where no dividend, or less than 6 per cent., was declared during the year, the capital stock was to be appraised, and be subject to a tax at the rate of three mills on its appraised value.

"But it frequently occurred, in the practical application of these two different modes of ascertaining the value of the capital stock and assessing the tax, that the capital stock of some corporations on which less than 6 per cent. dividend had been paid, was appraised above par, and was assessed with a larger tax than that of other corporations, which paid 6 per cent. or more in dividends, and there was therefore a want of uniformity in the taxation. This is one of the reasons given in preambles 4, 5 and 6 for the passage of the Act of 1891, as follows:

"'Whereas, Experience has shown that the said twentieth and twenty-first sections result, in many cases, in requiring corporations which pay dividends less than 6 per centum to pay a larger amount of tax than corporations paying dividends of 6 per centum are required to pay;

"'Whereas, also, It has been shown that the mode prescribed in the twenty-first section of said Act for taxing corporations paying dividends of 6 per centum and upwards at a rate of tax to be measured by the dividends, results, in many cases, in corporations with large investments in bonds, mortgages and moneys at interest, paying a less rate of tax than other corporations without capital stock, and individual citizens are required to pay, under the first section of said Act, upon the same kind of property;

"'Whereas, also, It appears that the taxes imposed upon corporations and individual citizens by the first and twenty-first sections of said Act can be made much more nearly uniform by taxing all corporations, limited partnerships and joint-stock associations, having capital stock, at a fixed rate of five mills upon each dollar of actual value of their whole capital stock, including as well their bonds, mortgages and moneys at interest, as their franchises and property of other kinds.'

"It is also declared in the title that one of the purposes of the Act is to provide 'for greater uniformity of taxation by taxing all the property of corporations, limited partnerships and joint-stock associations having capital stock, at the rate of five mills on each dollar of its actual value;' and, as we have already seen, the clause we are now considering, in express terms makes it the duty of the officers of the corporation to 'estimate and appraise the capital stock at its actual value in cash.'

"We are unable to see how any other conclusion can be drawn from these reiterated declarations in the preamble, the title and body of the Act, than that they express a deliberate intention to abandon the principle of measuring the taxable value of capital stock by the rate of dividends paid, and to substitute therefor taxation at a fixed rate on its actual value in cash, to be ascertained by an appraisement, made under oath, by designated officers of the corporations respectively.

"Against all this, and in favor of the construction contended for on behalf of the Commonwealth, we have merely the requirements that the capital stock shall be appraised at 'not less than the price or value indicated or measured by . . . . the amount declared in dividends or carried into surplus or sinking fund.' The Act does not prescribe that, in order to use the amount of the dividends as a measure, it is to be assumed that a 6 per cent. dividend will indicate or measure par value; nothing is said on this point, and the construction contended for reads it into the Act, as the sense an ambiguous expression was intended to convey. This might be permissible if it would harmonize all the provisions of the Act, but instead, it creates discord between them; and we think it would violate all the canons of construction to interpret this clause of doubtful meaning in such a way as to neutralize and make of no effect another clause in the same section which is so plain that its meaning cannot be doubted. We are therefore of the opinion that the weight claimed for the expression 'indicated or measured' on behalf of the Commonwealth cannot be given to it; and that the fundamental requirement of the Act is that the capital stock be appraised at its 'actual value in cash.' But as it is one of the cardinal principles of interpretation that effect must, if possible, be given to every part of the statute, we must not ignore the expression 'indicated or measured,' but must, if possible, construe it in harmony with the other plain declaration that the capital stock is to be appraised at its actual value in cash. We think this can readily be done by understanding it to require the appraisers to give such weight as their sound judgment dictates to the fact that such dividends were made during the year, as a help towards arriving at a just appraisement; and that if it appear to the auditor-general on an examination of their appraisement, when returned to him, that they have not done so, he, with the State treasurer, is to supply the omission and correct it accordingly.

"Believing the correct interpretation of the Act to be that just suggested, we cannot sustain the settlement made by the auditor-general, nor can we say that a settlement based on an appraisement made on the theory that a dividend of 6 per cent. would indicate or measure the capital stock to be of par value would be *ipso facto* correct.

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"We have therefore to determine whether the capital stock of the corporation defendant for the tax year 1892 has been shown to have been appraised at less than its actual value in cash; and we find from the evidence on file that the correctness of the appraisement has not been impeached. The depositions show that all the net earnings of the year, except the amount divided, were applied to the payment of debts, and that the corporation owns nothing except the right to mine about 400,000 tons of coal at a fixed royalty and a small amount of personal property. We cannot say, therefore, in the absence of testimony to that effect, that the appraisement is not correct.

"We have not thought it necessary to consider the question whether the Legislature would have the constitutional right to fix an arbitrary standard of value upon the capital stock of corporations, for the purposes of taxation, for the reason that the Act itself, when properly construed and interpreted, shows that it did not intend so to do; and we refer to this question simply to suggest that the grave doubt whether it would have such right tends to confirm us in the construction which we have given to the Act.

"The foregoing discussion leads to the following:

CONCLUSIONS OF LAW.

"1. The amount and rate per cent. of dividends made, and the amount carried to surplus or sinking fund, during the tax year, do not furnish an absolute indication or measure of the actual value in cash of the capital stock of a corporation, but are to be considered, with all other relevant facts, in determining what is its actual value in cash.

"2. The capital stock of the corporation defendant, has not been shown to be of greater value than that at which it was appraised by its officers, and therefore the settlement appealed from, in so far as it is based upon a higher valuation, is erroneous.

"3. The value of the capital stock of defendant for taxation for the tax year 1892 is $40,000, the amount at which it was appraised by its officers.

"4. The Commonwealth is entitled to recover in this case as follows:

Tax five mills on $40,000	$200 00
Interest, March 24 to December 5, 1893, at 12 per cent. per annum	16 67
Attorney-general's commission, 5 per cent.	10 00
Total	$226 67

"For which judgment is directed to be entered, if exceptions be not filed within the time limited by law."

The Commonwealth filed exceptions in—

That the Court erred (1) in that part of its opinion above included in brackets; (2) in its first and second conclusions of law; (3) in not finding as matter of fact that the settlement by the accounting officers was the correct one under the law; (4) in not giving judgment for the Commonwealth for the full amount of its claim.

The defendant also filed exceptions, raising the same points as those raised in Commonwealth *v.* Sharon Coal Company, Limited. See *post* p. 213.

The Court overruled the exceptions and entered judgment in accordance with the opinion.

The Commonwealth took this appeal, and assigned as error the overruling of its exceptions.

W. U. Hensel, attorney-general, (*James A. Stranahan*, deputy attorney-general, with him), for appellant.

The Revenue Act of 1891 is simply a supplement to the Acts of 1879 and 1889, and its object was to provide increased revenue, and, as shown by its preamble, "to impose INCREASED *taxation upon the capital stock of certain corporations.*"

The evil sought to be remedied was the fact that corporations, which pay dividends of 6 per cent. and more, did not bear their share of taxation.

The remedy for this was provided in what may be an artificial or arbitrary system of taxation, but which is a sure and safe one. True, the Legislature did not expressly designate 6 per cent. as the basis, but that being the legal rate of interest, or normal profit upon investments in this State, and the standard recognized by the old law, it may fairly be inferred to have been in the legislative mind. Moreover, it is distinctly recognized in the Act of 1889, as the "par" or standard dividend basis.

The standard which the Legislature has set up is:

I. Net earnings.

II. Profits made.

III. (*a*) amount declared in dividends; (*b*) carried into surplus, or, (*c*) sinking fund.

These three things are equal to the same thing, viz: The income of the company less its expenses—and are therefore equal to each other. The third is simply a combination of the separated elements of the first and second. Whatever is not divided among the stockholders or set apart to the sinking fund is surplus, in fact, whatever it may be called.

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Commonwealth *v.* W. U. Telegraph Co., 15 WEEKLY NOTES, 333.

The legislative intent was to comprise everything under the term "net earnings" or "profits made." In the cases cited by us, and in those depended upon by the learned Court below to define "net earnings," it had been already established that this term, and the other term, "profits made" meant the "products of the business deducting the expenses only"—the receipts of a corporation over and above its current expenses." Whichever of these two tests be applied, the Court below admits the same result is attained. We contend that these broad, comprehensive terms used disjunctively mean no more and no less when separated into their elements:

a. Dividends declared. *b.* Increase of surplus. *c.* Sinking fund additions.

And that these three terms conjoined, cover and comprise everything that "net earnings" or "profits" can stand for. There are not two nor three "different measures of value prescribed," but the same measure or standard described three different ways, so that there could be no possible mistake about it.

The title and preamble of the Act of 1891 do not justify the construction of the Court below.

It is true that neither under the old law nor the new is the value of all capital stock to be measured by the dividend standard—else the many stocks which pay no dividends would have no value for tax purposes. It was to meet these cases that the "actual cash value" clause was left in the law. For many purposes corporate stock that pays no dividend may have value.

Com'th *v.* Hamilton Mfg. Co., 12 Allen, 298.

The recital in the Boyer bill's first "Whereas" that the old law discriminated between corporations paying 6 per cent. or more and those paying less, will easily account for the new law's provision, that for all dividend paying stocks thereafter the 6 per cent. dividend standard which we contend for should apply. The second source of complaint, that individuals or corporations without capital stock paid an undue rate of taxation on moneys at interest, was cured by the provision that individual citizens and corporations without capital stock, should pay four mills tax on moneys at interest while corporate capital should pay five. There is nothing in this recital of a grievance to be redressed that indicates a purpose to abandon the old, well-approved and firmly established system of State tax on corporate capital according to its value as measured and indicated by its net earnings. The increase of revenues, uniformity of taxation, relief of individuals and corporations without capital stock, and every assured aim and purpose of the new Act, as expressed in its title, text or preamble, are met by the Commonwealth's construction of it.

There is no "deliberate intention to abandon the principle of measuring the taxable value of capital stock by the rate of dividends paid"—or rather of net earnings—but a rigid purpose to adhere to it and to extend it to all dividend payers. What the learned Court calls "merely" the requirement that the price or value of the stock shall be indicated or measured by its earning power, is the backbone of the statute. It is the restriction laid alike upon the corporation's officers and the Commonwealth's. Neither can drop the stock below the value thus ascertained. "Actual cash value" is to be at all times a subordinate consideration; and is only to be resorted to when no net earnings nor profits are made. The intention of the Act was simply to extend the process of valuation in the Act of 1889 to all dividend paying corporations.

"When a dividend is declared, that gives the measure and furnishes the rule for the tax." A. & O. Tel. Co., *v.* Commonwealth, 66 Pa. 57.

To that plain, simple, easy system the Legislature of 1891 meant to return, and the benefits of the Boyer bill ought not to be lost nor frittered away by judicial legislation.

The obvious intention of the new law was to raise the tax on capital stock from three mills to five mills, and to leave the old system of "measuring" the value of stock corporations by the dividends and amount carried to the sinking fund just as before.

The officers have a right to appraise the stock, but they are subject to the limitation that its value must be measured by the amount of profit made; not by contingencies past or present; not by actual value nor cost, but by the arbitrary standard of net earnings as construed to mean "the amount of profit made and either declared in dividends or carried into surplus or sinking fund."

When the tax is directed to be imposed upon the dividend basis, or upon the capital stock measured by the dividend standard, apprehensions of future depreciation in the stock are not to be entertained.

Com'th *v.* Ocean Oil Co., 59 Pa. 62.
Com'th *v.* Penn Gas Coal Co., 62 Id. 241.
Hamilton Steeled Wheel Co. *v.* Com'th, 12 WEEKLY NOTES, 328.

M. E. Olmsted, for appellee.

Under the old law there were two methods of assessing and levying taxes on corporate stocks.

About one-half the corporations of the State either paid no dividends, or paid dividends of

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less than 6 per cent., and were, therefore, taxed upon an appraisement of their actual value. So far as these corporations alone were concerned, no injustice was done, and there never was any complaint as to this method of appraisement and taxation. The mischief was that by the application of the dividend basis of taxation to the other one-half of the corporations of the State, the greatest inequality and injustice resulted not only as among the corporations which were subject to that method of taxation, but also as between them and those which were taxed upon a valuation.

Com'th *v.* Brush Electric Light Co., 28 WEEKLY NOTES, 527.

To provide against this mischief the obvious remedy was to wipe out the obnoxious and intolerable dividend basis of valuation and to tax all capital stock, as stated in the title of the Act of 1891, "at the rate of five mills upon each dollar of its actual value."

The remedy was, as stated in the sixth "whereas," to make taxation between corporations and individuals much more nearly uniform by taxing *all* corporations at a fixed rate of five mills "on each dollar of the actual value of their whole capital stock."

The attorney-general says—

"The standard which the Legislature has set up is:

"1. Net earnings.

"2. Profits made.

"3. Amount declared in dividends or carried into surplus or sinking fund.

"These three things are equal to the same thing."

But they are not. The net earnings of a company are the receipts of a corporation less its actual operating expenses, without any deduction for diminution in value of the body of the property, as in the cases of oil, coal and natural gas companies, or for interest or other fixed charges, as in the case of railroad and many other corporations.

Com'th *v.* Ocean Oil Co., 59 Pa. 61.
Com'th *v.* Penn Gas Coal Co., 62 Id. 241.
Union Pac. Rw. Co. *v.* U. S., 99 U. S. 402.

Yet these things must be deducted from the net earnings before the actual profits can be determined. Profits may or may not be declared in dividends or carried into surplus or sinking fund. Very frequently they are simply allowed to remain in the "profit and loss" account of the company, applicable to the payment of future dividends or to the payment of expenses, or they are devoted to repairs or improvements to the property of the company. In a prudently managed company the profits are usually less than the net earnings and more than the dividends.

It cannot be said that where a company accumulates for some years before declaring a dividend and then declares a larger one that that dividend capitalized at 6 per cent. shows the actual value of stock.

The dividend test of value, as used in the old law, was sufficiently objectionable. The profit test, arbitrarily applied, is still more so, and the net earning's test is the worst of the three. But to permit the auditor-general to select from them and in each particular case apply whichever he chooses, or whichever, thus used arbitrarily, produces the largest sum for taxation, is an aggravation of the evil, of which the Legislature never dreamed.

The tax in controversy is not a tax upon dividends nor upon net earnings nor upon profits. It is a tax upon capital stock, i. e., a tax upon property and assets.

Com'th *v.* Standard Oil Co., 101 Pa. 119.
Com'th *v.* Mining Co., 5 Pa. C. C. R., 90.
Fox's Appeal, 112 Pa. 337.
Fidelity Co. *v.* Loughlin, 139 Id. 612.

As construed by the Commonwealth, the taxable basis is a purely arbitrary one, arrived at by a simple mathematical calculation, the result of which in every instance must be the sum of which the net earnings, or the profits, or the dividends reported would equal 6 per centum. Why, then, did the Legislature require the officers of the corporation to be solemnly sworn that they would "with fidelity and according to the best of their knowledge and belief *estimate and appraise* the capital stock of said company at its *actual value in cash?*" What has their "fidelity" or their "knowledge" or their "belief" to do with the matter? What has the "actual value in cash" to do with the matter? Why require the officers of the company to do so absurd a thing as to estimate the actual value if the taxable basis is not the actual value? Why not let them simply return to the auditor-general the amount of net earnings or the profits or the dividends of the corporation, and let him or his clerks make the mathematical computation? Is it not absurd to require that at least two of the officers of the corporation shall unite in making under oath a mathematical calculation? Is it not absurd to require them to make that calculation with "fidelity" and "according to the best of their knowledge and belief," when the auditor-general or his clerks can just as well make it without being sworn at all, and with the utmost accuracy? Unquestionably the twentieth section of the Act of 1889, as amended by the Act of 1891, requires the exercise of judgment and discretion upon the part of the corporate officers, and that their action shall be not a mere

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mathematical computation, but an estimate and appraisement of the actual value of the thing to be taxed.

The officers of the corporation are, for the purpose of appraisement, officers of the Commonwealth, and their valuation must be presumed correct until proved otherwise.

P. & A. Tel. Co. *v.* Com'th, 3 Brewst., 517; 66 Pa. 70.
Phila *v.* Com'th, 52 Pa. 451.
Com'th *v.* Hays, 1 Pitts. 316.
Speck *v.* Com'th, 3 W. & S. 324.
D. & H. Canal Co. *v.* Walsh, 33 Leg. Int., 349.
City of N. O. *v.* La. Savings Bank, 31 La. 828; 32 Id. 1138.
Com'th *v.* Haines, 97 Pa. 228.
Com'th *v.* A. & Gt. W. Ry. Co., 53 Id. 9.
Com'th *v.* P. Ft. W. & C. Ry. Co. 74 Id. 83.
Com'th *v.* L. V. R. R. Co., 104 Id. 89.

October 1, 1894. PER CURIAM. It seems to us, the clear and forcible opinion of the learned President Judge of the Court below, ought to have compelled the assent of the Commonwealth to this judgment.

The Act of 1891, declares that each corporation "shall be subject to, and pay into the treasury of the Commonwealth annually, a tax at the rate of five mills upon the dollar of the actual value of its whole capital stock of all kinds, including common, special and preferred, ascertained in the manner prescribed in said twentieth section."

Thus, the subject of taxation, "whole capital stock," common, special and preferred, is defined. Then the kind of value to be multiplied by the rate of taxation, is distinctly fixed; the stock may have several values; a market value determined by the selling price of its shares in open market; a speculative value based on calculation of future prospects and contingencies; or an actual value, ascertainable from the intrinsic worth of its assets immediately available or unavailable; on its profits or losses, covering a fixed period, and on business calculations for the future. And other elements of value besides these, in the mind of the business man, may be taken into account in arriving at a correct conclusion as to the actual value of the whole capital stock.

The Act, then, prescribes a method for ascertainment of the actual value: "In every case, any two of the following named officers of such corporation, limited partnership or joint stock association, namely the president, chairman, secretary, and treasurer, after being duly sworn or affirmed to do and perform the same with fidelity, and according to the best of their knowledge and belief, shall, between the first and fifteenth days of November in each year, estimate and appraise the capital stock of the said company at its actual value in cash, not less, however, than the average price which said stock sold for during said year, and not less than the price or value indicated or measured by net earnings, or by the amount of profit made, and either declared in dividends or carried into surplus or sinking fund; and when the same shall have been so truly estimated and appraised, they shall forthwith forward to the auditor-general a certificate thereof, accompanied with a copy of their said oath or affirmation signed by them, and attested by a magistrate or other persons duly qualified to administer the same."

The Act, thus far, directs what shall be taxed, the "whole capital stock"; at what rate, "five mills"; at what value, "its actual value in cash"; then how and by whom, in the first instance, this value shall be ascertained. In the case before us, two of the officers, the chairman and treasurer, under oath, made an appraisement of the actual cash value, placing each of the 200 shares of the company at $200, and the aggregate at $40,000. There were no sales of stock during the year for which the report was made, so that this element prescribed as determining a minimum of value, was not present in this case. One dividend of 20 per cent., or $4,000 for the whole authorized stock, was declared, although $44,938.48 was the surplus or net earnings; the surplus, however, was appropriated to payment of the floating debt of the company. The two appraisers, designated by the Act, made oath, that they had performed their duty with fidelity according to the best of their knowledge and belief in their appraisement of the stock at an actual cash value of $200 per share.

On their certificate being filed with the auditor-general, it became subject to his scrutiny and that of the State treasurer under this proviso to the law: "Provided that if the auditor-general and State treasurer, or either of them, is not satisfied with the appraisement and valuation so made and returned, they are hereby authorized and empowered to make a valuation thereof, based upon the facts contained in the report herein required, or upon any information in their possession, or that shall come into their possession, and to settle an account on the valuation so made by them for the taxes, penalties and interest due the Commonwealth thereon."

The two appraisers designated by the Act, having either full knowledge or the means of full knowledge, of all the business of the company, necessary to an approximately correct estimate of the value of the company's shares, and the officers of the Commonwealth having little or none, any dissatisfaction on the part of the latter, based on a mere inspection of the report, must arise from diverse interpretations of the law. And that is all that is alleged here. The auditor-general and State treasurer made an ap-

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praisement, based on the amount of net earnings in the report, and raised the appraisement of the actual cash value of the capital stock to $748,-974.66, being more than eighteen times the actual cash value put upon it by the chairman and treasurer of the company. This, the Commonwealth argued, is the actual cash value "indicated by the net earnings or profit made," as given in the report. It will be noticed that the $44,938.48 net earnings set out in the report, was not divided among the stockholders, or carried into surplus or sinking fund. The Company paid its debts with it. It is perfectly plain, that no inference is warranted from these facts, justifying such a change from the appraised value. The auditor-general assumed that the cash value was a principal sum, 6 per cent. of which would equal the net earnings, without regard to what disposition was, and ought to have been, in good business management, made of the earnings. No man, as to the stock of any business corporation, can make oath that its actual cash value is a sum, which, multiplied by 6, would equal its net earnings. No prudent man, in business transactions, ever does adopt such an estimate as conclusive of an actual cash value. It is one element which is properly considered in making such an estimate, but only one out of many. In purely manufacturing enterprises, which depend for continuance and success on a supply of material which is inexhaustible, and on skilled and other labor which may always be obtainable, such a calculation would have greater probability in favor of "actuality." But in coal mining, oil and gas production, ore mining, quarrying, lumbering, and innumerable other enterprises, the actual cash value of the stock, cannot, from the very nature of the business, be determined solely by the net earnings for any one year. The net earnings for a year may equal 6 per cent. on a large principal; the very next year, the thing, the mine, oil or gas territory, quarry or timber, represented by the capital, may be wholly exhausted, practically worthless, and the stock becomes of no value whatever.

In this view, large net earnings may largely depreciate the actual value of the stock. For example, suppose the greater part of the paid up capital stock is represented by a tract of coal land, and that large net earnings in the year reported are attributable to large production; this large production would indicate large exhaustion of the coal, and, necessarily, impairment of the capital.

To arrive at the actual value, possibilities and probabilities, as well as things certain, are properly considered.

The Legislature, instead of saying the actual cash value should be that sum, 6 per cent. of which would equal the net earnings, thus plainly expressing an intention of which they have left no doubt in the estimate to be made on the average price of sales, go no further than to declare, that net earnings shall constitute one fact as the ground of an estimate of the actual cash value. The prominent idea or thought of the whole Act, as the learned Judge of the Court below has so clearly shown, was to base taxation on the actual cash value, and that this should be determined from facts, not theories, in all cases except the one, that this value should in no case be less than the average price at which the stock sold for during the year. In thus, in this one case, fixing a minimum, it is the only theoretical estimate adopted; and this has in it a foundation of at least approximate certainty; the worth of anything is "Just so much money as 'twill bring." The man who parts with his property at a price, and he who buys it, may be assumed to have that knowledge which warrants the one in not accepting less, and the other in not paying more than the actual value. The wisdom and justice both to the taxpayer and the Commonwealth of thus basing taxation on actual value, are so manifest, so completely in accord with the common sense of justice, that it would require a very convincing demonstration, that the Legislature intended otherwise, before we would disturb this judgment; the learned attorney-general has failed to so convince us, while the judgment of the Court below is vindicated by the soundest reasoning, leading to conclusions that are irresistible.

In thus expressing our approval of this judgment, we do not intend to, in any degree, deny the power of supervision and change by the Commonwealth's officers, of the appraisement as returned; but the report is of a fact, not a calculation, and if the officers are dissatisfied, the Act declares they shall "make a valuation thereof based upon the facts contained in the report herein required, or upon any information within their possession, or that shall come into their possession." Discrepancies between large net earnings, profits, dividends or surplus, and small actual cash value, may suggest inquiry to the auditor-general. If so, he has by law almost unlimited powers of investigation for ascertainment of the truth; such as the right of examination of books, papers and witnesses; the right to imprison witnesses for disobedience of his summons, or for a refusal to answer. But here, on a mistaken theory that the actual cash value was a sum which, multiplied by 6, would produce the net earnings, the appraisement was arbitrarily changed. There is nothing in the law to justify the change on the facts in the report; it is not pretended that any information had come into their possession, of fraud or false swearing.

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We hold with the Court below in its first conclusion of law from the facts, that:—

"The amount and rate per cent. of dividends made, and the amount carried to surplus and sinking fund during the tax year, do not furnish an absolute indication or measure of the actual value in cash of the capital stock of a corporation, but are to be considered with all other relevant facts, in determining what is its actual value in cash."

Therefore the judgment is affirmed, and the appeal is dismissed at costs of appellant.

H. B.

May, '94, 22. May 30, 1894.

Commonwealth v. Sharon Coal Company, Limited.

Taxation—Act of June 8, 1891, P. L. 229—Power of Legislature in taxation—Corporations, classification of—Constitutional law—Constitution of Pennsylvania, Art. IX., sec. 1; Art. III., sec. 3—Constitution of United States, Art. XIV., sec. 1, of Amendments.

The Legislature has power to classify corporations for the purpose of taxation, may sever a small class from a larger one, and subject one class to taxation while it leaves another exempt without violating Art. IX., sec. 1, of the Constitution of Pennsylvania, or Art. XIV., sec. 1, of the Amendments to the Constitution of the United States.

As properties in the same class must be taxed without discrimination in the rate of tax imposed, the rule for ascertaining the value of the property must be the same in all cases.

The title of the Act of June 8, 1891, P. L. 229, viz: "An Act to provide increased revenues for the purpose of relieving the burdens of local taxation, being supplementary to an Act entitled 'An Act to provide revenues by taxation,' approved the seventh day of June, Anno Domini one thousand eight hundred and seventy-nine, amending the first, fourteenth, sixteenth, twentieth, twenty-first, twenty-fifth and twenty-sixth sections of an Act supplementary thereto, which became a law on the first day of June, Anno Domini one thousand eight hundred and eighty-nine, entitled 'A further supplement to an Act entitled "An Act to provide further revenue by taxation," approved the seventh day of June, Anno Domini one thousand eight hundred and seventy-nine,' and providing for greater uniformity of taxation by taxing all of the property of corporations, limited partnerships and joint stock associations having capital stock at the rate of five mills on each dollar of its actual value," is sufficient to cover those sections of the Act which provide a new method of assessing the value of stock for the purposes of taxation and repeal the former method.

When the title of an Act is an "Act supplementary to," etc., if the subject of the supplementary Act be germane to the subject of the original Act, the constitutional provision with reference to titles has been complied with.

Appeal of the Sharon Coal Company, Limited, defendant, from the judgment of the Common Pleas of Dauphin County, upon an appeal by the said company, from an account settled by the auditor-general and State treasurer, for tax on capital stock for the tax year 1892.

The case was tried by SIMONTON, P. J., without a jury. The facts and conclusions of law appear from his opinion as follows:—

"This is an appeal by the corporation defendant from the settlement of an account against it by the auditor-general and State treasurer for tax on capital stock for the tax year 1892, and it was tried by the Court, without a jury, under the Act of April 22, 1874.

FINDINGS OF FACT.

"1. The corporation defendant is, and was during the tax year 1892, a limited partnership, legally organized and doing business in this State. Its officers on February 18, 1893, made to the auditor-general, under the sanction of the prescribed oath, the capital stock report and appraisement of capital stock, required by section 4 of the Act of June 8, 1891 (P. L. 229.) It appeared from this report that the par value of defendant's capital stock was $36,000, divided into 360 shares of the par value of $100, each; that no dividends had been made during the year, nor had any amount been carried into surplus or sinking fund, but that the net earnings of the corporation for the tax year were $6,406.79. In the appraisement returned with the report, the president and secretary of defendant stated that 'in pursuance of our aforesaid oaths we have estimated and appraised the capital stock of said company at its actual value in cash, viz: 360 shares at $20.00 per share, amounting in the whole to $7,200.00.

"2. The auditor-general and State treasurer were not satisfied with and did not adopt this appraisement, but, as they understood to be their duty under the law, made an appraisement and fixed the value of the said capital stock at $106,779.83. In making this appraisement they had before them no other evidence of its actual value than that contained in the report made by the officers of the corporation as above stated; and this amount of $106,779.83 was adopted by them as the value of the capital stock, because it was the sum which, at 6 per cent., would produce $6,406.67, the amount of net earnings made by the corporation defendant, as shown by the report above mentioned. On this valuation so made by the auditor-general and State treasurer, an account was settled against the defendant for tax at the rate of five mills per cent., amounting to $537.90, from which settlement defendant duly appealed to this Court.

"3. No evidence other than the report above mentioned has been produced tending to show

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that the actual value in cash of the capital stock of defendant, between the 1st and 15th of November, 1892—the date as to which the appraisement is required by law to be made—was more than $7,200.00, the amount at which it was appraised by the officers of the corporation; and we find that it was not greater than this amount and that there were no sales of shares of defendant's stock at any time during the tax year 1892.

"4. The corporation defendant did not in 1892 own or have any interest in any real estate, except the right, subject to certain royalty, to remove coal from a tract of land upon which it had been for some time operating. In the beginning of 1892 the coal in said land was exhausted, except that which had been left to serve as supports to the roof of the mine, commonly called pillars. With the exception of a small amount subsequently removed, the coal in these pillars was entirely removed in 1892 and sold by the defendant for $6,406.79 over and above the expense of removing the same, which sum it returned to the auditor-general as net earnings. At the end of the year 1892 its coal was exhausted, and defendant had no assets except $95.32 in cash, $4,401.16 due on accounts, and certain machinery and tools amounting in all to $8,436.68, and it owed for royalty and wages $1,236.68, leaving $7,200.00 as the net value of its entire property and assets.

"It is not contended that the appraisement made by the officers of the corporation defendant was not made honestly and in good faith, or that it does not represent what they believed to be the actual value in cash of the capital stock of the corporation; nor have we been furnished with any evidence which shows that its actual value was greater than the amount at which it was appraised and we have found as a fact that it was not greater. The only reason, so far as has been shown, why the auditor-general and State treasurer were dissatisfied with the appraisement was that according to their construction of section 4 of the Act of 1891, the officers of the corporation were required to appraise the capital stock at an amount not less than a principal sum, 6 per cent., of which would equal the net earnings of the corporation during the tax year, and that as they had not done this it became the duty of the auditor-general and State treasurer to make an appraisement and settle an account on that basis, which they accordingly did.

"The sole question before us therefore is whether section 4 of the Act of 1891, required the actual value in cash of the capital stock of the corporation defendant to be fixed at not less than a sum, six per cent., of which would equal the net earnings of the corporation during the tax year.

"By the terms of the Act the officers of the corporation are required to 'estimate and appraise the capital stock of said company at its actual value in cash, not less, however, than the average price which said stock sold for during said year, and not less than the price or value indicated or measured by net earnings or by the amount of profit made and either declared in dividends, or carried into surplus or sinking fund.'

"The auditor-general and State treasurer construed this clause as if the words 'net earnings' were wholly independent of those which follow; and indeed, just as they would have construed it if all the words following had been omitted, and the Legislature had said, only, that the capital stock must be appraised at a sum not less than the price or value indicated or measured by net earnings.

"But the rest of the clause must have some meaning, and it is well settled that in construing statutes effect must if possible be given to every word used to express the legislative will, and nothing should be rejected, and nothing can be added except by implication from what is expressed.

"We must therefore inquire what force and effect is to be given to the rest of the clause. When we attempt to do this, the first question which meets us is, whether 'amount of profit made' means the same thing as 'net earnings' or is a separate and different thing. It is said in Jones Manf. Co. *v.* Commonwealth, 69 Pa. 137, that 'net earnings or income are the products of the business deducting the expenses only;' citing Commonwealth *v.* Penn Gas Coal Company, 62 Pa. 422, which is to the same effect. And in Eyster *v.* Centennial Board of Finance, 94 U. S. 503, it is said by Chief Justice WAITE, that the receipts of a corporation, over and above its current expenses, are the profits of its business.

"Both these definitions are undoubtedly correct, and combining them and assuming what is manifest that the receipts of a corporation are the products of its business, we arrive at the conclusion that if one of these, less expenses, equals its net earnings and the other, less expenses, equals its profits, the net earnings and profits must equal each other. Any other construction would, in our opinion, involve a manifest absurdity. For if the net earnings and the amount of profit made by a corporation are not the same, then clearly by the express terms of the Act the price or value of the capital stock is to be measured by one or the other of these only, and not by both; by net earnings *or* by amount of profit made. But in this event which, in any given case, is to be taken? And who is to determine which? And how can uniform taxes be

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assessed when one or other of two different measures of value may be adopted. As well might the Legislature prescribe as the rule to be adopted by local assessors in appraising real estate that they must assess it at the price at which it would sell for cash, or else on some other basis, as, for example, at the amount for which it would be accepted as security by a careful money lender—which would be much less than it would sell for—and leave it to the caprice of the assessor to adopt whichever test he might choose in each particular case. We shall not be willing to believe that the Legislature has prescribed alternative tests of value, either of which may be adopted at the will of the officers of the corporation, or of the auditor-general and State treasurer, in assessing capital stock, until it makes its intention so plain that it cannot be mistaken.

"But it is not the total amount of profit made which is prescribed as the test of the minimum value of the capital stock. It is the 'amount of profit made and either declared in dividends or carried into surplus or sinking fund.' The amount so applied may be much less than the whole amount of profit realized from the business of the year, and therefore much less than the whole net earnings. But if only so much of the profit as is so applied is to be used as a test, and if, as we have seen, the profit is the net earnings, then only so much of the net earnings as is 'either declared in dividends or carried into surplus or sinking fund' is prescribed as the test of minimum value. In other words, the correct construction of the clause in question is, that so much of the income of the corporation —whether called net earnings or amount of profit made—as is either declared in dividends or carried into surplus or sinking fund, is made the test of the minimum price of value of the capital stock; thus applying to the appraisement of the capital stock of all corporations subject to the tax the same rule that was applied in the Act of 1889 to those making no dividend, or less than six per cent., with a more distinct declaration than was contained in that Act, that additions to sinking fund are to be counted as dividends, and adding additions to surplus.

"We are not concerned in this case with the question—which is raised and will have to be determined in some other cases now before us—whether the Legislature intended to prescribe an absolute test, and if so, whether it can, in accordance with sound legal principles and the provisions of the Constitution, require such a test to be applied, in estimating and appraising the capital stock at its actual value in cash. There was no dividend made, nor any addition to surplus or sinking fund in this case; and the settlement of the auditor-general and State treasurer is based solely on the theory that the clause in question required them to appraise the capital stock at an amount not less than a sum, six per cent. of which would equal the net earnings. But if our construction be correct, this was a mistake, and the test prescribed by the Act did not apply, and the appraisement made by the officers of the corporation defendant, not having been shown to be erroneous or unfair in point of fact, must stand.

"We therefore arrive at the following:—

CONCLUSIONS OF LAW

"1. That the intent and meaning of section 4 of the Revenue Act of 1891, is that only so much of the income of a corporation—using this word as an equivalent for both net earnings and amount of profit made—as is 'made and either declared in dividends or carried into surplus or sinking fund,' is to be taken as the test of minimum value in appraising the capital stock of a corporation.

"2. That as no part of the net earnings of the corporation defendant was during the tax year 1892 declared in dividends or carried into surplus or sinking fund, the test prescribed by the Act for cases where dividends or additions to surplus or sinking fund are made, does not apply to the appraisement of its capital stock for said year, and therefore, in the absence of proof of fraud or error or undervaluation the appraisement made by its officers must be sustained.

3. That the Commonwealth is entitled to recover in this case as follows:—

Tax on $7,200.00, at five mills,	$36 00
Interest from May 3 to November 23, at 12 per cent. per annum,	2 40
Attorney-general's commission, .	1 80
Total, ...	$40 20

"For which amount judgment is directed to be entered for the Commonwealth, if exceptions be not filed according to law."

The defendant filed the following exceptions:—

1. The learned Court erred in not sustaining the sixth objection to the auditor general's settlement of account, specified in defendant's appeal, viz:—

"6. The Act of June 8, 1891, in so far as it imposes a tax of five mills upon the appraised value of the capital stock of appellant, is unconstitutional and void, because it discriminates between property owned by appellant, represented by its capital stock and included in the appraised value thereof, and similar property owned by natural persons and by other corporations, contrary to the provisions to section 1 of Article IX. of the Constitution of Pennsylvania, and

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section 1 of Article XIV. of the amendments to the Constitution of the United States."

2. The learned Court erred in not sustaining the ninth objection to the auditor-general's settlement of account, specified in defendant's appeal, viz:—

"9. The Act of June 8, 1891, under which, in part, the tax in controversy is claimed, is in conflict with section 1 of article IX. of the Constitution of Pennsylvania, and section 1 of article XIV. of the amendments to the Constitution of the United States, because it imposes a tax of five mills upon the capital stock of appellant, whereas by the same Act capital stock of certain other corporations is taxed at three mills only, and other property of the same class at four mills."

3. The learned Court erred in not sustaining the tenth objection to the auditor-general's settlement of account specified in defendant's appeal, viz:—

"10. The fourth and fifth sections of the Act of June 8, 1891, are unconstitutional and void, the purpose thereof not being clearly expressed in the title, as required by section 3 of article III. of the Constitution of Pennsylvania."

4. The learned Court erred in directing that judgment be entered in favor of the Commonwealth and against the defendant for $40.20.

5. The learned Court erred in not directing judgment to be entered in favor of the defendant and against the Commonwealth.

The Commonwealth also filed exceptions raising in effect the same questions disposed of in Commonwealth *v.* Edgerton Coal Company, see *supra*, p. 205.

The Court dismissed all the exceptions and entered judgment in accordance with the opinion. The defendant took this appeal, and assigned as error the overruling of its exceptions above noted.

M. E. Olmstead, for appellant.

W. U. Hensel, attorney-general (*James A. Stranahan*, deputy attorney-general, with him), for appellee.

October 1, 1894. PER CURIAM. The rule stated by the learned Judge of the Court below in Commonwealth *v.* Edgerton Coal Company, No. 27, May Term, 1894, of this Court, in which opinion has this day been filed, we think applicable to the facts of this case. Its application here in no way affects the judgment. The Court has found as a fact that the actual cash value of the whole stock was the amount estimated by the appraisers on the construction of the Act of 1891, that: "The amount and rate per cent. of dividends made, and the amount carried to surplus and sinking fund during the tax year, do not furnish an absolute indication or measure of the actual value in cash of the capital stock of a corporation, but are to be considered with all other relevant facts in determining what is its actual value in cash." On that rule we affirm this judgment.

The further claim is made by appellant, that the Act of 1891 is unconstitutional, in that, 1. It discriminates for purposes of taxation between property owned by appellant and property owned by natural persons and other corporations. 2. It is in conflict with section 1, article IX., of the Constitution of Pennsylvania, and section 1, article XIV. of the Constitution of the United States, because it imposes a tax of five mills on capital stock of appellant, and on stock of other corporations only three mills, and on other property of the same class only four mills. 3. The fourth and fifth sections of the Act are void, the subject thereof not being clearly expressed in the title, as required by Article III., section 3, of the Constitution of Pennsylvania.

As to the first and second objections, it has been settled that the Legislature can, without making the revenue statute obnoxious to the Constitution, classify corporations for purposes of taxation; may sever a small class from a larger one; might subject one class to taxation and leave others untaxed: Commonwealth *v.* Brewing Co., 145 Pa. 85, and the cases there cited. And in Commonwealth *v.* Delaware Division Canal Co., 123 Pa. 596, it was decided that a different basis of taxation might be adopted on mortgages and loans held by individuals and those held by corporations.

All properties, however, in the same class must be taxed without discrimination in the rate of tax imposed; and the rule for ascertaining the value of the property must be the same; the actual cash value of one capital stock in the same class cannot be ascertained from net earnings, another from profit, another from surplus, and another from dividends, for each method will produce a different valuation and result in inequality. But each may be taxed on the actual cash valuation from any relative evidence tending to establish the fact.

As to the third objection, that two sections of the Act are void because their subject is not expressed in the title, we think it cannot be sustained. The Act is entitled, "An Act to provide increased revenues for the purpose of relieving local taxation, being supplementary to an Act," etc., and then follows an enumeration of the Acts of which it is a supplement. The Act is a supplement to provide increased revenues by taxation. Every section of it is germane to the subject of the original bill, and it is decided in State Line and Juniata Railroad Company's Appeal, 77 Pa. 431; Millvale Borough *v.* Evergreen Railway Company, 131 Id. 19, and in

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Craig *v.* Presbyterian Church, 88 Id. 42, that if the subject of the supplementary Act be germane to the subject of the original Act, it is a sufficient compliance with the mandate of the Constitution.

None of appellant's assignments of error are sustained, therefore the judgment is affirmed and appeal dismissed at costs of appellant.

H. B.

May, '93, 33. May 28, 1894.

Commonwealth v. The Philadelphia and Erie R. R. Co.

Taxation—Exemption—Act of June 7, 1879—Act of February 10, 1852—Repeal—Net earnings.

A binding contract for exemption from taxation may be made between a corporation and the Commonwealth by an Act supplemental to the charter of incorporation; it is not necessary for its validity that it be contained in the charter itself.

In a settlement with the Commonwealth for taxes on the capital based on the net earnings of the company, it is proper to deduct from the gross receipts the amount paid for use of equipment to another company.

Where a supplement to its charter, which exempts certain stock from taxation has been adopted by a company, the general repealing clause in a later Act will not repeal the supplement.

Commonwealth *v.* Pottsville Water Co., 94 Pa. 516, followed.

Appeal of the Philadelphia and Erie R. R. Co. from the judgment of the Common Pleas of Dauphin County, entered in an appeal from a settlement made by the auditor-general and State treasurer for taxes on the capital stock of the appellant.

The appellant was incorporated as the Sunbury and Erie Railroad Company, by Act of Assembly of April 3, 1837 (P. L. 170), with a capital of $6,000,000; by virtue of the Acts of March 9, 1865 (P. L. 291), and March 7, 1868 (P. L. 289), it was authorized to issue preferred stock to the amount of $2,400,000.

On March 27, 1852 (P. L. 186), an Act was approved in supplement to the Act of Incorporation, which enacted as follows:

"Section 11. That inasmuch as the construction of this railroad will tend to develop the resources and increase the revenue of the Commonwealth, the property which the said president and managers hold or may acquire under the charter for the benefit of the stockholders, shall be exempt from taxation for State purposes till the road is completed. *Provided*, That such exemption shall not extend to a period longer than five years from the passage of this supplement." (P. L. 1852, p. 186, 189). And this recital of expected benefits is repeated in section 1 of Act approved May 21, 1857. (P. L. p. 647).

A statute was also passed, approved March 7, 1861, changing the corporate name of the company to the Philadelphia and Erie Railroad Co. (P. L. 94).

On February 10, 1852 (P. L. 42), a supplemental Act was approved authorizing, *inter alia*, municipal and other subscriptions to the capital stock of the company, at the end of which was the following:

"*Provided further*, That the stock of the said company shall not be subject to any tax in consequence of the payment of the interest hereby authorized, *nor until the net earnings of the company shall realize at least six per centum per annum upon the capital invested.*"

This Act was formally accepted by a vote of the stockholders, February 13, 1852.

In 1862, the appellant company was leased to the Pennsylvania Railroad Company.

The settlement made was as follows:

Appraised value of capital common stock, ...	$4,785,000.00	
Tax three mills		$14,355.00
Dividend seven per cent. on special stock, ...	2,400,000.00	
Tax three and one half mills (one-half mill for each one per cent. of dividend) . . .		8,400.00
Due Commonwealth		$22,755.00

From which the railroad company appealed.

The Court below confirmed the settlement, and entered judgment against appellants for $26,850.90.

L. W. Hall (*F. Jordan* with him), for appellants.

"Net earnings" means the earnings that remain after deducting all charges and outlay.

Anderson's Dictionary of Law, 708.
St. John *v.* Erie R. R. Co., 22 Wallace, 148.
Railway *v.* U. S., 99 U. S. 420.

The company having promptly accepted the supplemental enactments of February 10 and March 27, 1852, to its charter, the State had no power to abrogate the contract.

Railroad *v.* Alsbrook, 146 U. S. 279.
Hans *v.* Louisiana, 134 U. S. 1-20-21.

"The power of the Legislature of Pennsylvania in grants and contracts, is limited and restrained by the Federal and State Constitutions, so that it cannot impair contracts made either by itself or others."

Com'th *v.* Pitt. and Connellsville R. R. Co., 58 Pa. 26.

"If the Legislature, in creating a corporation,

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prescribe a rate of taxation, *and expressly release the power to impose further taxes*, or do not expressly reserve the power to themselves, a subsequent tax law does not impair the obligation of the contract, and is void."

Bank *v.* Pittsburg, 37 Pa. 340, 347.
Com'th *v.* Pottsville Water Co., 94 Pa. 516.

James A. Stranahan, deputy attorney-general, and *W. U. Hensel*, attorney-general, for appellee.

The exemption claimed does not exist, for the reason that it was not granted in the charter of the defendant company, and is therefore no part of the contract between the Commonwealth and defendant, but is a mere gratuity which the Legislature could withdraw at pleasure, and it did withdraw it by passing the Act of June 7, 1879, taxing the capital stock of all railroad corporations.

Union Improvement Company *v.* Pennsylvania, 69 Pa. 140.
Christ's Church Hospital *v.* Philadelphia, 24 How. 302.
Tucker *v.* Ferguson, 27 Wallace, 527.
Wisconsin Railroad Company *v.* Supervisors, 3 Otto, 595.

The General Taxing Acts of 1859 and 1868, as well as the Constitution of 1874, and subsequent Revenue Acts, have repealed all special exemptions.

Com'th *v.* Pittsburg and Connellsville Railroad, 2 Pearson, 389.
Com'th *v.* Fayette County Railroad, 55 Pa. 452.
Com'th *v.* Improvement Co., 69 Id. 140.

October 1, 1894. GREEN, J. The learned Court below found specifically that "If the net earnings are what remains after the operating expenses and the amount charged for interest on equipment have been deducted, the net earnings did not, in 1888, amount to six per cent. on the capital invested; but if the net earnings are the gross receipts, less operating expenses only, the net earnings were more than six per cent." The designated sum of money which constituted the amount paid for the use of the equipment was $168,403.75, and the learned Court below decided that this could not be regarded as a part of the operating expenses of the road and, therefore, declined to deduct the sum from the aggregate of the gross earnings. We find ourselves unable to agree to this conclusion. The sum paid for the use of the equipment was, by the agreement of the lessor and lessee corporations, determined by an allowance of interest on the entire cost of the equipment. The lessor company did not have an equipment, and had not the money to pay for it. It was, therefore, furnished by the lessee company, and, by the contract of 1870, a reasonable compensation for its use, "not exceeding seven per cent. per annum for the capital actually invested in supplies, engines and cars required and employed," was to be allowed by the lessor company. The subject is thus explained in the testimony: "The equipment was leased from the Pennsylvania Railroad Company. The Philadelphia and Erie did not own their equipment; they leased it from the Pennsylvania Railroad, and paid the interest on the valuation. The valuation was changed from time to time, and interest on the valuation was paid. We always considered that as one of the operating expenses, although it was stated partly in the reports of the company. . . . . Q. Will you state what rental you paid to the Pennsylvania Railroad Company for the equipment which you so leased during the year 1888? Ans. First, the rental was seven (7) per cent. on the valuation, but it was reduced by the Pennsylvania Company to six per cent. I do not remember the exact year in which the reduction was made, but my impression is it was six per cent. at the time." The witness subsequently stated that the amount paid for the year 1888, was $168,403.75. The learned Court below thought that this money should be treated simply as interest paid on borrowed capital, and that such money cannot be deducted from gross receipts as part of the operating expenses. We do not think so. In actual fact it was not interest on borrowed capital, because there was no borrowed capital in the case. The lessor did not borrow the money from the lessee and construct its own equipment, hence, it could not be indebted to the lessee for any interest on borrowed capital. The lessee was and continues to be the owner of the equipment, and the lessor paid for the use of it, distinctively as such. It was entirely competent for the parties to regulate the rental to be paid for the use of it by an annual percentage on its cost. Its fundamental character as rental was not changed, but the manner in which the amount of the rental was determined; it was still rental or compensation for the use of the equipment. It is a method of compensation for the use of property and not at all uncommon in the business world. Regarding this sum of $168,403.75, then, as compensation for the use of the equipment, we can see no good reason why it should not be regarded as a part of the operating expenses of the road. Engines, and freight cars, and passenger cars, and the necessary supplies, are as essential to the running of the road as rails, and cross-ties, and stations, and the supplies necessary to them. The road cannot be run at all without them, and if they have to be hired because the company is unable to own them, we cannot understand why the cost of hiring them should not be regarded as a part of the operating expenses. We are not referred to any authority holding a contrary

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doctrine. The cases of Commonwealth *v.* Penn Gas Coal Company, 62 Pa. 241, and Commonwealth *v.* Ocean Oil Company, 59 Pa. 61, cited by the appellee, are not at all in point. They raise a very different question, but they do recognize and state a proposition with which our conclusion is in entire harmony, to wit, that "net earnings or income, are the product of the business, deducting expenses only." A more comprehensive and accurate definition is the following, taken from Anderson's Dic. of Law, 390, "As a general proposition the net earnings of a railroad company are the excess of the gross earnings over the expenditures defrayed in producing them, aside from, and exclusive of, the expenditure of capital laid out in constructing and equipping the works themselves." St. John *v.* Erie Railway Company, 22 Wall. 148; Railway Company *v.* United States, 99 U. S. Rep. 420.

Compensation for the use of equipment, which is hired and not owned, is most certainly part of the expense of producing the business which is transacted, and is therefore a part of the operating expenses. We, therefore, hold that the sum in question should be deducted from the gross earnings, and, that being done, the amount of net earnings is not equal to six per cent. on the capital invested, and the exempting clause of the Act of 1852 becomes applicable, unless for some other reason it is unavailable.

The learned Court below held that this clause was not applicable because it was repealed, and the argument to establish a repeal, was, that by the general law of June 7, 1879, taxation was imposed upon the capital stock of all railroad corporations, and, therefore, although this exemption was special and particular, it was repealed by implication. The question is not discussed in the opinion but the intention to repeal is assumed, and the question that is discussed is, whether the Legislature had the power to repeal.

There are no repealing words in the Act of 1879, of the Act of 1852, and there is nothing but the usual clause repealing laws or parts of laws inconsistent with the Act. But that a mere general law without negative words cannot repeal a previous special statute, although the provisions of the two Acts are different, has been so frequently decided that it must be regarded as settled law. In Brown *v.* County Commissioners, 21 Pa. 37, we said, "It is well settled that a general statute without negative words cannot repeal a previous statute which is particular even though the provisions of the one be different from the other. . . . . It is against reason to suppose that the Legislature, in framing a general system for the State, intended to repeal a special Act which the local circumstances of one county had made necessary." To the same effect are Malloy *v.* Commonwealth, 115 Pa. 25; Morrison *v.* Fayette County, 127 Pa. 110; Homer *v.* Commonwealth, 106 Pa. 221; In re Royersford Bridge, 112 Pa. 627; Evans *v.* Phillipi, 117 Pa. 226; Malloy *v.* Rinehart, 115 Pa. 25; Hendrix's Account, 146 Pa. 285; Trust Company *v.* Fricke, 152 Pa. 231.

In Commonwealth *v.* Pottsville Water Company, 94 Pa. 516, we decided that the repealing clause at the end of a public general Act repealing all Acts inconsistent with it, did not repeal the inconsistent provisions of special Acts granting exemption from taxation.

We hold, therefore, that the exempting clause of the Act of February 10, 1852 (P. L. 42), was not intended to be repealed, by the general taxing law of 1879, and is therefore yet in force.

The discussion of the question, therefore, whether the Legislature had the power to repeal that clause is rendered unnecessary. But were it important to consider that question, we should hold that the granting of this exemption was not a mere gratuity, but was a grant, upon the faith of which, it was intended by the Legislature that subscriptions by other corporations to the capital stock of the Sunbury and Erie Railroad Company, should be solicited and obtained. It was an inducement to make such subscriptions for the benefit, not only of the company, but of the Commonwealth, that was thus held out, and it would be an act of bad faith, after such subscriptions had been obtained, to take away the inducement by even an express repeal. It would be bad faith to the subscribers, because it would change the conditions upon which their contracts of subscription were made, and it would be bad faith both to the company and the subscribers, because it would diminish the ability of the company to pay either interest or dividends on the stock subscribed. The amount required to pay taxes on the capital stock of the company, if the exception clause were repealed, would be a most serious impairment of the financial ability of the company, which had never earned money enough up to 1888, to pay a single dividend to its stockholders, which had with the utmost difficulty been able to sustain its solvency, and whose whole corporate life was an incessant struggle for mere existence. This is fully proved by the tabulated statement given in evidence on the trial, showing the condition of the capital stock, common and special, the funded debt, the net earnings, the fixed charges, and the surplus or deficiency, for each year, from 1852 to 1888. During much of this time very heavy annual deficiencies were accumulated against the company, showing their inability to pay their fixed charges. After the acceptance by the company of the Act of February 10, 1852, new subscription books were opened, containing a copy

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on the first page, of the second section of the Act which granted the exception, and very large amounts of money were subscribed by individuals and corporations to the capital stock of the company, and several millions of dollars were thus raised. It then became the duty of the company to proceed with the construction of the road, and this they did, until it was completed through its whole length to the City of Erie, in the year 1864. The advantage to the Commonwealth of the completion of this great enterprise, was fully recognized and recited in the Act of March 27, 1852 (P. L. 186), wherein it is declared, the "construction of this railroad will tend to develop the resources and increase the revenue of the Commonwealth," and in the fourth section of the supplemental Act of May 21, 1857 (P. L. 647), whereby it is enacted "That in consideration of the advantages which the Commonwealth will derive from the completion of the said railroad by the improvement of the country through which it will pass, and the consequent increase of the public revenues," the bonds and property of the company, and all municipal bonds issued for stock, shall be exempt from taxation for ten years. It therefore appears that the Commonwealth, desiring to have its territory improved, and its revenues increased, contracted with this company, that if it obtained an increase of its capital so as to complete its road by obtaining municipal and other subscriptions to its capital stock, "the stock of the said company shall not be subject to any tax in consequence of the payment of the interest hereby authorized, nor until the net earnings of the company shall realize at least six per centum per annum upon the capital invested." On the part of the company, it was to obtain and did obtain, very large additional subscriptions to its capital stock, and in consequence thereof it became subject to a duty, to proceed with and carry on the construction of its railroad to the full extent of its increased capital, and this duty was performed during the succeeding years until in 1864 the entire road was completed. In order to induce these additional subscriptions the Commonwealth promised the company and the subscribers that the whole stock of the company should be exempt from taxation until "the net earnings of the company shall realize at least six per centum per annum upon the capital invested."

The full benefit and advantage of this contract has accrued to the Commonwealth. Her territory has been vastly improved over the whole length of the road. Great business interests have been established, towns and cities have been built, population has largely increased, and a region which was an almost unbroken wilderness in 1852, when the Act in question was passed, is now a cultivated country abounding with population, pursuing innumerable industries, and contributing immensely to the wealth of the Commonwealth and to the increase of its revenues. Upon no principle of common justice, of sound morality, or of settled law, can she be permitted to repudiate her contract and deny her obligation. In our judgment the grant of exemption from taxation in the Act of 1852, was a term of a contract, and in no sense a mere gratuity, held out as a bait to allure innocent citizens and municipalities to part with their money, and then to deny them the promised consideration upon which it was given. But the Commonwealth has not expressed any such purpose. The exempting Act of 1852, and the general taxing law of 1879, can easily stand together and be administered without any conflict, and therefore there is no necessary inference of inconsistency upon which to found a repeal by implication.

All the law there is in this question has been fully settled by the decision of this Court in the case of Commonwealth *v.* Pottsville Water Company, 94 Pa. 516, before cited. There the exempting language was contained, as here, not in the charter, but in a supplemental Act, and was precisely similar in its character and almost in its words. Thus in that case, the words were, "The stock in said company shall be exempt from all taxation whatsoever." Here the words are, "The stock of said company shall not be subject to any tax," etc., etc. In that case we held that the exemption was binding on the Commonwealth, and that the tax claimed by the accounting officers could not be collected. The same contention was made there as here, to wit, that a general taxing law passed subsequently to the exempting Act, operated as a repeal by implication. We denied that proposition, but we also held that an express repeal would have been inoperative, because the exemption was part of a contract and not a gratuity, and was therefore beyond the power of the Commonwealth to repeal. We then held that an increase of capital from $50,000 to $200,000 occasioned a resulting increase in the rights and duties of the company, to bring water from a greater distance, and introduce it into other towns. We said, "The enlarged duties and obligations imposed by the Act substantially created a new corporation. It is no answer to say the corporation was not bound to assume these new powers and duties. That is true, yet it did assume them. Relying thereon it made large expenditures. . . . . Although free to accept or reject, yet having accepted, all the rights and exceptions given by the Act follow. The learned Judge correctly held the stock of the company exempt from taxation."

Some matters of minor importance are dis-

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cussed in the opinion of the learned Court below and the paper books, but they need only a brief consideration. The learned Judge thought, and so held, that the exception was a matter personal to the lessor corporation, and was forfeited to it because of the leases made by it to the Pennsylvania Railroad Company. It was considered that the lessor corporation thereby surrendered all its right to control and operate its railroad, and to determine its rates of tolls, freights and charges, and that therefore it had no net earnings nor any power to determine the conditions upon which the amount of net earnings depended. We are unable to assent to these conclusions. The reasoning simply results in a question of fact as to what the net earnings were, and if there were any dispute as to that it would have to be determined by testimony and found by the Court. But no such question was raised on the trial, and, as we understand there is no actual controversy now upon that subject. The independent existence of the lessor company has at all times been maintained and still is. It is, and always has been, regarded by the taxing officers as an actual corporation, having its own separate and independent existence, its own officers, its own capital stock, its own funded debt, its own earnings gross and net, and in all respects a proper subject of taxation. If it can be taxed at all, it can only be upon the conditions which the law creates, and subject to the limitations which the law imposes. If the Commonwealth has exempted it from taxation in any respect, it is entitled to the benefit of such exemption, because the exemption is a part of the law under which any tax can be imposed or collected. The tax cannot be collected except according to the law which regulates it, and the exemption is a part of that law.

On the whole case, we are of opinion that the exemption of the Act of February 10, 1852, prevails, and that the defendant is not liable to the tax sought to be imposed. The assignments of error are sustained.

The judgment of the Court below is reversed, and judgment is now entered for the defendant, with costs. W. D. N.

July, '93, 100. January 19, 1894.

Fryer et al. v. Magill.

Ejectment—Municipal liens for taxes—Registry—Act March 29, 1867.

A vendee of the sheriff under a levari facias sur municipal lien for taxes will take no title if the deed to the actual owners at the time the taxes were assessed had been left at the surveyor's office for registration under the provisions of the Act of March 29, 1867, although the registration was inaccurately performed, unless the actual owners had been served with the scire facias sur claim "as in the case of suit by summons."

Appeal of Edward W. Magill, assignee of John Bardsley, defendant, from the judgment of the Common Pleas No. 3, for the County of Philadelphia, entered on a case stated in an action of ejectment, wherein Anna M. Fryer, individually and as trustee under the will of Joseph C. Fryer, deceased, and Charles E. Claghorn were plaintiffs.

The facts of the case appeared from the case stated to be as follows:

On July 24, 1858, Henry Holthausen, Charles E. Claghorn and Joseph C. Fryer acquired by purchase, as tenants in common in equal shares, a tract of ground in the Twenty-second Ward, Philadelphia, at the northeast corner of Twenty-first and Costello streets, containing 336 feet on Twenty-first street and 153 feet 4½ inches on Costello street, and their deed therefor was duly recorded September 23, 1858.

On January 7, 1871, this deed was taken to the registry bureau in the chief surveyor's office in the City of Philadelphia for registration under the provisions of the Act of March 29, 1867. The registry was not made in the name of the three tenants in common but merely thus, "Henry Holthausen et al."

The taxes for the years 1879, 1880, 1881 and 1882 were not paid and a lien was filed for them in the name of "Myers and Claghorn." The proceedings whereon are shown by the following entries in the mechanics' lien docket of Court of Common Pleas, No. 3, of September term, 1883:

8, 11, '88 Warwick, 421.	The City of Phila. v Myers & Claghorn, Owners, etc. Nov. 10, 1888, suggestion filed that Henry Holthausen et al. are A. and P. owners. Eo die, afft. service of notice filed. Eo die, afft. under Act June 10, 1881. Nov. 12, 1888, sci. fa. exit Ret. 1 Mon. Dec., 1888. Made known by posting and advertising Nihil Habet as to Myers & Claghorn, owner, etc., and Henry Holthausen et al., actual and present owner. May 6, 1889, judgt. for want of an appearance. Eo die, damages assessed at $107.35. June 6, 1889, lev. fa. exit Ret 1 Mon. July, 1889. Sold to John Bardsley for $162 Deed recorded in Sheriff's Deed-Book, No. 134, page 440, etc.	Claim for $81.06 for Registered Taxes, 1879-80-81-82, agst. lot of ground N. E. corner of Costello and 21st Sts., in 22d Ward, Phila., contg. in front on Costello St. 153 ft. 4½ ins., and in depth 336 ft. 11 ins. on 21st St. Filed Nov. 13, 1888. Oct. 22, 1889, by order of Warwick, Esq., Attorney for plaintiff, filed this claim is satisfied. Sheriff for costs.

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On May 21, 1891, John Bardsley and wife, by deed duly recorded in deed-book T. G., No. 49, page 217, etc., granted and assigned, *inter alia*, the premises so purchased to Edward W. Magill.

On May 22, 1893, the Court entered judgment as follows:

Judgment upon the case stated for Charles S. Claghorn for one undivided third part of the said described premises.

Judgment for the plaintiff, Anna M. Fryer, individually and as trustee under the will of Joseph C. Fryer, deceased, for an undivided third part of said premises.

R. Alexander, for appellant.

The spirit of tax legislation is to make the *land*, not the person the debtor.

Act March 11, 1846, sec. 4, (P. L. 114.)
Jones *v.* Shawhan, 4 W. & S. 257.
Northern Liberties *v.* Coates, 3 Harris, 245.
Delaney *v.* Gault, 30 Pa. 63.

The record of the case shows careful attention to the provisions of the Act of June 10, 1881, § 1, (P. L. 91) and the proceedings were perfectly regular.

The clause in Act of 1867, requiring sale in name of owner as returned, did not, therefore, apply when Bardsley took title under the Act of 1881, and his title is valid and perfect, and the finding of the Court should be for the defendant in this case.

William C. Hannis, for appellees.

The proceedings and sale of the property as to the interest of appellees were void because they were not conducted "in the name of such owner after service of process upon him as in the case of a suit by summons."

Simons *v.* Kern, 92 Pa. 455.
Gans *v.* Philadelphia, 102 Id. 97.

The Act of Assembly of June 10, 1881, P. L. 91, on the effect of which the appellant places his sole reliance, is of no importance in this case, for two reasons:

1. Because the whole proceedings show that there was no effort made to find the owners, Charles E. Claghorn and Joseph C. Fryer, who were only represented in the proceedings by the words "et al.," and might as well have been represented by "John Doe," and that the whole effort was directed to finding and serving Henry Holthausen.

2. The Act is unconstitutional (Art. 3, Sect. 7, of the Constitution), because it relates to practice or jurisdiction in judicial proceedings, and "changing methods for the collection of debts, or the enforcing of judgments, or prescribing the effect of judicial sales of real estate," and is local in being limited only to cities of the first class.

See the case of City *v.* Church, 115 Pa. 291, in which a similar Act of Assembly relating to municipal claims in cities of the first class was declared unconstitutional.

See also, as to what is local legislation:

Weinman *v.* Railway Co., 118 Pa. 192.
In re Ruan St., 132 Id. 257.
In re Wyoming St., 137 Id. 502.
Ayar's App., 122 Id. 266.
City *v.* Whyte, 148 Id. 419.
Reeves *v.* Traction Co., 152 Id. 153.
Perkins *v.* Philadelphia, 156 Id. 554.

October 1, 1894. STERRETT, C. J. After reciting the facts agreed upon, the case stated provides as follows: "If, on the above facts, the Court shall be of opinion that after said registry no sale for taxes could lawfully be had of the interest of the said plaintiffs in said property, or of either of them, without having their names or either of their names suggested as the actual owners, and until after service of the writ on them and recovery by suit against them, made as in the case of summons, then judgment to be entered for the plaintiff, Charles E. Claghorn, for one undivided third part of said premises, and judgment to be entered for the plaintiff, Anna M. Fryer, individually and as trustee under the will of Joseph C. Fryer, deceased, for one other undivided third part of said premises; otherwise judgment to be entered for the defendant," etc. Judgment was accordingly entered on the case stated in favor of each of said plaintiffs for one undivided third part of the premises in controversy; and of this the defendant complains.

It was claimed by plaintiffs that the "registry" of their deed referred to was defective in that it did not set forth the individual names of the three vendees given in said deed, and that this negligent omission of the chief engineer and surveyor of the city was perpetuated by the city solicitor when suit was brought to enforce payment of delinquent taxes.

On July 24, 1858, Henry Holthausen, Charles E. Claghorn and Joseph C. Fryer purchased, as tenants in common in equal shares, the land in question, and their deed therefor was duly recorded September 23, following. As required by the Registry Act, they presented the deed to the proper officer for registry, and he stamped thereon that the same was duly registered January 7, 1871. Having thus performed their duty, the said owners had a right to rely upon the guarantee of the Registry Act that no proceeding should be taken against their property except by process issued in their names as registered owners and that proper effort would be made to serve such process on them. The Act declares: "If said duty . . . . shall have been discharged by the party who shall have acquired

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title, in whatsoever manner, before the tax accrued as a lien of record, for which the same shall have been sold, the purchaser at the tax sale shall not acquire the title of such person who shall have performed said duty, or of his heirs and assigns, unless the sale shall have been made in the name of such owner, after service of process upon him, as in the case of suit by summons."

As has been suggested, the property was carelessly and negligently registered, not in the names of three owners, as it should have been, but in the name, "Henry Holthausen et al." The abbreviation "et al." was thus substituted for the name of Charles E. Claghorn and Joseph C. Fryer, two of the owners. This was never corrected, nor does it appear that any effort was made to correct it. On the contrary, when the city filed its claim, the patent blunder of the registry bureau was repeated by the law department, notwithstanding the registry disclosed the date of the deed, etc., and the words, "et al.," clearly indicated that Henry Holthausen was not the only owner. The result was that plaintiffs were deprived of that protection which it was the chief object of the Registry Act to ensure. The Court was clearly right in virtually holding that the proceedings, from the defective registration down to the sale of the property, both inclusive, were a series of blunders, the consequences of which could not be visited on the plaintiffs. If defendant's contention should prevail, the Registry Act, instead of being a protection to law-observing property owners, would be a snare into which any one might fall.

Throughout the proceedings, by which it is claimed plaintiff's title was divested, the ownership was treated as being in a single person, Henry Holthausen. Efforts to find and serve him were of course fruitless because of his disappearance; but it does not appear that any effort was put forth to ascertain who were represented by the words, "et al.," on the registry. Reference to the record of the deed would have readily furnished that information. There is nothing in the record that would justify a reversal of the judgment.

Judgment affirmed.

NOTE: That the lien being for taxes for the years 1879-80-81-82 and the scire facias sur claim not having issued until November 12, 1888, it was too late to preserve the lien and all proceedings upon it were void:

See City v. Hiester, 142 Pa. 39.
Same v. Baker, Id.

W. D. N.

July, '93, 116. January 11, 1894.

Fuhrmeister v. Wilson et al.

Practice—Pleading— Sale— Delivery— Master and servant—Negligence—Evidence.

If a statement in an action for damages for personal injuries alleges a specific act of negligence, as the cause, and issue is joined on this allegation, the inquiry at the trial should be confined to this issue.

Where goods are sold to be delivered to the purchasers, whose place of business is on the upper floor of a factory, the delivery is not complete until the goods are fastened to the lift for the purpose of being hoisted to the upper floor; and if the same were negligently fastened to the lift the purchasers are not responsible for the consequences.

It is essential to the maintenance of an action of this nature that the plaintiff should prove an act or omission on the part of the defendants which constituted negligence, and that it was the proximate cause of the injury.

Appeal of Samuel C. Wilson, et al., from the judgment of the Common Pleas No. 3, of Philadelphia County on a verdict for plaintiff, August Fuhrmeister, in an action for damages for personal injuries.

On the trial, before FINLETTER, P. J., it appeared that plaintiff was employed by Ring & Bros. in the ground floor of their mill, of which they used the two lower floors. Defendants were tenants of said Ring & Bros., and occupied the third and fourth floors of their mill. Defendants purchased some wool from Firth & Foster, and the latter's driver delivered the same on July 13, 1892, and during the delivery the accident occurred which plaintiff described as follows:—

"I was on the first floor sorting a bag of wool, and there was some cotton amongst it, and I sorted that out, and while I was engaged in doing that I heard a wagon come up on the platform, and I saw the chain where we hoist the stuff off the wagon. I was engaged in sorting that bag of wool about half an hour, and I got through with my work and I took the bag and folded it up, and I saw it was the driver of Firth & Foster's dye works, and the man was standing on the back of the wagon with his head down like this ——, and he was always a lively man and I thought he was sick, and I spoke to him while I was folding the bag up, and he made a remark about the hot weather, and I said it was terrible hot especially where the sun was against a high building, and we were talking together for a while, and I put the bag away, and as I came back Mr. Corrigan, the driver, asked me to hand him his hat, which had fallen down on the platform, and I stooped down and picked it up, and as I straightened up to hand it to him these bags came down on me and knocked me down, and I was taken away."

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Plaintiff also testified that the hoist chain had stopped working at least fifteen minutes before the accident. Tustin, a witness for plaintiff, that it was ten or fifteen minutes. John Corrigan, the driver, who was called by plaintiff, testified on the other hand that no time had elapsed in which the bags could have hung suspended.

Counsel for defendant requested the Court to direct a verdict for defendant. Refused. (Fourth assignment of error.)

The Court charged, *inter alia*, as follows:—

"This action is brought by the plaintiff to recover damages for injuries alleged to have resulted from the negligence of the defendant or of the defendant's employés. To recover, it must be clearly established to your satisfaction, first, that the defendant or his employés were negligent, and, secondly, that the plaintiff himself was not negligent in any manner contributing to the injury. Unless both of these propositions are established by the evidence your verdict must be for the defendant. You understand, that the defendant is responsible for the act of those in his employment, and [it appears from the evidence that at this time they were using the lift in and about the business of the defendant]. They were raising the bags of wool from the platform to the room above, which was occupied by the defendant. They were in sole charge of the lift, and it therefore became their duty to use the lift in a careful and proper manner and to exercise all the care necessary for the protection of anyone who might be about the premises, or who might be subject to the dangers which would result from it. [They had charge of the lift, therefore from the time the goods were delivered on the platform, until they were raised to the room in which they were working.]

"From the evidence in this case, it appears that the bags slipped from the rope by which they were being raised from the platform to the room above. I think there can be no controversy about that because it is in evidence that the rope itself did not break, —— and these very same bags were subsequently raised by that same rope. Therefore it may be taken as being clearly established that the bags themselves slipped from the fastenings. It is your duty to ascertain from the evidence whether they slipped from the rope because they had not been properly fastened in it. [If you find from this evidence that they were not properly fastened, then the negligence of the defendant is established.] . . . . It might very well be that the bags were securely fastened in order to lift them to the room in which they were to be stored, and were not sufficiently fastened to allow them to remain there for ten or fifteen minutes swinging and swaying in the wind. These are questions for you to consider. It might very well be that they were sufficiently fastened for all ordinary purposes, and if that were so it was not necessary to have them hang in the air for ten or fifteen minutes, or for any indefinite time. If they did remain there for ten or fifteen minutes, that would be evidence of negligence on the part of the defendant."

The jury found a verdict for plaintiff for $800, and under instructions of the Court they also found as special facts:—

First. That the lift was not running when the bags fell.

Second. That the bags did remain lifted up toward the room of defendants, but that they (the jury) could not say how many minutes.

Defendant filed the following motion in arrest of judgment:—

"Because under the charge of the Court the jury were instructed that if they found as a fact that the bag of wool which fell on the plaintiff and injured him, slipped out and fell because it was improperly fastened in the lift or hoisting apparatus, that then negligence was proven on the part of defendants, whereas the statement of plaintiff's cause of action did not allege this act as the act of negligence complained of, but did allege another cause or act of negligence, entirely separate and distinct in its character from the act of fastening the bag in the lift, and it does not appear that the verdict of the jury establishes the act of negligence complained of."

The Court dismissed this motion and judgment was entered on the verdict.

Defendant appealed, assigning for error the portions of the charge in brackets and the dismissal of the motion.

Edwin O. Michener, for appellants.

The driver was not the servant of defendants so as to make them liable for his negligence.

Michael *v.* Stanton, 3 Hun. 462.
Addison on Contracts, 52.
Story on Agency, ¶ 453.
14 A. & E. Ency. p. 804.

The evidence showed a case of contributory negligence.

City *v.* Fischer, 111 Pa. 13.

John M. Vanderslice, for appellee.

October 1, 1894. McCollum, J. Is there any evidence in this case which authorizes an inference that the plaintiff's injury was caused by the defendant's negligence? It is alleged in the plaintiff's statement that the defendant negligently left heavy bags of wool suspended from the hoisting apparatus on the outside of the building, and that the bags became detached from it and fell upon the plaintiff while he was lawfully passing out of the doorway below them. Issue was joined on this allegation, and under

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the pleadings the inquiry on the trial should have been confined to it. The evidence in support of the plaintiff's side of the issue thus made was meagre. It consisted of his own testimony, corroborated somewhat by two of his witnesses, to the effect that the hoisting apparatus was not running when the bags fell from it. The jury were instructed in substance that they might infer from this testimony that the defendants allowed the bags to remain suspended, "swinging and swaying in the wind," for an unreasonable length of time, and that such an inference would support a verdict in favor of the plaintiff unless it appeared there was contributory negligence on his part. It should be stated in this connection that there was no direct evidence that the bags were suspended from the hoisting apparatus longer than was necessary to convey them from the wagon to that portion of the building occupied by the defendants, or that there was any wind which obstructed or interfered with the transfer of them from the former to the latter place. Indeed, the only direct and positive evidence produced by the plaintiff on this branch of the case clearly and expressly negatived his theory that the bags were suspended from the lift an unreasonable time. It was in exact accord with the evidence submitted by the defendants on the same point, and was to the effect that the bags fell from the lift while they were being hoisted to the third floor.

The special finding furnished no basis for a conclusion that the bags fell in consequence of an act or omission of the defendants. The jury were asked to find specially "whether the goods remained lifted up toward the room of the defendants for ten or fifteen minutes, or for any other unreasonable length of time," but they did not do so. In the special finding, considered by itself, there was nothing to convict the defendants of negligence in the affair under investigation. It was consistent with the exercise of due care and diligence by them in transferring the wool from the lift to the part of the building they occupied. We may therefore reasonably conclude that the verdict was the result of a belief by the jury that Corrigan improperly fastened the bags to the hoist and that the defendants were chargeable with the consequences of his carelessness. If the jury were satisfied that he was negligent, and that the plaintiff was not, it was their plain duty under the instructions they received from the Court to render the verdict they did. But were the defendants liable for an injury inflicted by the negligence of Corrigan in fastening the bags to the hoist? He was not in their service at the time. In unloading the bags from the wagon he represented his employers for whose acts the defendants were in nowise responsible. While the bags were in the wagon before they were attached to the lift they were in the possession and under the control of Corrigan's employers. The delivery of them was not complete until they were fastened to the lift for the purpose of being hoisted to the third floor. The fastening of the bags to the lift was the final act in the delivery of them. It was an act in discharge of a duty which rested on Corrigan's employers, and if there was negligence in the performance of that duty the defendants were not responsible for the consequences of it. We do not mean to be understood as assenting to the claim that there was negligence in fastening the bags to the lift, or that the evidence in the case would justify a jury in so finding. All that we decide in this connection is that the relation between the defendants and Corrigan was not such as would render them liable for an injury resulting from his mistake or carelessness.

It was essential to the maintenance of this action that the plaintiff should prove an act or omission on the part of the defendants which constituted negligence, and that it was the proximate cause of the injury he received. We are of the opinion after a careful consideration of the evidence submitted by him that he failed to do so. The evidence submitted did not warrant an inference that the bags were suspended from the lift an unreasonable time after they were raised to the level of the third floor, or that there was any negligence on the part of the defendants to which the injury the plaintiff received was properly chargeable. The first, second, third and fourth specifications of error are sustained.

Judgment reversed. W. M. S., Jr.

Jan. '94, 235 and 236. March 23, 1894.

Ensign and Cash to use of Paine v. Kindred.

Paine v. Kindred.

Affidavits of defence—Sufficiency of—Accord and satisfaction—Evidence of—When a question for the jury—Foreign judgments—Defective certificate to.

The appellate Court will not interfere, where rules for judgment have been discharged in the lower Courts, in doubtful and uncertain cases, but only in such as are very clear and free of doubt.

In a suit upon a promissory note given for the purchase money of certain land, the affidavit of defence averred that after the note matured and the debt became due the plaintiff and defendant agreed that the defendant should reconvey the land to the plaintiff on demand, and that the plaintiff would not sue upon the note, and that the

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plaintiff accepted this agreement in full satisfaction of the debt:

Held, that it was a question for the jury whether the facts set forth in the affidavit, constituted an accord and satisfaction, or were only the case of a verbal contract for the sale of lands without any such incidents as would take it out of the statute of frauds, or create a trust of the title in defendant for the benefit of the plaintiff.

Held, also, that the Court below acted rightly in discharging a rule for judgment for want of a sufficient affidavit of defence.

In an action based upon a foreign judgment it appeared from the copy of the record annexed to the plaintiffs' claim, that the certificate of the clerk of the Court in which the judgment was obtained, was made, not by the clerk, but by his deputy:

Held, that this defect defeated the record of the foreign judgment as the basis of an action.

Held, therefore, that the Court below acted rightly in discharging a rule for judgment for want of a sufficient affidavit of defence.

Appeal of Mark Paine, plaintiff, from the action of the Common Pleas No. 2, of Philadelphia County, in dismissing rules for judgment for want of sufficient affidavits of defence in two actions of assumpsit, brought by the said plaintiff against Charles F. Kindred, to recover certain sums of money, one upon a judgment against said defendant, held by said plaintiff, and the other upon a promissory note executed by said defendant in favor of said plaintiff.

The facts of these cases were as follows: The first case was brought upon a judgment obtained by Josiah D. Ensign and Daniel G. Cash, copartners as Ensign & Cash, in Minnesota, February 17, 1887, on the defendant's promissory note, maturing July 3, 1886, which judgment was duly assigned to Mark Paine, the plaintiff, and marked to his use, being certified, as required by the Act of Congress, and filed in the Court below. It appeared, however, that the certificate of the clerk of the Court, in which the judgment was obtained, was made, not by the clerk, but by his deputy. The second case was brought upon the defendant's promissory note of July 3, 1885, payable to the order of Mark Paine, two years after its date. The defendant filed affidavits of defence in the two actions, to the effect, that, prior to July 3, 1886, the plaintiff and defendant were joint owners, as tenants in common, of a tract of land in Dakota, each having one-half interest therein. That about that date the defendant purchased from the plaintiff his one-half interest, giving him in payment therefor two notes. That subsequently to the maturity of said notes, and after the debt became due, it was agreed between the plaintiff and defendant that payment therefor should not be exacted; but that the defendant, in payment and satisfaction thereof, should upon demand being made by the plaintiff convey back to him the said one-half interest in said tract of land, which reconveyance should be in full payment and complete satisfaction of the notes. That the plaintiff accepted this settlement and agreed with the defendant, to receive the one-half interest in payment of the notes, and that the defendant has been at all times ready to comply with this agreement, and on demand to reconvey said land to the plaintiff. The affidavit of defence to the first suit also suggested that the judgment sued on was not certified in conformity with the Act of Congress.

The Court having discharged rules for judgment for want of sufficient affidavits of defence the plaintiff took this rule, assigning for error, this action of the Court.

A. H. Wintersteen, (*Geo. Tucker Bispham* with him), for appellant.

The affidavit of defence is merely an alleged accord between the parties, without satisfaction, of an executed contract.

Hosler *v.* Hursh, 31 WEEKLY NOTES, 82.
Hearn *v.* Kiehl, 38 Pa. 147.
Spruneberger *v.* Dentler, 4 Watts, 126.
Lance *v.* Ashton, 2 WEEKLY NOTES, 305.
Savage *v.* Everman, 70 Pa. 315.
Hieskell, Assignee *v.* O'Donnell, 12 Phila. 306.
Reed *v.* Martin, 29 Pa. 179.
Blackburn *v.* Ormsby, 41 Id. 97.
Mechanics' Bank *v.* Huston, 11 WEEKLY NOTES, 389.
Cumber *v.* Wane, 1 Smith's Leading Cas. 664.

The deficiency of the certificate to the foreign record only invalidates as evidence, but does not avoid the statement.

Moore *v.* Fields, 6 Wright, 467.
Wetherill *v.* Stillman, 65 Pa. 105.
Hartman *v.* N. Y. Man. Co., 5 WEEKLY NOTES, 502.
Mink *v.* Shaffer, 23 WEEKLY NOTES, 348.

C. Oscar Beasley, for appellee.

The affidavit of defence sets up an executed agreement, accepted by the plaintiff in full satisfaction of the debt.

The satisfaction alleged is not that, if the defendant at some future time shall reconvey the lands, it would be in full satisfaction of the notes in suit, but that the plaintiff accepted, in full satisfaction of the notes, defendant's agreement to hold the land subject to plaintiff's direction.

A requirement of the agreement was a non-conveyance of the land by the defendant, except on demand by the plaintiff: and no such demand having been made, defendant, in holding the land, has fulfilled his agreement of satisfaction in every particular.

It is a question for the jury whether the agreement or the performance thereof was accepted in satisfaction.

Bouvier's Law Dictionary, 84.
Ætna Ins. Co. *v.* Confer, 33 WEEKLY NOTES, 443.

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PAINE *v.* KINDRED.

October 1, 1894. GREEN, J. In this case judgment was refused in the Court below on a motion for judgment for want of a sufficient affidavit of defence. Upon the facts set forth in the affidavits a very close case is presented, which is altogether too doubtful in its character to justify us in interfering with the Court below in its action. In Ætna Ins. Co. *v.* Confer, 158 Pa. 604, we said, "It must be a very plain case of error in law, if we sustain appeals in such cases as this, from the decree of the Common Pleas discharging the rule. The decree being interlocutory no injury can result to the complaining suitor other than delay of final judgment. Besides it is doubtful whether the Act of Assembly authorizing these appeals has not on the whole aggravated delay. The observations of this Court in Griffith *v.* Sitgreaves, 81* Pa. 378, and Radcliffe *v.* Herbst, 135 Pa. 568, are pointedly applicable in the case before us."

These remarks are very pertinent in the consideration of the present case. Whether the case will ultimately present a question of accord and satisfaction, or a mere question of a verbal contract for the sale of lands without the payment of any purchase money or taking possession, or making improvements, or of a trust of the title in the defendant at the instance of the plaintiff, may depend upon nice shades of testimony, upon the credibility of witnesses, or upon facts and circumstances which can not now be foreseen and which may be quite potential in determining the result. Such possibilities are entirely within the scope of the facts set out in the affidavits of defence. We do not mean to interfere, where rules for judgment have been discharged in the lower Courts, in doubtful and uncertain cases, but only in such as are very clear and free of doubt, as we have frequently said.

Judgment affirmed.

ENSIGN & CASH FOR USE OF PAINE *v.* KINDRED.

October 1, 1894. GREEN, J. This was an action of assumpsit upon a foreign judgment. The copy of the record annexed to the plaintiffs' claim discloses that the certificate of the clerk of the Court in which the judgment was obtained, was made, not by the clerk, but by his deputy, and it is contended this is not a proper certificate. In the case of Lothrop *v.* Blake, 3 Pa. 483, we held that such a certificate is invalid and will not entitle the record to admission in evidence. ROGERS, J., in delivering the opinion said, "The clerk also, who certifies the record, must be the clerk himself or his successor; the certificate of his under clerk, in his absence, or of the clerk of any other tribunal, office or body is held incompetent for the purpose. See Sampson *v.* Overton, 4 Bibb 409, and Greenleaf's Evidence, § 506, and the authorities there cited."

As this defect appears on the face of the plaintiffs' statement and *prima facie* defeats the record of the foreign judgment as the basis of an action, it follows that the judgment of the Court below must be sustained.

Judgment affirmed.

NOTE: This decision would seem, while it makes no mention of the case, to overrule Mink *v.* Shaffer, 33 WEEKLY NOTES, 343. In that case suit was brought upon a foreign judgment defectively certified, and no affidavit of defence being filed the Court granted judgment, which was affirmed by the Supreme Court, GREEN, J., saying: "But while the insufficiency of the certificate must be conceded and while this would have constituted a valid objection to its admission in evidence on the trial, it has been well decided by this Court that it is unavailing in an affidavit of defence." In the case reported above, suit is also brought upon a foreign judgment defectively certified. The affidavit of defence suggests, *inter alia*, that the judgment sued on is not certified in conformity with the Act of Congress; judgment for want of a sufficient affidavit is refused, and an appeal of the Supreme Court affirms the judgment, GREEN, J., saying: "As this defect appears on the face of the plaintiffs' statement and *prima facie* defeats the rccord of the foreign judgment as the basis of an action, it follows that the judgment of the Court below must be sustained." These two judgments would seem irreconcilable. Compare also the language of the Court in Hartman *v.* The New York Manufacturing Co., 5 WEEKLY NOTES, 502, as follows: "What would be thought of an affidavit of defence to a note or bond which should aver no defence to the debt demanded, but should allege that the plaintiff had not produced proof of the signature?"

S. H. T.

July, 1893, 74. February 7, 1894.

Steiner v. Scholl.

Warrant for confession of judgment of married woman—Act of June 3, 1887—Opening judgment.

S., a married woman, executed a promissory note, to which was attached a warrant to confess judgment waiving inquisition and exemption. She denied the execution of the note, and alleged an indebtedness to her on the part of the payee of the note:

Held, the judgment should have been opened, and permission to defend granted.

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Appeal of Magdalena W. Scholl, defendant, in a judgment confessed, wherein I. Erb Steiner was plaintiff, from the decree of the Common Pleas of Bucks County, discharging a rule to open the judgment and let her into a defence.

Magdalena W. Scholl executed a judgment note, which had not been witnessed, containing clauses waiving exemption and inquisition, on August 1, 1892, in favor of I. Erb Steiner, for $2,500. Judgment was entered January 10, 1893, and on January 23, 1893, execution was issued. The note was written in English, which defendant could neither read nor write.

Defendant obtained a rule to show cause why the judgment should not be stricken off upon a petition denying execution of the note, and alleging an indebtedness on the part of plaintiff to her of $500. In his answer plaintiff denied such indebtedness on his part.

The Court discharged the rule, and this appeal was taken.

George Ross, (*J. F. Long* with him), for appellant.

The question whether the judgment of a married woman is *void* or *voidable* must be for a jury.

Kochling *v.* Henkel, 144 Pa. 215.

When confessed for purposes not comprised in the provisions of the Act of June 3, 1887, it is void.

Real Est. Investment Co. *v.* Roop, 132 Pa. 496.

That the maker of a note cannot read the language in which it is written is a fact to be considered, still the burden is on him to establish that it was falsely read, or represented to be other than what it was written.

Knarr *v.* Elgren, 19 WEEKLY NOTES, 531.
Jenkintown Bank's Appeal, 124 Pa. 337.

Henry O. Harris, (*W. F. Dannehower* with him), for appellee.

"The rights of a married woman in the management of her separate estate are now the same as if she were a single woman, and in exercising the rights of a *feme sole*, she must incur the liabilities of one."

Milligan *v.* Phipps, 153 Pa. 208.
Latrobe Building and Loan Association *v.* Fritz, 152 Id. 224.
Bauck *v.* Swan, 146 Id. 444.
Abell *v.* Chaffee, 154 Pa. 254.

October 1, 1894. STERRETT, C. J. While the prayer of the petitioner was that the judgment in question be stricken from the record, the proceeding appears to have been treated throughout as a rule to show cause why the judgment should not be opened, and defendant let into a defence, etc.

The result of our examination of the record, including the petition, answer and depositions, is that the evidence tends to establish such facts and circumstances as would have justified the learned Judge of the Common Pleas in opening the judgment and sending the case to a jury. As disclosed by the testimony, the business relations of the plaintiff with the defendant, an illiterate old woman, of nearly three score and ten years, were not what they should have been. It tends among other things to show that in 1892, the year the judgment note in question purports to have been given, she held his note for $500, which he claims to have paid in June of that year; but, it also appears that in October of the same year he wrote for defendant, in relation to said note, a letter to her daughter, Mrs. Landis, in these words: "Dear Daughter. You will please send me that note of I. Erb Steiner down, he wants to pay some money on it, and I must have it. Send it in a letter and seal the letter well, and address it to me. Send it at once, and don't fail. MAGDALENA SCHOLL."

At best, plaintiff's explanation of this and other transactions with defendant appear to be unsatisfactory. If he actually paid the $500 note, it is due to him, as well as the defendant, that he should have an opportunity of proving the fact. If he is unable to do so, defendant should at least have credit for that amount.

Without referring to other circumstances which may assume importance on the trial, we think the decree discharging the rule should be reversed.

Decree reversed and ordered that the judgment be opened and defendant be permitted to defend, etc.

W. D. N.

Jan. '94, 96. January 23, 1894.

James Maguire v. Milton Powel and Louise Claghorn Powel, his Wife, and Michael P. Heraty and Susannah M. Heraty, his Wife.

Contract of sale of real estate—Equitable title—Married woman—Damages.

A married woman orally agreed with H. to sell him certain of her real estate; the following day her husband, acting for her, placed this same property in the hands of brokers for sale who, that day, obtained a purchaser. The terms of the sale were approved in writing by the owner. She and her husband consummated the oral bargain with H. The second purchaser brought a bill in equity against H. and his wife, in whose name the property was taken, asking for specific performance and general relief:

Held, that the first purchaser acquired the title; that

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specific execution could not be decreed against the vendor, for specific execution was out of her power; and the plaintiffs remedy was for damages sustained in consequence of the contract and the vendor's refusal to perform it.

Appeal of James Maguire, from the decree of the Common Pleas No. 4, of Philadelphia County, dismissing a bill in equity wherein appellant was complainant, and Michael P. Heraty and Susannah M., his wife, and Milton Powel and Louise C., his wife, were respondents.

The facts appearing by the bill and answer were as follows: Louise C. Powel was the owner in fee simple of premises No. 233 North 18th street in the City of Philadelphia, up to the 4th of October, 1892, when a verbal agreement was made with one Cockroft Thomas to sell it to him, acting in behalf of his daughter, Susannah M. Heraty, one of the respondents.

The next day Milton Powel, one of the respondents, acting in behalf of his wife, signed an authority to Teller & Brother, real estate brokers, to sell the property. That same day the brokers secured a purchaser, the complainant, and the following day an agreement of sale was executed by the brokers and complainant, which was afterward approved in writing by the respondent, Louise C. Powel. On October 18, 1892, the respondents Powel executed and delivered a deed for the premises to the respondent Susannah M. Heraty, which was duly recorded.

James Maguire thereupon filed a bill in equity as stated, praying:—

a. That an injunction issue, preliminary until hearing and perpetual thereafter, restraining the said respondents, Michael P. Heraty and Susannah M. Heraty, his wife, from conveying the said premises to any person other than the complainant.

b. A decree that the respondents, Michael P. Heraty and Susannah M. Heraty, upon the payment to them of the sum of $18,000 and the proportion of the taxes and water-rent, less the amount paid on account, shall execute and deliver to the complainant a deed of conveyance, in fee simple, of the premises within described, free and clear of all liens.

c. That the defendants be decreed to answer the premises, and that your Honors will make such decree as will carry into specific execution the agreement of sale of said premises as hereinbefore stated.

To this bill Michael P. Heraty and Susannah M., his wife, demurred in that it disclosed no contract between the complainant and respondents, nor any equity against them. The respondents Michael P. and Susannah M. Heraty also made answer to the bill, denying any knowledge prior to October 18, 1892, of any transactions between Milton and Louise C. Powel and complainant.

The respondents, Milton and Louise C. Powel, neither answered nor demurred to the bill, and a decree *pro confesso* was entered against them.

The master, Francis L. Wayland, Esq., reported, *inter alia*:—

"A decree of specific performance must necessarily include the husband. But how can he be compelled to unite in a conveyance to this plaintiff? He has never agreed to do so, and, on the contrary, has united in a conveyance to a third party. He has bound himself by no writing, and nothing has been here shown that will work such an estoppel against him as to take this case out of the operation of the statute of frauds. Miranville *v.* Silverthorn, 48 Pa. 147. Mere payment or tender of purchase money is not enough. Withers' Appeal, 14 S. & R. 185; Parker *v.* Wells, 6 Wh. 153, 161; Peifer *v.* Landis, 1 W. 392; McFarland *v.* Hall, 3 Id. 37; McKee *v.* Phillips, 9 Id. 85; Gangwer *v.* Fry, 17 Penn. 491; Hill *v.* Meyers, 43 Id. 172.

"Mrs. Powel has agreed to do that which she cannot do, and she is liable to the plaintiff for her failure in performance. For whatever damages he has sustained he must look to his legal remedy.

"In view, therefore, of the foregoing considerations the master is of opinion that complainant's bill should be dismissed."

To this exceptions in behalf of complainant were filed, which were dismissed by the Court and the master's report confirmed.

David W. Sellers, for appellant.

There was a contract of sale to Maguire.

Souder *v.* Bank, 156 Pa. 374.

The appellees, who are holders of the title, with notice of the contract of sale should make the conveyance.

Bispham's Equity, Part II., Chapter III., sec. 251; Part II., Chapter VII., sec. 365.
Lewis *v.* Bradford, 10 Watts, 80.
Coble *v.* Nonemaker, 78 Pa. 506.
Le Neve *v* Le Neve, 2 Lead. Cas. Equity, 152. (Am. Notes.)

The appellees held the title in trust for appellant.

McGowin *v.* Remington, 12 Pa. 63.
Masson's Appeal, 70 Id. 26.
Winton's Appeal, 97 Id. 395.

F. Carroll Brewster, for appellee.

Mr. Heraty's title being prior in time must prevail over that of the plaintiff as the equities are equal.

Story's Eq. Jurisp. 640.

October 1, 1894. WILLIAMS, J. The report of the master shows the facts important to a decision of this case very clearly.

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The house and lot in controversy appear to have been the separate property of Mrs. Powel prior to the fourth day of October, 1892. On that day she and her husband made a verbal agreement for the sale of the property to their next door neighbor, Cockroft Thomas. For some reason, which does not appear, her husband went on the following day to B. F. Teller & Brother and authorized them to make sale of the house and lot for eighteen thousand dollars. They found a purchaser, notified Mrs. Powel, and she signed a memorandum approving the sale negotiated by them, which is dated on the sixth of October, 1892. On the eighteenth of the same month she and her husband completed the sale to Thomas by executing and delivering their deed acknowledged in due form, to his daughter Susannah M. Heraty, for whose use he desired the property, and to whom he seems to have presented it as a gift. Maguire having refused to surrender or sell his interest under the bargain made by him with B. F. Teller & Brother, now seeks a decree for the specific execution by Mrs. Powel and her husband of the agreement made on their behalf by Teller & Brother, and that Susannah M. Heraty be adjudged a trustee of the title for his use and directed to convey it to him.

The Powels, with the same indifference to the rights of others, manifested in the negotiations preliminary to the sale, have taken no defence, and a decree *pro confesso* has been entered against them; but Mrs. Heraty denies that she is a trustee of the title for the plaintiff, and insists that she is entitled to hold it for herself.

Upon this question two facts are conclusive. First, the contract made by her father, and in execution of which the deed was delivered to Mrs. Heraty, was the first in point of time. It was made on the fourth day of October. The contract, so far as it was authorized or ratified by her, between Teller and the plaintiff, was on the sixth. It is a maxim of equity that first in time is first in right. Thomas had a right as between himself and his vendors, to insist on his agreement as good against any and all persons acquiring rights subsequently to his own; and Maguire was such a person. It is true that Mrs. Powel was not legally bound by her contract with Thomas, but on the other hand she was under no obligation legal or moral to repudiate it. If she chose to recognize and execute it, she had a right to do so, and a Court of equity will not deny to her this right.

Second. Thomas, the purchaser, who paid the price of this property to Mrs. Powel, and under whose direction the deed was made to Mrs. Heraty, is the party to the contract which we are asked to hold void, and he is a necessary party to this bill, for that reason. Mrs. Heraty did not buy from Mrs. Powel. She is a donee of her father, who did buy, and who paid the price; and if that contract of purchase and the deed made in pursuance of it are to be adjudged fraudulent and void as against the plaintiff then beyond all question the actual purchaser should be a party.

The plaintiff insists that he shows the first and only written contract of sale, and that this contract is complete in every essential particular. This is true; but it was the privilege of Mrs. Powel to reply the fact that she had made an earlier contract of sale which, though not in writing, she felt bound to perform, and that she had accordingly done so.

The rule in equity is that any circumstance that shows that a decree of specific execution, even of a written agreement of sale, would be unfair or inequitable is sufficient to defeat the application. Br. Eq. Jurisprudence, 220.

Mrs. Powel did not choose to state the facts, but they have been made to appear by the other defendants, and have been distinctly found by the master. Even if the evidence upon this subject was conflicting, the finding by the master would, when approved by the Court below, be regarded as settling the question: Kutz's Appeal, 100 Pa. 75. But the evidence is not conflicting. There is no denial of the fact that the verbal contract with Thomas was made on the fourth of October.

Whether Mrs. Powel was necessarily bound by her contract with the plaintiff it is not important now to inquire. She seems to have assumed her liability, and suffered a decree to be entered *pro confesso* against her. As she has made the specific execution of the agreement impossible by the performance of a prior contract of sale, and the acknowledgment and delivery of a deed in pursuance thereof, her liability upon the second contract is for damages only, and these can be adjusted by the Court below under the judgment *pro confesso*.

As to Susannah M. Heraty and M. P. Heraty, her husband, the decree is affirmed and the bill dismissed. Appellant to pay the costs of this appeal. The record is remitted for proceedings under the decree *pro confesso* to ascertain the damages to which the plaintiff is entitled.

W. D. N.

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July, '93, 109. January 12, 1894.

Ellison's Estate.

Richards' Appeal.

Trustees—Executors—Use of trust moneys in business—Fraud—Laches—Reopening adjudication.

Trustees who use funds of the trust estate in their private business must account to their *cestui que* trust for the profits made by such use.

Where the trust relation still exists and a fraudulent concealment of facts is alleged in a petition, and that a confirmation of trustee's account was obtained by agreement to which petitioner was not a party, the mere lapse of ten years since the confirmation of said account does not show such laches as will bar petitioner's right to a review, when it appears that she acted promptly after a knowledge of the facts.

A petition for review averred, *inter alia*, that petitioner was entitled to a one-fourth interest in the estate of her father, who died in 1865, that her brothers R. and W. were executors of the same, and that said W. was trustee for her share in same; that said R. and W. were engaged in mercantile business, and after the death of her father used the money of her father's estate in their business, making large profits; that at the audit of their account in 1882 they were permitted in violation of law to testify against the interests of their decedent as to a purchase of his interests in his lifetime; that petitioner was not present at the audit, but was prevented by them from attending, and did not consent to such testimony; that by the wilful concealment and fraudulent acts of said R. and W. she was defrauded of a large share of her father's estate; that she was not informed of these facts until January, 1893. She prayed that the account of R. and W. be reopened and reheard, and that they be compelled to account for the profits made from the use of said money.

The Court sustained a demurrer on the ground of laches in petitioner:

Held, that it was error to sustain the demurrer; that upon the case as presented the petitioner was entitled to relief; the record should be remitted for further proceedings, including leave to the executors to file an answer.

Appeal of Elizabeth M. Richards, from the decree of the Orphans' Court of Philadelphia, sustaining a demurrer to her petition.

The petition set out that:—

John B. Ellison died in the City of Philadelphia on the seventh day of March, 1865, leaving a last will bearing date on the 30th day of May, 1864. Letters testamentary upon the estate were duly granted by the Register of Wills of Philadelphia County to Rodman B. Ellison and William P. Ellison, who entered upon their duties and continued to act as executors and trustees until the filing of their account.

By the terms of the said will no distribution was to be made of the principal of the estate until the death of the wife of the said John B. Ellison, which occurred on the 14th day of July, 1880.

On the death of the said wife of John B. Ellison, the said executors filed their account in the Orphans' Court, which was adjudicated on the 13th day of January, 1882.

By the terms of the said will, on the death of the said wife of John B. Ellison, the estate was to be divided into four shares, one share to each of the four children of the decedent, of whom the petitioner was one; but the shares of the petitioner and her sister, Margaret Ellis, were, after the said distribution, to be held in trust by trustees to be selected by them respectively.

The said Margaret Ellis selected Ellis D. Williams, Esq., as her trustee, and the petitioner selected at the special instance and request of her brother, Rodman B. Ellison (the executor of the will), her brother William P. Ellison.

At the audit of the account of the said executors the petitioner was not present, but was represented by her trustee and brother, William P. Ellison, who was also one of the executors of the said will.

When the said account came up for audit, as your petitioner has been informed for the first time in January, 1893, Ellis D. Williams, Esq., trustee for Mrs. Ellis, discovered that the moneys of the estate of John B. Ellison had been used by the executors in their business during the period from 1865 (the time of the death of the decedent) to the time of the filing of their account. The said Ellis D. Williams, Esq., called this to the attention of the executors, and was about to proceed to make the executors account for the profits earned by the said money, and which were properly due to the estate, when the said executors, and particularly William P. Ellison, induced their said sister, Margaret Ellis, to instruct her said trustee to desist from attempting to so surcharge them, and at the same time pledged the said Margaret Ellis not to communicate the facts to your petitioner.

That the said executors were at the time they were acting as executors until the filing of their account engaged in commercial business in the City of Philadelphia, under the firm name of John B. Ellison & Sons. During that time they used the money of the estate of the said John B. Ellison in the said business, and made large profits in the business aforesaid, in which profit the said estate by reason thereof was entitled to share.

The said executors were permitted at the said audit (in violation of law), with the consent of the parties present, to testify to certain alleged facts relating to the purchase of the business of the said John B. Ellison by the said executors in his lifetime. The petitioner never consented to such testimony being admitted, personally, nor did she ever authorize William P. Ellison, one of the said executors, her trustee, who represented her throughout the proceedings, either so

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to testify or to permit his co-executor to testify; nor had she any knowledge that they had so testified until January, 1893.

By the testimony aforesaid, the executors were enabled to show a state of facts which tended to relieve them from a surcharge of many thousands of dollars.

No explanation of any kind was given to your petitioner by the said William P. Ellison, her trustee, or by either of the said executors (her said brothers) as to the acts being done in the settlement or adjudication of the said estate, but the petitioner was, by the wilful concealment of the facts from her by the said William P. Ellison, her trustee and brother, defrauded of a large portion of her share of the said estate.

The petitioner further averred that she was, by the fraudulent acts of the said William P. Ellison and Rodman B. Ellison, executors as aforesaid, prevented from properly protecting her interest in the said estate at the audit of the account of the said exeeutors, and was prevented by them from attending the said audit. By reason of their relation to her as the executors of her father's will, and as her brothers, and (in respect to the said William P. Ellison) as her trustee, they sustained such a relation of confidence to your petitioner that they were bound to disclose to her the facts hereinabove recited; and by failing to do so they have procured a decree of the Court in fraud of the rights of your petitioner.

The petitioner was first informed of the facts relating to the settlement of the said estate, as herein recited, since the first of January, 1893. The said William P. Ellison, having notified your petitioner that he was about to resign the trust, the petitioner placed the matter in the hands of counsel, and thereupon, on information disclosed by the sister of your petitioner and by Ellis D. Williams, the trustee of her said sister, for the first time discovered the facts hereinabove recited. These facts were brought to the attention of your petitioner by a copy of a letter written by Ellis D. Williams, Esq., to William P. Ellison, bearing date on the 9th day of January, 1893, which letter was set forth.

In conclusion, the petitioner averred that she was at the time of the adjudication a married woman, and had been under coverture from that time until the present, and prayed that a citation issue to Rodman B. Ellison and William P. Ellison and to Margaret Ellis and Ellis D. Williams, trustee for Margaret Ellis (being all the parties in interest) to appear and show cause:

First. Why the adjudication of the accounts of Rodman B. Ellison and William P. Ellison as executors of the will of John B. Ellison, deceased, should not be reopened and a rehearing granted, and the said Rodman B. Ellison and William P. Ellison be surcharged with the profits earned by the moneys of the estate by their use in business of the said Rodman B. Ellison and William P. Ellison from 1865 until 1882.

Second. To show cause why the record of the said Orphans' Court should not be amended by striking therefrom the adjudication so fraudulently procured, to be entered upon the account of the said executors as hereinbefore set forth.

Third. Why the said Rodman B. Ellison and William P. Ellison should not state an account of the profits earned by the said moneys of the estate by their use in the business aforesaid, and make payment of the proper portion thereof to your petitioner.

Fourth. Further relief as the cause may require.

The defendants demurred to this petition for the reason that it stated "no facts sufficient to justify the Court in setting aside the adjudication made January, 1882."

The Court sustained the demurrer and dismissed the petition, ASHMAN, J., delivering the opinion and saying, *inter alia*: "The filing of the account and its audit and settlement were fully known at the time by the petitioner, and her acquiescence in the proceedings continued unbroken for all that appears upon the record down to April 3, 1893, when she presented the petition for review." . . . . "The question, however, is not whether the sister and her trustee acted unwisely, but whether the petitioner can now go behind their action. We think that whatever right she may have had in this respect has been dissipated by her inaction."

Petitioner appealed from this decree, assigning for error: 1, because executors were not required to account for profits; 2, because petitioner held not to be entitled to review by reason of fraud practiced upon her; 3 and 4, the portions of opinion above quoted, and 5, the dismissal of her petition.

William W. Porter and *John G. Johnson* (*Frederick J. Geiger* with them), for appellant.

The Court erred in not requiring the executors to account for the profits made by the use of the funds of the estate in their private business.

Norris' Appeal, 71 Pa. 106.
Robinett's Appeal, 36 Id. 174.
Docker *v.* Somes, 2 My. & K. 655.

The petitioner was entitled to review on the ground of fraud practiced upon her at the adjudication in January, 1882.

The continuity of the trust relation tolls the running of the statute.

Johnston *v.* Humphreys, 14 S. & R. 394.
Barton *v.* Dickens, 48 Pa. 518.

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Lyon *v* Marclay, 1 Watts, 275.
Finney *v.* Cochran, 1 W. & S. 118.
Walker *v.* Walker, 16 S. & R. 384.
Hill on Trustees, 264.
Zacharias *v.* Zacharias, 23 Pa. 455.

The several acts of concealment and fraud recently discovered secured to the petitioner her right to review.

Kuhn's Appeal, 87 Pa. 100.
Kinter's Appeal, 62 Pa. 318.

The fact that the confirmation of the account is based only on its being "admitted to be correct" makes the adjudication but a decree by agreement, to which appellant never agreed.

The account did not include profits, and therefore is not conclusive on this point.

McLellan's Appeal, 76 Pa. 231.
Shindel's Appeal, 57 Id. 43.

The petitioner was ignorant of the wrong done her, and there can be no laches without knowledge.

William C. Hannis, for appellees.

It was lawful for the Court to examine the executors as to any item in their account.

Account of Bowen, 2 Clark, 404.

The decree was conclusive not only as to all matters raised, but what might have been raised under it.

Helfenstein's Estate, 135 Pa. 293.

A verdict would not be set aside because it was afterwards discovered that one of the jurors was incompetent.

Hollingsworth *v.* Duane, 4 Dallas, 354.
Wassum *v.* Feeney, 121 Mass. 93.
Queen *v.* Hepburn, 7 Cranch, 290.
Amherst *v.* Hadley, 1 Pick. 41.
Caldwell *v.* Carter, 153 Pa. 310.

Fraud without injury is no ground for relief in equity.

Williams *v.* Kerr, 152 Pa. 560.
Bauer's Estate, 30 WEEKLY NOTES, 429.
Milligan's Appeal, 82 Pa. 389.

A review will not be granted for new proof unless it could not possibly have been discovered at the time of decree.

Story s Equity, sec. 404.
Riddle's Estate, 19 Pa. 431.
Russell's Adm. Appeal, 34 Id. 258.
Hartman's Appeal, 36 Id. 70.
Scott's Appeal, 112 Id. 427.

The following cases illustrate the doctrine that laches will bar a right to an account:—

Gress' Appeal, 14 Pa. 463.
Maulfair's Appeal, 110 Id. 402.
Fidelity Co.'s Appeal, 115 Id. 157.

Laches for six years, or less, will bar an effort to charge a purchaser with a constructive trust.

Ashhurst's Appeal, 60 Pa. 291.
Evans' Appeal, 81 Id. 278.

The omission of an accountant to charge himself with money received cannot be corrected in a petition for review after five years.

Weiting *v.* Nissley, 6 Barr, 141.

The fraud must be actual not constructive.

Cole *v.* McGlathry, 9 Greenleaf, 131.
Farnam *v.* Brooke, 9 Pick. 202.

The mere allegation of fraud is not enough if the means of discovery existed, or by ordinary care and diligence it could have been discovered.

Blanchard on Limitation, 81.
Bank *v.* Forster, 8 W. 12.

An interested party is competent to prove facts existing after the death of the decedent, even though such evidence may tend to prove that the same facts existed prior to death.

Stephens *v.* Cotterell, 99 Pa. 188.
Rochrock *v.* Gallaher, 91 Id. 108.

October 1, 1894. STERRETT, C. J. The facts upon which appellant's prayers for a citation and relief are grounded are fully set forth in hr petition and need not be repeated.

It is stated in the opinion of the Court below, that the plea and answer filed by appellees were withdrawn by agreement, and the general demurrer on which the case was heard and disposed of was substituted. As the learned Judge correctly says: "The facts set out in the petition, being thus accepted as verities, raise the single point whether they place the petitioner in a position to demand relief;" and then, for the purpose of argument, he assumes, "that the money of the testator was used by the executors for their own profit after his death; that the respondents concealed from the petitioner the circumstance that an effort to charge the executors, of whom one was her trustee, had been abandoned at the earnest solicitation of accountants, and that by agreement of the respondents, testimony which, without the consent of all parties, was incompetent, had been introduced at the audit, that resulted in finding that the testator, in his lifetime, had sold out his business interests to his executors and had loaned them $100,000 of the purchase money."

After considering the questions involved, the learned Court held, in substance, that by reason of her laches and acquiescence petitioner was not entitled to relief in any form, and her petition was accordingly dismissed.

The subject of complaint in the third specification is in finding as therein recited, that "the

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filing of the account and its audit and settlement were fully known at the time by the petitioner, and her acquiescence in the proceedings continued unbroken, for all that appears upon the record, down to April 3, 1893, when she presented this petition for review." This, as well as the holding complained of in the fourth specification, appears to have been unwarranted. They are both in conflict with averments contained in several paragraphs of the petition. In one of them, after stating that the executors were permitted (contrary to law) to testify at the audit to certain alleged facts relating to the purchase of testator's business in his lifetime, that she never consented, nor authorized any one to consent for her to the admission of said testimony, etc., appellant avers she had no "knowledge that they (the executors) had so testified until January, 1893." Again, referring to the same subject, she avers, "Your petitioner was first informed of the facts relating to the settlement of said estate, as herein recited, since the first of January, 1893." In another paragraph, she avers, that "No explanation of any kind was given to your petitioner by the said William P. Ellison, her trustee, or by either of said executors (her said brothers), as to the acts being done in the settlement or adjudication of the said estate, but your petitioner was by the wilful concealment of the facts from her by the said William P. Ellison, her trustee and brother, defrauded of a large portion of her share of said estate," etc. In the next paragraph she avers that by the fraudulent acts of said executors she was "prevented from properly protecting her interests in said estate at the audit of the account of the said executors, and was prevented by them from attending the said audit."

We have considered the averments embodied in the petition, and giving to them that weight, as evidence, which they are entitled to under the pleading, we are of opinion that, upon the case as presented, the appellant is entitled to relief. The assignments of error are sustained.

Decree reversed with costs to be paid by the appellees, and record remitted for further proceedings, including leave to the appellees to answer, etc. W. M. S., Jr.

Common Pleas.

C. P. No. 4. June, 1892, 481.

In re Assigned Estate of the Goodwin Gas Stove and Meter Co.

Assigned estates—Priority of lien for taxes—Act of June 7, 1879—Act of June 1, 1889—Act of April 14, 1827—Act of 1811—Rights of creditors.

An assignee for the benefit of creditors is not a purchaser within the meaning of the word which protects lien creditors or vendees for value.

As between other lien creditors and the Commonwealth, the latter must be postponed when a certificate of lien by the auditor-general has not been filed in pursuance of the Act of 1827; Silversmith's Est., 150 Pa., 285; but the Commonwealth's lien has priority over the claims of general creditors, claiming under an assignment.

Sur Exceptions to auditor's report.

The assigned estate of The Goodwin Gas Stove and Meter Company was referred to an auditor for distribution. The Commonwealth claimed for taxes upon the property of the assignor, taxes for some years previous to the assignment. The auditor refused to regard the Commonwealth as a preferred creditor. To which the Commonwealth filed exceptions. The salient facts are stated in the opinion of the court.

James A. Stranahan, for the exceptions.
Charles E. Pancoast, contra.

June 16, 1894. THAYER, P. J. The question argued in this case was, whether the claim of the Commonwealth for taxes, which, by the 14th section of the Act of June 7, 1879, and the 31st section of the Act of June 1, 1889, is a preferred claim, "to be first allowed before any other claims are paid," has lost its preference by reason of non-compliance with the provision of the 4th section of the Act of April 14, 1827, Purd. 1386, requiring the auditor-general "to transmit to the respective counties, to be by them entered of record, certified copies of the liens which may hereafter arise by virtue of the 12th section of the Act of March 30, 1811, as soon as the same are settled and entered in the books of the accounting officers." (Purd. 1385). By the 12th section of the Act of 1811 the balance found in the account is to be "a lien on all the *real estate* of the person indebted throughout the Commonwealth." By the Act of June 7, 1879, it is a lien "upon the franchise and property *both real and personal* of corporations and limited partnerships."

In Commonwealth's Ap., 4 Pa. 164, it was held that, in default of the filing of a certified copy in pursuance of the provisions of the Act of 1827, the Commonwealth's claim was entitled to no preference over other *lien* claimants. The

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case was a contest between rival liens against real estate. Arnold's Est., 46 Pa. 277, was to the same effect, but that also was a controversy between lien claimants, and the Commonwealth was postponed to *judgment creditors*, because no certificate had been filed. The proceeds distributed, as in the Commonwealth's Ap., 4 Pa. 164, were derived from a sheriff's sale of real estate. In his opinion in Arnold's Estate Judge STRONG treats the question entirely as one of *priority of lien*, and, while postponing the Commonwealth to other lien claimants on account of the neglect to file a certificate, adds distinctly: "Without the notice given by filing a copy of the balance of the account, and having it entered on record, the debt ascertained to be due to the Commonwealth *may be a lien as against the debtor*, but is inoperative against other lien creditors."

In Silversmith's Est., 150 Pa. 285, the case was again a contest between lien creditors, and the opinion of Justice GREEN proceeds upon the ground that, as between *other lien creditors* and the Commonwealth, the latter must be postponed when a certificate has not been filed in pursuance of the Act of 1827. "Other *lien creditors*," says he, "have the same right to notice under the Act of 1879 as under the Acts of 1811 and 1827."

The present case, it is to be observed, is entirely different from the cases already referred to, which were relied upon by the auditor in his report against the Commonwealth as a preferred creditor. In the present case none of the claimants are lien creditors. That fact is expressly found by the auditor, and the fund was derived from the sale of personal estate exclusively. The creditors here were all general creditors claiming under the assignment. Is the Commonwealth's preference, secured by the strong language of the Acts of 1879 and 1889, lost as against creditors who are not lien creditors at all, but general creditors, claiming under an assignment made by the debtor seven years after the Commonwealth's lien attached? We think not. The Commonwealth's claim was for taxes for the years 1882, 1883, 1884, and part of the year 1885. The assignment was not made until June 23, 1892. It cannot be doubted that the personal property in the hands of the debtor was subject to the lien of the Commonwealth's taxes for all those years, for, by the express words of the Act of 1879, the Commonwealth's taxes were "a lien upon the franchises and property, both real and personal, of corporations and limited partnerships," *from the time the said taxes are due and payable*. It has never been asserted by any decision, and cannot be pretended with any show of reason, that the Commonwealth's lien against the debtor's property, while it is still his property, is lost by not filing the certificate referred to in the Act of 1827. Such a construction would be unreasonable and a total perversion of the meaning of the Legislature. We entertain no doubt that Judge STRONG was right in saying, as he did in Arnold's Estate, that although the failure to file the certificate postponed the Commonwealth's claim to other lien claimants, it was, nevertheless, a lien against the debtor himself.

If this be so, nothing can be plainer than that the rights of the general creditors of the gas company could rise no higher than those of the debtor himself. If the Commonwealth's claim attached to the property in his possession, as it undoubtedly did, he could not divest it by making an assignment for the benefit of creditors. That an assignee for the benefit of creditors is not a purchaser within the meaning of the word which protects lien creditors or vendees for value is familiar law. Neither the rights of the assignee nor those of the general creditors could rise higher than those of the assignor, and, as the property was subject to the Commonwealth's lien in his hands, it remained subject to it in the hands of the assignee; and, inasmuch as the fund distributed arises from the sale of that property, the lien attaches to the proceeds as firmly as it did to the property itself in the hands of the debtor.

It is ordered that the exceptions filed by the Commonwealth be sustained, that the report be referred back to the auditor with instructions to re-adjust the distribution in accordance with these views, and to award to the Commonwealth the full amount of its claim with interest thereon.

F. B. N.

C. P. No. 2. March 1893, 253.

Hirst v. Freeman.

Assignment for the benefit of Creditors—Assignees—Discharged or removed—Accounts of—Mode of settling—Act of June 14, 1836.

When an assignee is discharged or removed the Court having charge of his account must ascertain what is in his hands, and by its decree order him to pay over to his successor in trust.

When an assignee is discharged or removed and there is no decree that he shall pay over, it must be conclusively taken in any collateral proceeding that the Court discharging or removing him found no funds in his hands.

Sur motion to take off judgment of non-suit.

The facts of this case are sufficiently stated by JENKINS, J., in his opinion.

Charles Lex Smyth, for plaintiff.

William H. Staake, for defendant.

March 13, 1894. JENKINS, J. This was an action by the assignor for the benefit of his creditors to recover against his assignee moneys

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which it was alleged the assignee had received. Upon the trial of the case the counsel for the plaintiff offered to prove that the defendant, as assignee under a deed of assignment, had received $1160, which the plaintiff claimed to recover, "less whatever sum it may be determined is reasonable that he should receive as compensation for acting as assignee for the benefit of creditors, and with a credit to him for whatever reasonable costs and expenses he may have incurred;" that the defendant had presented his petition to this Court, and was "discharged" or "removed" as assignee, and paid and transferred to his successor in the trust $650.56 in cash, together with whatever goods that had remained unsold of the assets of the assigned estate, and that the defendant's successor in the trust had, by order of Court, made a reconveyance of the estate to the plaintiff. The offer was objected to "upon the ground that there is a statutory mode of determining this matter; and such a suit as this cannot be brought in this way to have a jury determine compensation." The objection was sustained, and the offer was overruled. The plaintiff also offered to prove that the defendant's conduct had been such as to deprive him of commissions. This was also objected to, on the additional ground that it was a different cause of action than that set out in the statement. This objection was sustained and the offer was overruled. The plaintiff presented no other testimony, and the trial Judge entered a judgment of non-suit.

The questions sought to be raised in this case seem to be well settled. The Act of June 14, 1836, P. L. 630 (2 Br. Purd. 1653), provides the modé for settling the accounts of assignees for the benefit of creditors. Sec. 21 of the said Act provides: "When any assignee or trustee shall be dismissed from the trust, it shall be lawful for the Court to order and direct all books, papers, moneys and effects in the hands of such dismissed assignee or trustee, to be forthwith delivered or transfered to such other person or persons, as the Court may appoint to receive the same, upon security being given by such receiver, according to the order of the Court."

It is therefore clear that when an assignee is discharged or removed, it is the duty of the Court having charge of his accounts to ascertain what is in his hands, and by its decree order him to pay over to his successor in the trust. From this it necessarily follows that where an assignee is discharged or removed, and there is no decree that he shall pay over, it must be conclusively taken in any collateral proceeding that the Court discharging or removing him has ascertained that there are no funds in his hands.

In Gray *v.* Bell, 4 Watts, 410, it was held, in an action by the creditor of the assignor against the assignee, that "an assignee under a voluntary assignment was not liable in an action for money had and received, before an account has been settled and a decree made by the Court of Common Pleas having jurisdiction of the assignee's accounts." The reasons given by Justice SERGEANT, in his opinion in that case, apply with full force to the present case, for it must be admitted that the assignee has rights as well as the assignor and his creditors.

In Vanarsdale *v.* Richards, 1 Whart. 408, which was also an action by a creditor against an assignee, it was held: "Where an assignment has been made for the benefit of creditors, an action cannot be maintained by one of the creditors against the assignees until the accounts of such assignees have been settled in the Common Pleas, and a decree made by that Court for the distribution; and the rule is the same, whether the action is for money had and received or upon an averment of misconduct and mismanagement on the part of the defendants."

In Artman *v.* Giles, 155 Pa. 409, it was held that an assignment for the benefit of creditors could be attacked only in the Court having jurisdiction of the assignment.

The counsel for the plaintiff denied that there was any statutory mode for settling the assignee's accounts, and relied upon Weld *v.* McClure, 9 Watts, 495, to sustain his right of action, but an examination of that case, which was an action by the administrator *de bonis non* against a dismissed executor, will show that the Orphans' Court had found a balance in the executor's hand of $628.11, for which amount the suit was brought, and the Court merely decided that "the decree of a Court directing money to be paid makes it a debt, for which an action lies at common law."

In the present case, however, there was no offer to show that a decree had been entered against the defendant finding any amount in his hands. The plaintiff simply offered to show that the defendant had, as assignee, received certain moneys and wished to compel him to account for the same in this suit, so that the case of Weld *v.* McClure, *supra*, has no application to the present controversy.

The principles governing this case are so well understood, and are so constantly called into practice in administering assigned estates, that we would not have considered it necessary to reduce our reasons to writing, had it not been that the counsel for the plaintiff so strenuously argued that there was no statutory mode for settling assignee's accounts, and determining the amount of the estate in his hands.

The motion to take off the judgment of non-suit is refused. F. B. N.

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WEEKLY NOTES OF CASES.

VOL. XXXV.] *FRIDAY, NOV. 16, 1894.* [No. 10.

Supreme Court.

Jan., '93, 399. January 22, 1894.

In re Assigned Estates of Robert Hare Powel & Co. and Robert Hare Powel's Sons & Co.

Appeals of George M. Brisbin, Hannah E. Brisbin, Daniel M. Good, Eliza B. Good and Charles R. Houtz, lately trading as the Houtzdale Bank.

Assignments for benefit of creditors—Accounts—Removal of Assignees—Assignees' commission—Act of June 14, 1836, sec. 16.

In their first account assignee claimed a credit for assignees' counsel fees and commissions which had not been paid, which credit was allowed by the Court below:

Held, to be error, *first*, that it was an appropriation of uncounted assets, and *secondly*, assignee could not claim commissions after delegating its duty to counsel.

In a second account assignee claimed credit for the difference between what an asset brought by sale and what it was appraised for, and sought discharge of a piece of property which had been omitted from the schedule of assets:

Held, the property in question should remain as an uncounted asset and made the subject of a future account.

In stating the account the assignee charged itself with the appraised value of the property assigned, and added to this each month's receipts from the estate which were largely sales of these assets themselves:

Held, to be a misleading and an improper way of accounting.

In a proceeding under the Act of June 14, 1836, for the removal of the assignee, the Court below appointed a master, upon the filing of his report by the examiner appointed under the petition; the master reported the charges of mismanagement unfounded and unproved, and directed the costs of the proceeding to be placed upon the petitioners:

Held, reversing the Court below, that it was the Judge's province to decide upon the examiner's finding of fact without the intervention of a master, and also that the costs should be charged on the fund in the hands of the assignee.

Appeal of George M. Brisbin, Hannah E. Brisbin, Daniel M. Good, Eliza B. Good, and Charles R. Houtz, doing business as the Houtzdale Bank, from a decree of the Court of Common Pleas No. 3, of Philadelphia County, dismissing a petition filed by appellants for the removal of the Guarantee Trust and Safe Deposit Company, assignee of Robert Hare Powel & Co. and of Robert Hare Powel's Sons & Co.

Appellants were creditors of both firms.

The facts of the case are sufficiently set forth in the opinion of the Supreme Court.

James W. M. Newlin, and *Mayer Sulzberger*, for appellants.

John G. Johnson, for appellee.

October 1, 1894. DEAN, J. On August 29, 1887, the partnerships of Robert Hare Powel & Company, and Robert Hare Powel's Sons & Company, made assignments for the benefit of creditors to the Guarantee Trust and Safe Deposit Company. The assets of the assignors were made up principally of iron ore lands, coal lands, collieries, one large blast furnace in operation, and another approaching completion. These properties were located in Allegheny, Westmoreland, Bedford, Clearfield and Huntingdon counties. The assets, with some others of less value, were appraised by appraisers appointed by the Court at $4,300,000. The liabilities, principally liens on real estate and maturing negotiable paper, were approximately more than $1,500,000. Apparently the value of the assigned estate was sufficient to pay at least twice the indebtedness. But after three years' administration of the trust by the assignee, the accounts filed showed such a dwindling from the appraised value, that all the unsecured debts, in the most sanguine view, were in peril.

On January 24, 1889, the assignee filed its first account, to which exceptions were filed by several of the creditors, among them the Houtzdale Bank, this appellant. The balance, as shown by the account filed, was $3,780,755.93. The auditor did not sustain any of the exceptions to the account, nor did he make any distribution, except to counsel for fees, agents for commissions, costs and expenses of audit, amounting to $7,146.47, which added to appraised value of properties conveyed by assignee to Powelton Iron Company, $2,313,318.89, left an apparent balance of $1,460,390.57 on this first account, still in hands of accountant.

The basis of this large credit to the assignee, as stated by the auditor, was as follows:—

"The firm of Robert Hare Powel's Sons & Company, prior to the assignment, had conducted the business of the manufacturing and sale of iron, and the firm of Robert Hare Powel & Company had carried on the business of mining and shipping coal. The affairs of both firms, particularly the latter, were upon an extremely large scale.

"The assignment occurred on the twenty-ninth day of August, 1887. Shortly afterwards the creditors of the two firms organized, and appointed a committee to represent them in

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advising the conduct of the assigned estates. A number of meetings were held by this committee to assist the judgment of the assignee. In pursuance of their recommendations the business of both firms was continued by the assignee through the medium of the partners as agents until the end of the year 1888.

"The creditors were of two classes.

"Two sets of loans, aggregating nearly $500,000, issued by the iron firm and secured by mortgages upon the iron plant, were outstanding at the time of the assignment. There were also several mechanics' liens filed in Bedford County.

"One class of creditors were the holders of these bonds and of the said liens.

"The second class was unsecured. It consisted of the other creditors in general.

"The property assigned consisted of a large iron manufacturing plant and extensive coal lands and leases.

"At length the following arrangement was reached, and was joined in by all the creditors who could be ascertained. The assured creditors agreed to an extension of five years upon the terms of their loans and mechanics' liens. The unsecured creditors formed a corporation under the laws of Pennsylvania, to which they gave the name of the Powelton Iron Company, with a capital of $1,000,000. To this company $100,000 in cash was to be paid, and a transfer made of the iron plant and various other properties which belonged to the assigned estates, estimated to be worth not less than $900,000 above the mortgage. This stock was to be taken by the creditors in proportion to the amounts of their claims. It was to be divided into twenty thousand shares of fifty dollars each. These shares were to be accepted dollar for dollar for all unsecured claims, all odd amounts of which —less than fifty dollars—were to be paid in cash. The remaining portion of the stock was to be transferred to the Guarantee Trust and Safe Deposit Company to be held in trust for the assignors."

Presumably, and by a note appended to the account, the balance of the estate was made up of what was left of the inventory, Sterling Coal Mine No. 2, Crisfield tract of coal land, lands in Belmont County, Ohio, coal land in Allegheny County, coal land in Westmoreland County, Powelton estate land in Centre County, unpaid book accounts, proceeds of sale of Sterling Coal Mine No. 1, Ramey coal lease. By the terms of his appointment the auditor was to "audit, settle and adjust the account filed," but an examination of his report shows that he really settled by hearing and adjudication only eight distinct matters of contention. 1. He determined that the assignee was rightfully entitled to credit of nearly $26,000. 2. For $15,000 paid to Mrs. Amy Powel as rentals. 3. That certain boats used in transportation of coal were advantageously disposed of. 4. That the assignees had diverted no money paid for coal to payment of illegal commissions. 5. That E. B. Wigton was entitled to $2,510 as commission on sale of Sterling No. 1 Mine. 6. That part of exceptants' costs and counsel fees should be paid out of the assigned estate. 7. That an allowance of $2,154.91 commissions on sale of coal cars should be made. 8. That the property conveyed to the Powelton Iron Company was free from the trust created by the assignment.

As the first account showed still a very large portion of the assigned estate undisposed of, and there would necessarily be another accounting, the investigation of the claims of the assignee for compensation and counsel fees at this audit was not very thorough, nor does it seem to have been so considered by any of the parties in interest. The principal object seems to have been to settle by an adjudication, that the Powelton Iron Company was not answerable to the assignee for the administration and management of the property conveyed to it under the arrangements with the creditors, and that thereafter the creditors must look to the board of directors of that corporation as alone answerable for the assets transferred. We have no doubt the auditor, on the facts before him, performed his full duty in respect of the authority conferred upon him, and the confidence reposed in him by the Court. The contending parties were represented by able counsel. It was not the duty of the auditor to suggest new subjects of contention to them; he was to pass upon the issues of fact and law raised by the litigants, and not upon those which might suggest themselves to him during the progress of the hearing.

The report of the auditor was filed August 12, and confirmed absolutely August 20, 1889. On September 6, 1889, the second account of the assignee was filed. This was also excepted to, and the account referred to Mr. Miller as auditor. It appeared from this account, that in its final account the assignee had taken credit for the payment of $62,586.06 more cash than it had in its hands; a correction of this error in the second account was made by charging itself with the appraised value of unconverted assets, less that amount. The auditor properly held this was wrong, as it in effect was an appropriation of assets not yet converted. Further, it appeared at the second audit that the amounts with which the assignee was charged in the account, although apparently collections in the ordinary course of business, were in large part the proceeds of sales of assets at prices far below the appraised value. In such cases the amounts realized were added to the debit side of the account, thus swelling

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the appraised value by the amount of proceeds of sales until the aggregate reached nearly $7,000,000; while the large difference between the appraised value and the price realized by conversion, even at that period of the management, showed there would not be enough money to pay the unsecured creditors.

The auditor pertinently says, "The vice of this mode of presenting the assignee's operation consists . . . . not merely in formal error, but in radical and vital injury to the creditors. . . . A very careful examination of the whole account, in connection with the facts appearing at the audit, shows that these monthly items of receipts include the entire proceeds of assets sold at an enormous depreciation from the appraised value." That is, apparently the appraised value of $4,311,579 of the assets, as shown by the inventory, had been augmented by the monthly receipts from operating the plants, month by month, during a period of seventeen months, until they reached $6,877,969.27. There is but obscure intimation in the account that these monthly receipts were to a large extent, from the sale or conversion of assets. This is the form of the charge for the first month of the seventeen:—

"1887, September 30. To amount of receipts for this month, $149,213.15."

And this entry, except as to month and amount, is dittoed for each of the following months, up to the date of filing the account. And there is no real correction of this method of accounting for conversion of the assets on the credit side of the account. The Sterling No. 1, appraised at $496,785.72, and sold for $50,000, is itemized thus: "By appraised value of properties sold and account collected and accounted for in the receipts, Stg. on acct. $5,000." It is true, as argued by counsel for appellee, the mere fact of entering proceeds of sales on the debit side of the account is not necessarily misleading; they may be so distinguished as to clearly identify them, and then they disclose the truth, however awkward the method. And this is the case as to the charge in first account of appraised value of the Powelton Iron Company property. But, if the sales be entered as apparently monthly receipts from another source than sales, the account is not alone formally wrong, it is false. Not necessarily intentionally so, but false because misleading.

In fact the second account, on both sides of it, by the method of stating it, was misleading. The auditor undertook to some extent to reform it, as to the item of $62,586.06, by deducting this sum from a credit of $75,000, counsel fees and commissions in the first account, on the theory that as the money to pay that item was not in the hands of the assignee at the date of the credit, it could not have been adjudicated, because not in fact paid. He therefore surcharges the accountant with the $62,586.06 by adding that sum to the balance brought over from the first account, making the whole $3,843,341.99 instead of $3,780,755.93. In thus treating this item and leaving it for future adjudication he was right. The assignee had taken up a note in the sum of $2,584.50 of the Reading Iron Works, endorsed by the assignors; the drawer became insolvent; this was also surcharged, and the item remains to be passed upon at another hearing. The auditor, for reasons stated by him, disallowed the credit of $2,313,218.89, the appraised value of the property conveyed to the Powelton Iron Company, and surcharged the assignee with this amount, to be finally adjudicated, however, on settlement of final account.

As to the sale of lease of Sterling No. 1, the auditor recommended that the contention as to that item stand over for adjudication in a subsequent accounting. He further surcharged accountant with interest on balance of funds on hand from date of assignment to the amount of $600, for the reason that the money was mingled with the funds of the assignees' bank, and loaned indiscriminately to customers. On a restatement of the account, and adding surcharges, the balance against accountant was $3,920,029.92. No distribution was made to creditors for the reason that sufficient notice of audit had not been given, and therefore many claims may not have been proven and presented; and further, because of some doubt as to his authority to distribute under the terms of his appointment. He therefore awarded the balance to accountant to be thereafter accounted for. A re-hearing on exceptions to this report was had before the auditor before it was filed, but, except in some immaterial matters, he adhered to his adjudications and filed his report, and exceptions were entered by both assignee and complaining creditors.

One thing appears clear, that is, that so far as concerned all the real questions in contention between the assignee and the complaining creditors, they now were substantially before the Court, with the evidence bearing on them. There were also two reports of a competent auditor, of whose ability and integrity neither party had intimated a doubt.

The litigation on the important matters tried before the auditor, with so much labor and vexation to all concerned, and at such large expense to the estate and creditors, should have been stopped just at that point by a final judgment of the Court below on the exceptions to these reports. After tracking step by step the long course of litigation which followed, it seems to us but little further light was thrown on the important points in controversy, and the questions

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raised at the second audit continued to the end almost the only ones of merit in dispute. It is not alone the duty of Courts to decide disputed points, it is also their manifest duty to so control the course of procedure before them, that, consistent with fair hearing, as speedily as possible, there shall be an end of strife in final judgment.

But, while the exceptions were pending before the auditor on the second account, on June 7, 1890, the Houtzdale Bank presented its petition for the removal of the assignee, and this was followed on January 10, 1891, by a like petition by the Harrisburg Bank and other creditors. The petitions preferred fifteen distinct charges of mismanagement and dishonesty against the assignee; all were answered by a distinct denial of record. On July 8, 1890, just a month after the first petition for removal of assignee was preferred, the second report of the auditor was presented, to which exceptions were filed by both accountant and creditors. These exceptions raised distinctly the questions of negligence and mismanagement. Unless the estate was in peril from the insolvency of the trustee, which was not even intimated, it is very clear action on the petitions should have been suspended to await the event of the judgment on the exceptions to the auditor's report; but judicial action on the reports was suspended, and the new line of litigation, having for its object the removal of the assignee, was taken up and pursued for nearly two years, with an acrimony seldom exhibited in the records of Courts. Thomas J. Worrell, Esq., was appointed examiner, and it was directed that all the testimony theretofore taken by the auditor be laid before him. Afterwards the same gentleman was appointed master. In the opening language of his report he says, "By the examiner's report, it appears that the entire record of the Powel assigned estate in this Court, and the proofs taken at the several audits, shall be treated as before him, in order to help him in finding the facts, and in forming his opinion upon the case. So that every paper filed in the cause is now practically before the master for his determination, and accordingly he proceeds to pass upon them as directed."

The master then, in a most elaborate report, proceeds to state his findings of fact on the issues raised by the petitions and answers for removal. In the course of the report he undertakes to review, pass upon, and condemn some of the findings of fact and conclusions of law by the auditor on the first and second accounts. He points out where in his judgment the auditor committed grave errors in both his facts and law. During the course of the proceedings before him the auditor had prepared what is termed an "interlocutory report" for the Court; it was intended by the suggestion in this paper to move the Court to direct a form of notice to be given creditors as to the audit. As counsel immediately agreed upon the form of notice, this report was not presented, but is here upon the record as one of the exhibits of the cause. While vindicating the integrity, it reflects somewhat severely on the business management of the assignee. The master regrets this paper was not withdrawn and destroyed at the time counsel agreed upon the form of notice, as it only tended to encourage litigation. He says of this paper, "It was unfortunately violent in its insinuations, and, as it was soon shown, unwarranted by the facts of the case, the improvident statements of which had been derived somewhat from sources beyond the regular course of the audit . . . . The proposed interlocutory report was due to a misconception of matters of fact, and to mistaken conclusions upon matters of suspicion." The master further characterizes the litigation as experimental; speaks in a tone of disapproval of the complaining creditor for calling the respondent and its agents as witnesses, and interrogating them with a view of discrediting their answers to the petitions. After narrating the course of management he announces this conclusion, "The master has, without difficulty, reached the conclusion that the assignee has done nothing to bring it within the provisions of the Act of June 14, 1836, whereby neglect or mismanagement of a trust estate are declared to be grounds for dismissal. It has not been seriously contended at the argument, that any offence greater than neglect and mismanagement could be charged. The proof is overwhelming, that an extraordinary degree of care and conscientious and remarkable skill in management are to be ascribed to the assignee." He then recommends that the petitions be dismissed at the costs of the petitioners.

The decree suggested by the master was adopted by the Court. The material exceptions by the assignee to the report of the auditor on the second account, were sustained, and the report set aside, and the second account confirmed absolutely. From the different formal orders of the Court below, the Houtzdale Bank takes no less than twelve appeals. All the questions raised by them are embraced in, and can be considered, in disposing of the decree overruling exceptions to the auditor's report, and confirming absolutely the first and second accounts, which is appeal No. 12; and from the decree overruling exceptions to the report of the master, and dismissing the petitions for the removal of the assignee, which is appeal No. 11.

The petitions for removal were presented under the 11th section of the Act of 14th of June, 1836, which enacts that: "Whenever it shall be made to appear in a Court of Common Pleas

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having jurisdiction . . . . that such assignee or trustee is wasting, neglecting or mismanaging the trust estate . . . . it shall be lawful for such Court to issue a citation to such assignee or trustee to appear before the Court at a time to be therein named, to show cause why he should not be dismissed from his trust. On the return of such citation, the Court may require such security, or such other and further security, from such assignee or trustee as they may think reasonable, or may proceed at once to dismiss such assignee or trustee from the trust."

Under this Act, the petitions of these appellants for the discharge of the assignee were presented. This was after two accounts had been filed by the assignee. Then followed, on January 10, 1891, petitions by other creditors for the discharge. As before noticed, in the meantime, the two accounts by the assignee, to which exceptions were filed, had been referred to E. Spencer Miller, Esq., as auditor, for adjudication; he had made two reports; in the last one, had surcharged the assignee with $2,313,218.89, and exceptions were filed to this report, which were pending when, on January 24, 1891, Thomas J. Worrell, Esq., was appointed as examiner to take testimony. By an order of the Court, made the same day, all the testimony and exhibits produced before the auditor, were directed to be treated as evidence before the examiner. Then, afterwards, the examiner is appointed master, and, as such, passes on all the evidence, and reviews the findings of the auditor.

The creditors had averred against the assignee, illegal payments of the trust money to itself; concealment of the true value of the assets; favoritism towards the assignors in employing them at large salaries; excessive charges for commissions and counsel fees; reckless sales at grossly inadequate prices, of portions of the assets, and other charges. Whether the evidence sustained all, or any one of these averments, was solely for the Court to determine from an impartial consideration of it. We are very decided in our opinion, that, under the Act, the duty of consideration of the testimony, and the formation of opinion upon it, cannot be delegated by the Court to any appointee. It is, doubtless, within the power of the Court, and properly so, to appoint an examiner to reduce to writing the evidence offered in support of the petition, that it may be presented in an orderly form for the consideration of the Judge who passes upon it; but the right to act through another, by appointment, extends no further. The petitioning creditor, then, has the right to the best judgment of the Court on his proofs, uninfluenced by the opinion of any other person on the same proofs. Here, the gentleman appointed master, passes on the evidence touching every averment; discusses its relevancy and significance, and in no doubtful terms gives his opinion as to the truth or falsity of the charges. He may have been a very capable officer, and in every respect fitted to exercise the judicial function attempted to be conferred upon him, but his opinion is not what these appellants had the right, under the law, to ask on their complaint. It is the opinion of an officer wholly unknown to the law, which has prompted and framed the judgment.

Nor does the fact, that the evidence on which the opinion of the master was based, was afterwards submitted to the scrutiny of the Court, help the master. This evidence went before the Court, accompanied by inferences, argument and a judgment as to the fact, by one who stood as a disinterested officer. Necessarily, from the very composition of the human mind, the tendency is, to give weight to the opinion which comes before us as the result of an impartial and disinterested deliberation. The petitioners' case was prejudged before it reached the Court, which alone, under the statute, had the duty of determining whether the complaint was well founded. It was error, to ask the opinion of a master on a matter which was solely for the opinion of the Court on the facts; to invite another to suggest a judicial decree, which the law, in effect, declared must originate in the mind of the Court. As the master had no authority to tell the Court what to do in reference to the discharge of the assignee, much less had he power to review the findings and conclusions of the auditor, then pending for consideration in Court. Therefore, we eliminate and put to one side his opinions, and take the facts bearing on the issue raised by the petition and answers. As to the auditor's report, and exceptions thereto, they must stand on the facts developed at the audit, and be adjudicated accordingly.

The prominent fact, and the one which, without doubt, suggested and to a great extent stimulated this litigation, is the gross disparity between the assets when converted, and their appraised value. The appraisement of the property passing into the hands of the assignee, was greatly in excess of any probable realization. The amount of the inventory was $4,311,579.15; the actual indebtedness approached $1,700,000, made up of liens, by mortgage, judgment and mechanics' liens, about $700,000, and unsecured debts of nearly $1,000,000. As indicating how unreliable was this appraisement, as a basis of value for payment of debts, we note the Sterling No. 1:—

Appraised value,		$496,495.23
Selling price,	$50,000.00.	
Ramey lease, appraised value,		268,998.05
Surrendered to discharge a debt of	16,000.00.	
	$66,000.00	$765,493.28

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These two properties had been disposed of before the second account was filed, and not two years after the assignment, for less than 9 per cent. of their appraised value, a loss of about 91 per cent. The blast furnaces and all the coal and ore lands appurtenant, with improvements, were valued by the appraisers at $2,313,218.19; they were transferred to the Powelton Iron Company for $900,000, a little over 40 per cent. of the appraised value, a loss of about 60 per cent. Yet the evidence shows Sterling No. 1 was sold for the best price that could be got for it, and that the surrender of the Ramey lease, under the circumstances, was wise; the assignee could not operate, indefinitely, a coal mine; the minimum royalty to be paid was fast piling up a debt. The mismanagement, was not in a reckless conversion of the assets at wholly inadequate prices; it was in a reckless appraisement of them, by appointees of the Court, at prices, which no assignee, under a lawful management of the property, could obtain for them.

The appraisers were reputable gentlemen; one was an iron manufacturer, having experience and knowledge of iron properties; two of them were practical coal operators, and besides, for years before the assignment, one of them had special knowledge of the assigned coal lands. The competency of the appraisers, from everything that could be known of them, when appointed, was beyond question. But, now notice from the testimony of Mr. McHugh, a coal operator for forty years, on what a radically wrong basis they proceeded to make their valuation of assets, which clamorous creditors were demanding should be turned into money and appropriated in payment of more than one and a half million dollars of debt. He testifies: "We met at Saxton, and organized there, and conferred together as to the basis upon which this appraisement should be made, and we concluded that it should be made upon a practical basis; that is, upon the basis that the business should be conducted uninterruptedly, and under skillful management, and all to be made out of it that such management could produce. . . . . That was the method we settled on to make those appraisements." Further on, he says, in substance, that he did not think the properties would have brought anything like the appraisement at a sale, but the valuation made, was on the assumption that the creditors would take and operate the properties until their debts were paid Mr. Coit, in his testimony as to the iron property, after speaking of the special advantages of the plant says: "We valued it as an active plant in operation; not as a dull, dried-up, dead thing, but as a thing that was going, that was capable at that time of making money."

A man of ordinary observation, it seems to us, would have no difficulty in discerning the cause of the great disparity between the amount realized by a sale, soon after the appraisement, and this sort of "practical" value thus put upon the property by the appraisers. Take the Sterling Mine; the lease stipulated that ten cents per ton royalty was to be paid to Long, the owner, for each ton of coal mined; the coal seam being about five feet in height, yielded about 5,000 tons to the acre; the appraisers estimated a reasonable profit on each ton to the operator of ten cents; this made a profit of $500 per acre when the coal was mined; the coal yet in the tract, was, therefore, valued at $500 per acre. It does not seem to have occurred to the appraisers, that any one purchasing on that valuation, after years of business management and risk, would only get back what he had paid; and unless he made in profit the interest on his investment, would be a heavy loser. The fact is, the value of the coal in place, ten cents per ton, was to be paid to Long, the owner, as it was mined; to mine it was a business venture running through future years, and depending for its success on many contingencies. It might or might not yield a profit. To enter upon this venture, required an investment of capital in rails, tipples, engines, mules, and other mine equipment at that particular point, a large part of which would be practically valueless, when the coal was mined. The value of this equipment, at that time for the purpose of mining out what remained in that coal tract, was the reasonable value of Sterling No. 1. It brought, at a sale entirely fair and open, $50,000; and, so far as the evidence shows, that was about all it was worth.

The value of the iron property was ascertained by the same unreliable estimate; that is, what net profit by skillful management might be made? The principal sum on which that profit was a fair percentage was adopted as the appraised value. As an illustration, presumably, a blast furnace, with the capacity of those transferred to the Powelton Iron Company, with all the ore, coal and limestone in proximity to and part of the furnace property, ought to make 500 tons of pig metal per week, which ought to yield a profit of $2 per ton, or $1,000 profit per week, or $50,000 per year, and with two furnaces, $100,000 per year, or 5 per cent. on $2,000,000; therefore, the value of the plant, with some additional advantages, was over $2,000,000. Where the purchaser, who put in his $2,000,000, was to get his profit, we cannot conjecture. Clearly, having paid $2,000,000, if the money was worth 5 per cent., he would just keep whole. Yet the appraisers seem to have assumed, that sane men would invest $2,000,000 in an iron manufacturing enterprise, take all the risks incident to that business in the hope of making 5

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per cent. profit, when the money was worth that much in other investments, where other men took all the risks. As was to be expected, there was no rush of purchasers, nor any purchaser at that figure.

If Robert Hare Powel, with his exceptional business energy and activity, had survived for many years, and no unlooked-for business disaster had overtaken him, having already a large amount of money invested, it is possible he might have added to his estate a sum approximating the values put upon those properties by the appraisers. But, taking the circumstances as they existed when the appraisement was made, they were wholly unwarranted. The assignors were sanguine young men, with but little experience; they took a most hopeful view of the condition of affairs. What to other men, of more experience, seemed a barely possible value, under the most propitious circumstances, to the assignors was a value certain under the then existing circumstances. And, they seem to have impressed their views on the appraisers and creditors, and possibly to some extent at first, on the assignee. This is the utmost proven by the evidence, as to a fraudulent over-valuation. There is nothing to show the assignee was intentionally a party to this valuation, or even knew how erroneous it was, until months after it was filed. Many of the creditors, among them this appellant, were familiar with some of these properties, if not all of them, and knew the values put on them were purely fanciful, yet filed no exceptions. As the assignees were guilty of no mismanagement in accepting what they were actually worth, in this particular, the averments in the petitions are not sustained.

Nor do we find anything in the evidence in the other averments, which would warrant the Court in removing the assignee from the trust. Irregularities, which we will notice in considering the exceptions to the auditor's report, there were, but nothing which calls for anything more than surcharge, if not made clear on settlement of the final account.

That part of the decree imposing the costs upon the petitioners, is not justified by the facts. The findings of the auditor in his second report, and in the interlocutory report, were sufficient grounds on which to base the petitions. And although, on a consideration of the whole evidence, the weight of it is in favor of the respondent, the litigation cannot be properly termed, causeless.

As to the complaint of the conduct of the master, in receiving part of his fee from the assignee before his report was filed, there is no evidence that this was other than an indiscretion. That an auditor or master should wait until the end of a prolonged litigation like this, before receiving any part of his compensation is unreasonable; that he should receive any part of it from one of the parties without the knowledge of the other, or of the Court, is, to use the mildest term, unseemly. If he has devoted his time for months to his duty, and the end is not in sight, as here, he has a right to ask a direction of the Court for immediate payment of a proportionate part, and then such order can be made as to the Court seems proper. But if this, clearly the better way, be not followed, then the payment should be made with knowledge of and by consent of counsel for parties interested.

The course pursued here, by the master, was exactly that sort of indiscretion which invited upon him the grave imputation put of record in the exception of the appellant. A master ought to be honest, as we believe the master here was; but he ought, also, to appear to be honest.

Therefore, we find as a fact, the material averments of the petitions are not sustained, but that they were not groundless. The decree dismissing them is sustained; so much of it as imposes the costs upon the petitioners is reversed, and it is directed the costs to be paid out of the assigned estate.

As to the examiner and master's fee, $5,000, we think the charge excessive. A very large part of the testimony had been taken before the auditor and typewritten; this had to be read and considered; the time consumed in taking additional testimony, and in making up the report, warrants no such charge as this. One-half this sum, or $2,500, we determine to be a reasonable compensation, and that is the sum directed to be allowed him.

This brings us to a consideration of the appeals from the decree overruling the exceptions to the second report of the auditor.

The principal subject of contention, as to the auditor's second report, is his surcharge of the assignee with the appraised value of the iron property, $2,313,318.89, conveyed by the assignee to the Powelton Iron Company. This company was a corporation formed by the creditors for the express purpose of taking a conveyance of this portion of the assets. The creditors were the subscribers for the stock; by the operation of the plant, they expected to make the stock valuable, and thus realize a part of their debts against the assigned estate. The consideration was $900,000, subject to mortgages and liens; and in addition, the assignee paid to the company $100,000 in cash, which was intended to be a working capital. The Powelton Iron Company gave to the assignee a receipt and discharge of all further liability in respect of the matter. The operation turned out disastrously for the creditors. This, itself, can give the creditors no ground of complaint against the assignee. Be-

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fore buying the property, they met together, discussed its value, and capabilities; weighed all the advantages and disadvantages of the proposed corporation; then signed the creditor's agreement to take a conveyance of it; accepted the $100,000 in cash from the assignee, and launched their enterprise. In a few months, under their management, the scheme utterly failed. Why should these creditors, or any of them, seek to surcharge the assignee with more than twice the agreed value of a property, which their own management had demonstrated they had paid too much for? They were not children or lunatics, for whom the law provides guardians as protectors against improvident bargains; they were grown men, of large business experience; they had ample opportunity of knowledge concerning the subject of the contract; most of them knew as much, some of them more, about the property, than the assignee did. Unless there can be some evidence of fraud or overreaching upon the part of the assignee, or there be some settled rule of law in the administration of such a trust as this one, violated, a Court of Equity will be slow to visit such a penalty on a trustee. The auditor finds: 1. That by the third paragraph of the creditor's agreement, it was not to go into effect until all the creditors had signed it; 2. That all had not signed it; 3. That the confirmation of the first account was not an adjudication of this question; 4. That appellants had done nothing which estopped them from raising any legal objection at the audit of the second account.

As facts, we find, from the decided weight of the evidence, that all the known creditors, except those of $350 or less, who were to be paid in cash, did sign the agreement, except the First National Bank of Huntingdon. And, as to this creditor, we find its claim was represented by a third party, who professed to own it; that this was known to the bank, and that it purposely refrained from making its ownership known, that it might afterwards assert its debt independent of the other creditors, and thus compel payment. It thus kept silent when it ought to have spoken, and therefore, will not be heard now. It further appears, that the Houtzdale Bank was represented by counsel, at the first audit, who knew of the report of the auditor, and its filing; that this report, after exceptions were filed, was confirmed absolutely, and thus, by a final decree of the Court, this credit was allowed; that Mr. Brisbin, one of the partners acting for the bank, took part in the meetings of the creditors leading up to the transfer of the property, and knew of the payment of the $100,000 by the assignee to the company.

As we have already noticed, in the first account, this transfer was distinctly identified by accountant, in the first auditor's report, it was the subject of consideration and adjudication. The auditor was asked in the interest of all concerned, to make specific findings as to this property, and says: "It has been brought to the attention of the auditor, that the transfer to the Powelton Iron Company by the assignees of the property agreed upon as aforesaid, has been effected several months prior to the filing of this report. The payment of $100,000 to the company appears on the assignee's account filed. The auditor finds that these transfers are absolute, save as limited by the terms of the creditors' agreement referred to. In the ownership of the company, these assets will continue free from the trust of the assignment, from all claims of creditors, save under the agreement reported herewith, and subject only to the mortgage held by the secured creditors, and such other liens of record as may exist, and to the stipulations of said assignment. Should any other creditor, hereafter make themselves known, they must have recourse to a later fund in the hands of the assignee, or to the assignors. There is no need that these facts be expressly found by the auditor, because the directors of the Powelton Iron Company should know to whom they are accountable for their administration of the corporate property."

Certainly, a question thus passed upon by the auditor, and then settled by a final decree of confirmation by the Court, with all the attending circumstances of notice and hearing to appellants, ought not to be disturbed without imperative reasons.

As to some of the creditors acting in a fiduciary capacity, having no authority to join in such an agreement, the appellant is not in a position to raise that question. The trustee and his *cestui que trusts* will be heard at the proper time, when it is raised between them. Those directly interested are not now before us.

But whatever might have been appellants' right at an earlier stage, it is too late to challenge the validity of this transfer after his apparent acquiescence in the first report. The material facts were then known to him, or might, with reasonable diligence, have been known. As is said in Randolph *v.* Quidnick Co., 135 U. S. R. 457, in a case involving a somewhat similar arrangement by the creditors of the insolvent Sprague estate: "We do not feel called upon to decide as a question of absolute law, whether the conveyance was or was not valid beyond challenge. It is enough for the purposes of this case, that it was with the general acquiescence of the creditors, and that its purpose was equality between them. If they were not satisfied with the legality and equity of the proceedings, they should have antagonized them sooner. Equity

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loves equality; and if they did not believe that these proceedings were legal and equitable, they should promptly have invoked the aid of a bankrupt Court, or made their assertion of legal right. They might not equitably wait the outcome of the proceedings, expecting to approve if they worked out full payment of all creditors, and ready to attack if the scheme proved a failure."

To the same effect are Guiterman *v.* Landis, 1 WEEKLY NOTES 622, and Boyd *v.* Smith, 128 Pa. 205.

The appellants' 3d, 5th, 6th, 7th, and 9th assignments of error, all relate to and depend upon the validity of the transfer of the Furnace Plant to the Powelton Iron Company, and are therefore overruled.

As to the 8th assignment, that is overruled to this extent: It appears that Coal Seam B., an underlying, undeveloped seam of Sterling No. 1, did not pass to the purchaser of the lease and equipment of the upper seam, but that it remains an unconverted asset. Let the assignee account for this in a future account. It is not discharged from accountability by the fact that the whole property is one item in the inventory. The sale severs that item. A part is now sold and accounted for; a part remains unsold, and to be accounted for.

The Ramey lease was properly disposed of and accounted for, and therefore the 12th assignment is overruled.

As to the 13th, the decided weight of the evidence shows, that Mr. Crawford was of counsel for appellant at the first audit, with his, appellant's, knowledge and consent, and as counsel, had due notice of the filing of the report.

What we have said, generally, as to the effect of the decrees of confirmation, necessarily disposes of the 4th, 10th, 11th, and 14th assignments of error; they are overruled.

This leaves the parties in this attitude: the assignee, in its second account, claimed a credit for $62,586.06, because, in its first account, credit for that amount for commissions and counsel fees, in excess of cash on hand, had been taken. By this very act, the accountant, in effect, admitted there had not been a final adjudication of it; that the payment had not been in fact executed as represented in the first account. The auditor concludes, that to the amount of $32,586.06, this credit "must be regarded as unadjudged." We concur with him in this conclusion, and sustain the 1st and 2d assignments of error.

The decree of the Court sustaining exceptions of assignee to second report of the auditor in this particular is reversed. And this is the only question remaining open to further litigation, as to items embraced in the two accounts filed; and as this claim of credit is not yet *res adjudicata*, it is the duty of the Court below to appoint an auditor to pass upon the legality and reasonableness of the charges of the assignee for counsel fees and commissions, and to distribute any balance in hands of assignee. This reasonableness is to be determined from proper proof adduced before him. That ought not to be fixed on the large appraised value of the assigned estate, without regard to its real value. True, the extent of responsibility is an element in arriving at what is a reasonable charge. But there are to-day millions of stocks and bonds not worth five cents on the dollar; an assignment of such assets involves very little responsibility on part of the trustee, and it would be unjust to creditors to measure compensation by the nominal value. Nor, is the assignee entitled to double compensation in any case; if duties usually performed by an assignee personally, have been delegated to lawyers and agents, and compensation has been allowed for their services, it cannot again charge for such service, as if rendered by itself. It is the duty of the Courts in every trust account, to rigidly scrutinize all charges for compensation, and to prevent the depletion of trust funds from excessive charges by either trustees or counsel.

All creditors' claims on the fund, in a sense, are antagonistic to the trustees. It is his duty to see that they are properly proven, and to resist payment of all unfounded demands. He should not be represented by counsel who have adverse claims.

As to the complaints put on record here, against the learned Judge of the Court below, we can discover nothing to warrant them, in the evidence before us.

The character of the litigation and the temper of counsel may exhaust even the patience of a Judge, as they possibly did here. The Court had other cases to try, and other suitors anxious for a hearing; this probably did not occur to counsel for appellant, and therefore, he attributes the adverse judgment to a neglect to fully hear, rather than to a weakness of his cause in the several important particulars we have noticed.

The record is remitted to the Court below, to be proceeded in to final decree in accordance with this opinion; the record costs of these appeals to be paid out of the fund. W. D. N.

Jan. '93, 330. January 22, 1894.

In re Assigned Estates of Robert Hare Powel & Co. and Robert Hare Powel's Sons & Co.

Appeals of Southwestern National Bank of

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Philadelphia, Importers' and Traders' National Bank of New York, Brisbin *et al.*, lately trading as the Houtzdale Bank, the Central Banking Co. of Mount Union, Pa., First National Bank of Bellefonte, The Curwensville Bank, Irwin & Stewart, D. D. Morrell, Atlantic City National Bank, and Farmers' and Mechanics' National Bank of Woodbury, New Jersey.

October 1, 1894. DEAN, J. All the questions raised by this appeal have been passed upon in the appeal of the Houtzdale Bank from the same decrees, opinion filed this day. The record is therefore remitted to the Court below to be proceeded in to final decree in accordance with that opinion, the record costs of this appeal to be paid out of fund in hands of assignee.

W. D. N.

Jan. '94, 348. May 16 and 17, 1894.

Stevens's Estate.

Appeal of Thaddeus J. B. Stevens and others.

Will—Contingent bequest.

The testator by his will left to his nephew a life estate in certain property, and, upon certain conditions precedent, to be performed by the nephew, the fee, and added, in case the life estate should expire before the legatee had entitled himself to the fee, "then I dispose of whatever shall remain as follows: If the aggregate sum shall amount to $50,000, without which no further disposition thereof can be made, I give it to my trustees to erect, establish and endow a house of refuge." The nephew died before fulfilling the condition and at that time the estate did not amount to $50,000:

Held, the effect of the parenthetical requirement that the estate should amount to $50,000 was not to make the bequest for the charity contingent upon the estate's amounting to $50,000 on the death of the life tenant, but merely to prevent the erection of a house of refuge until the estate equalled the said sum.

Appeal of Thaddeus J. B. Stevens and others from the decree of the Orphans' Court of Lancaster County, confirming the report of auditors upon the account of the surviving executor of Thaddeus Stevens, deceased.

Thaddeus Stevens died in 1868, leaving a will which contained, *inter alia*, after other legacies the following:

"I give to my nephew, Capt. Thaddeus Stevens, now at Caledonia, my gold watch; I give to my nephew, Capt. Thaddeus Stevens, eight hundred dollars a year, to be paid half yearly. If by reason of sickness he may need more, he is to have it at the discretion of the trustees.

"If at the end of any five years Thaddeus (nephew) shall have shown that he has totally abstained from all intoxicating drinks during that time, the trustees may convey to him one-fourth of the whole property; if at the end of the next successive five years he shall show that he has totally abstained from all intoxicating drinks they may convey to him another fourth, being one-half of the property; if at the end of another consecutive five years he shall show that he has abstained from all intoxicating drink, they may convey the whole to him in fee simple; if he should get married before the house I live in is sold he may receive the same and occupy it without sale.

"If the life estate of my nephew or rather the annuity of the said Capt. Thaddeus Stevens, of Pennsylvania, should expire before he has enabled himself to become entitled to the corpus, or fee simple of my estate, then I dispose of whatever may remain, as follows: If the aggregate sum shall then amount to fifty thousand dollars, without which no further disposition thereof can be made, I give it all to my trustees to erect, establish and endow a house of refuge for the relief of the homeless indigent orphans."

In 1891, the third account of the estate was filed by Edward McPherson, surviving executor, and was referred to Simon P. Eby, William Leaman and J. Hay Brown, Esqs., as auditors, before whom it appeared that Capt. Thaddeus Stevens died on or about June 1, 1874, before he had enabled himself to become entitled to the corpus or fee simple of the estate, at that time there were no accumulations; that the estate of Thaddeus Stevens, deceased, did not at any time "aggregate" fifty thousand dollars exclusive of accumulations and after payment of debts and liabilities, necessary expenses of settlement, general legacies and collateral inheritance tax; that at the time of filing the third account with all accumulations the "aggregate" of the remainder of the estate was only $50,687.90; when the auditors' report was prepared the estate exceeded $54,000.

Upon these facts the heirs of Mr. Stevens claimed that there was an intestacy so far as the residue of the estate was concerned because at the time of Captain Stevens's death the estate did not amount to $50,000. The auditors, however, held otherwise and awarded the balance of the estate to E. McPherson in trust for the house of refuge. The heirs filed exceptions which were dismissed by the Court. The heirs took this appeal.

H. M. North and *D. G. Eshleman*, for appellants.

The only way in which the position of the Court below can be sustained is by writing into the will a trust for accumulation, but there is not a word, not an intimation even, from which an inference can be drawn that testator intended that the "aggregate" balance, if it amounted to

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less than fifty thousand dollars, should be held for accumulation.

Words may be supplied to carry out a defectively expressed intent, but not to create another intent, hence, if a doubt arises that the change would advance the real intent of the testator, it cannot be made.

Varner's Appeal, 87 Pa. 422.
McKeehan *v.* Wilson, 53 Id. 76.

The question in expounding a will is not what the testator meant, but what is the meaning of his words.

2 Williams on Executors, 1078.
Martindale *v.* Warner, 15 Pa. 480.
Weidman's Appeal, 42 Leg. Int., 338.
Hancock's Appeal, 112 Pa. 532, 541, 544.

If the construction of a will be doubtful, the law leans in favor of a distribution as comformably to the general rule of inheritance as possible.

France's Estate, 75 Pa. 220, 225.

An heir at law can be disinherited only expressly or by necessary implication, hence in the construction of a will of doubtful meaning every fair intendment is to be made in his favor.

Bender *v.* Dietrick, 7 W. & S. 284.
Hitchcock *v.* Hitchcock, 35 Pa. 393.
Rupp *v.* Eberly, 79 Id. 141.

The estate devised to the trustees for a home for the relief of orphans, was limited upon the contingency that at the time when Capt. Stevens' opportunity to take expired, the aggregate balance of the estate should amount to fifty thousand dollars. The auditors have found the fact that the residue did not at that time amount to that sum. That being the case, the fund descended to his heirs at law. That principle of law must have been in Mr. Stevens' mind when he wrote the words, "without which no further disposition thereof can be made."

George M. Kline, for appellees.

A restricted meaning cannot be given where the effect would be to lead to an intestacy.

Stivers' Est. (O. C.) PENROSE, J., 21 WEEKLY NOTES, 335.

No presumption of an intent to die intestate as to any part of the estate is to be made, where the words of the testator will carry the whole.

Stehman *v.* Stehman, 1 Watts, 466, 475.
Miller's Appeal, 113 Pa. 459.

It is never presumed that a testator intended to die intestate as to any part of his estate if a contrary intent can be fairly deduced from the language of the will.

Roland *v.* Miller, 100 Pa. 50.
Ferry's Appeal, 102 Id. 207.

October 1, 1894. WILLIAMS, J. The will of the late Hon. Thaddeus Stevens was written by himself, and is a characteristic production. Its provisions are expressed in very few words and, generally speaking, with great clearness. Such ambiguity as exists in it is due to brevity in expression, and the use of popular instead of technical words. Looking at it as a whole it is clear that he did not intend that his estate should go to his heirs as such, or that any part of it should be distributed under the intestate laws.

After a few legacies and two small annuities were provided for he made an alternative disposition of the remainder of his estate. The first object of his bounty was his nephew Captain Thaddeus Stevens, son of his deceased brother, Morrill Stevens. This young man, after the death of his father, was brought from Vermont to the home of his uncle, who seems thereafter to have stood to him *in loco parentis*. The provision made for him in the will was so drawn as to furnish the strongest possible argument in favor of a life of sobriety. It is as follows: "If at the end of any five years Thaddeus (nephew) shall have shown that he has totally abstained from all intoxicating drinks during that time, the trustees may convey to him one-fourth of the whole property; if at the end of the next successive five years he shall show that he has totally abstained from all intoxicating drinks they may convey to him another fourth, being one-half of the property; if at the end of another consecutive five years he shall show that he has abstained from all intoxicating drink, they may convey the whole to him in fee simple." Here is a devise of the whole estate to his nephew on a single condition, that of abstaining, for fifteen years consecutively, from all intoxicating drinks.

In case his nephew was unwilling or unable to comply with the condition, so that the estate could not vest in him, the testator had a second object of his bounty, which was in that case to succeed to his entire estate. The provision for this second object is as follows: "If the life estate of my nephew or rather the annuity of the said Captain Thaddeus Stevens, of Pennsylvania, should expire before he has enabled himself to become entitled to the corpus, or fee simple, of my estate, then I dispose of whatever may remain as follows: If the aggregate sum shall then amount to fifty thousand dollars, without which no further disposition can be made, I give it all to my trustees to erect, establish and endow a house of refuge for the relief of the homeless indigent orphans. Those shall be deemed orphans who have lost either parent. I desire twenty thousand dollars to be expended in erecting suitable buildings. The residue to be secured in Government securities bearing not less than six per cent. per annum interest."

The ambiguity in this provision is found in

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the words, "If the aggregate sum shall then amount to fifty thousand dollars, without which no further disposition can be made, I give it all," etc.

The contention of the appellants is that this gift is conditional upon the amount of the estate at the death of Captain Stevens. If at that time the estate was of the aggregate value of fifty thousand dollars the gift was to take effect. If it was not of that value then the gift failed, the testator became intestate and his whole estate descended, less the legacies paid, to the heirs at law. The trouble with this position is that it disregards the intentions of the testator and it gives to an explanatory and parenthetic clause the effect of a condition. It is true that the question to be settled in giving construction to a will is not so much, what did the testator mean, as what is the meaning of the words he has employed: Hancock's Appeal, 112 Pa. 532. But the words must be read according to their plain and ordinary meaning taking the immediate context into view: Appeal of E. D. Howe et al., 126 Pa. 233; and when necessary the scheme of the will, and the character of other provisions in it should be considered so that the instrument may be interpreted as a whole.

Looking over this will as a whole we conclude that the testator did not intend to die intestate. This is a legal presumption arising from the fact of his making a will: Ferry's Appeal, 102 Pa. 207; Miller's Appeal, 113 Pa. 459. But in the will before us it is not left to be gathered by presumption, for it is plainly expressed. The declaration of the testator is that if his nephew should die without entitling himself to the fee simple of his estate, "then (that is, in that event) I dispose of whatever may remain as follows: . . . . I give it all to my trustees to erect, establish, and endow a house of refuge for homeless indigent orphans." No more apt words could have been chosen to show the testator's intention, or to carry it into effect, than these words of absolute gift of all that should remain of his estate at the death of his nephew without having complied with the condition on which the gift to him depended.

But when and how is this charity to be established? It is in the treatment of this subject that the testator sacrificed clearness to brevity. The answer to the question "when?" is found in a parenthetic clause. It is whenever the estate shall have an aggregate value of fifty thousand dollars; and until that happens no further disposition can be made of it. Why? because, as the testator states, he wishes twenty thousand dollars to be invested in building and equipment, and thirty thousand dollars in interest bearing securities as an endowment. Without this sum, or until it is within the reach of his trustees, the charity can not be put upon the foundation the testator desires; and he does not wish anything done until it can be done in the way pointed out.

The answer to the question "how?" is given very clearly. The trustees are to procure a charter of incorporation. They are to see that admission is not made to depend on race, color, or religious belief of parents, that all eat at a common table, and share alike in all the advantages of the house of refuge established. The gift to the charity is thus seen to be absolute. The fee simple having failed to vest in the nephew, vests unconditionally in the charity. The only element of uncertainty in the gift is that which relates to the time when the trustees shall begin the work of erection, establishing and endowing the charity. This the testator makes depend on the value of his estate at the time when the contingency happens that vests the title in the trustees for the charity. If at that time the value is fifty thousand dollars or upwards the trustees are required to enter at once on their work. If it is less than that sum then they must wait until it has reached fifty thousand dollars, "without which no further disposition can be made."

The testator's plan requires the use of at least that sum of money, and if the aggregate value of the estate was less, then nothing could be presently done but to wait till the necessary sum was in hand. If the parenthetical words should be transposed and placed at the end of the sentence the meaning would be made to appear very clearly. The gift would then be in this form. "I dispose of whatever may remain as follows: I give it all to my trustees to erect, establish and endow a house of refuge, but I do not want this work entered upon until the trustees shall have at least fifty thousand dollars at their disposal. Of this sum, twenty thousand dollars may be used to build and furnish a suitable building, and thirty thousand dollars or more, if more should be in the hands of trustees, must be put at interest as an endowment fund."

The learned auditors reached the same conclusion in an elaborate and able report which the Orphans' Court adopted as a correct exposition of the will of the testator, and as the basis of the decree appealed from.

When the last account was filed by the surviving executor, and the auditors were appointed, the value of the estate was something more than the sum named by the testator as necessary for the establishment of the charity.

The decree awarding the fund to the trustees, "to erect, establish and endow a house of refuge for homeless, indigent orphans" is in accordance with the directions of the testator, and it is now affirmed. H. B.

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Jan. '94, 351. May 16, 17, 1894.

Stevens's Estate.
Wiestling's Appeal.

Statute of limitations—Trust—Termination of trust relation.

Where an attorney in fact collects money due to his principal and gives to the principal his own note for the amount, the fiduciary relation is at an end and the statute of limitations begins to run as in an ordinary case of debtor and creditor.

Appeal of J. M. Weistling, administrator d. b. n. of Alanson Stevens, deceased, from the decree of the Orphans' Court of Lancaster County, dismissing exceptions to the report of auditors in the estate of Thaddeus Stevens, deceased.

Before the auditors appointed to pass upon the account referred to in the foregoing case a claim was presented by the administrator d. b. n. of Alanson Stevens, deceased, the particulars of which appear in the opinion of the Supreme Court. The auditors rejected the claim and their action was affirmed by the Orphans' Court, whereupon this appeal was taken.

A. C. Reinoehl, for appellant.

The fact that a note was given does not conflict with the evidence that it was given as evidence of money held in trust, or change Mr. Stevens's situation from that of a trustee to that of a mere debtor.

Rupp's Appeal, 100 Pa. 537.
Harrold *v.* Lane, 53 Id. 270.

The statute of limitations does not apply, for this is not an attempt to recover on a note, but is a demand on the estate of a trustee to pay the funds belonging to a *cestui qui trust* which it is not attempted to deny has not been paid.

George M. Kline, for appellee.

October 1, 1894. WILLIAMS, J. This appeal presents but one question. The facts upon which it is raised are free from difficulty. Alanson Stevens was the son of Morrill Stevens of Vermont, who was a brother of the late Hon. Thaddeus Stevens of Pennsylvania. After the death of his brother in Vermont, Thaddeus Stevens brought his two sons to Pennsylvania and treated them with the same kindness and liberality that he would have been expected to show them if they had been his own sons. Their interests in their father's estate had remained in the hands of their guardian in their native State until after they came of age, when they executed a power of attorney to their uncle to settle with their guardian and receipt for the money due them. By virtue of this power of attorney Thaddeus Stevens received two thousand four hundred and sixty-one dollars belonging to Alanson. The power of attorney bore date on the 30th June, 1858. On the 12th of July following, the decedent settled with Alanson and gave his note for two thousand four hundred dollars of the money he had received from Kittridge, the guardian.

This terminated the relation of principal and agent, or attorney and client, and established that of debtor and creditor. In the meantime Alanson had been made the agent of his uncle, and was employed at a salary as superintendent of the Caledonia Iron Works located in Franklin County. In 1859, he married, but continued to reside at, and take charge of the iron works. In 1861 or 1862, he enlisted in the army of the Union, in the artillery branch of the service; with a battery he had been instrumental in organizing. In 1863, while in the discharge of his duty, he was killed at the battle of Chickamauga. After his death his brother found the note of Thaddeus Stevens for twenty-four hundred dollars among other papers in his army trunk. This brother became the administrator of Alanson Stevens's estate, which he settled; but he never made any use of, or claim upon, the note, and did not treat it as part of his brother's assets. He held it for about eleven years, and died in 1874.

His estate was administered by R. W. Shenk, who found the note among his papers, took possession of it, and placed it in the hands of William Leaman, Esq., who retained it after Shenk's death in 1880. In 1886, Weistling, the appellant, who had been appointed administrator *de bonis non* of Alanson Stevens for this purpose, obtained possession of it and demanded payment from the executors of Thaddeus Stevens, the maker.

The note was given in July, 1858, payable on demand. The maker died in 1868. No demand or claim of any sort was made upon him in his life-time, and no payment upon, or acknowledgment of it was ever made by him. The payee held the note for over five years before his death. His administrator held it for more than eleven years. Shenk and Leaman held it for twelve years more. Twenty-eight years after its date the first demand is made for payment, and that comes after the death of all the parties who were in a position to know about the transaction or to explain its non-presentment. Under such circumstances the statute of limitations is a conclusive answer to the appellant's demand.

But it is urged that the statute ought not to apply because the maker of the note was a trustee for the payee. We are unable to find any evidence of the existence of a trust relation. Kittridge, the guardian, was a trustee, but his ward had grown out of his minority and called upon him by his attorney in fact, for settlement. After the settlement with his guardian he next

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settled with his attorney in fact, received sixty-one dollars in cash, and a note payable on demand for twenty-four hundred dollars in full for the money received by him. The relation of guardian and ward was terminated by the act of the agent of Alanson Stevens. The relation of principal and agent was then closed by his own act in making settlement in full with his agent.

The note created a new relation, that of debtor and creditor, and so far as the evidence enables us to judge that was the only relation thereafter existing between them. One witness testifies that the decedent once spoke of the note as representing money held by him in a fiduciary character. If this was so, it is clear that the word fiduciary must have been used in a popular and not in a legal sense, for there is no single fact in the case that points to the existence of any trust relation between the maker and the payee of the note. Rupp's Appeal, 100 Pa. 537, and kindred authorities are not applicable on the facts of this case.

The decree appealed from was properly entered and is now affirmed.

H. B.

Jan. '93, 271. January 29, 1894.

Roberts' Estate.
Roberts' Appeal.

Executor—Expenses of, not allowed—Wills—Construction of—Orphans' Court—Jurisdiction of.

An accountant cannot have charged against one of the distributees' share the expense of successfully defending a suit against him individually for such share in another State, although such suit indirectly benefited the estate. Whatever costs he is entitled to recover are incidental to the judgment in his favor, and must be collected under the laws of that State.

Testatrix, a resident of Maryland, ordered her farm in Pennsylvania to be sold, and one-half of the proceeds she directed to be "secured in the farm while my dear husband lives, or if it is taken out it must be secured in some other real estate, so as to keep the principal to be equally divided, after my husband's death, among all my children. My husband is to have the interest only while he lives.

"The other half I want to be equally divided among my children, or if any of them is dead, their share is to be equally divided among their heirs.

"If anyone owes us anything take it out of their share before giving it to them, and divide it among them all."

The husband died prior to testatrix, and her Pennsylvania executor sold the farm. At the adjudication of his account, he claimed that the indeb edness of the three sons to their father should be charged against their shares of the proceeds:

Held, (1) that it was the intention of the will that each child s indebtedness to either his father or mother, should be deducted, and the father's death prior to that of his wife did not alter this construction.

(2) That the Orphans' Court had jurisdiction to determine the amount of indebtedness of the sons to their father, as that was necessary to a proper distribution of the fund under the will.

Appeal of William L. Roberts, individually and as executor, from the decree of the Orphans' Court of Montgomery County, in the matter of the estate of Jane P. Roberts.

The facts of the case, and the material assignments of error, are set out in the opinion of the Supreme Court, *infra*.

J. P. Hale Jenkins, for appellant.

N. H. Larzelere and *James Rich Grier* (*J. S. Freeman* with them), for appellees.

October 1, 1894. DEAN, J. The domicile of Jane P. Roberts, the testatrix, at her death was Harford County, Maryland. Besides some personal property, she was the owner of a farm of 52¼ acres in Abington Township, Montgomery County. Her husband was William H. Roberts, who owned in his own right some property in Maryland. They had six children: Charles W., Mary Jane, and Edward H., who lived in Maryland; Isaac L., William L., and Ruth Ann, in Pennsylvania. On the 28th of July, 1881, while her husband was living, she made her will, wherein, after dividing her personal effects among her children, she disposed of the farm:—

"I desire my farm to be sold as soon as it can be sold to advantage after my death, that is, if it is not sold before. But no one shall force a sale to get their share without the majority is willing for it, and one-half the price I want to be secured in the farm while my dear husband lives, or if it is taken out, it must be secured in some other real estate, so as to keep the principal to be equally divided after my husband's death, among all my children. My husband is to have the interest only while he lives. The other half I want to be equally divided among my children, or if any of them is dead, their share is to be equally divided among their heirs. If anyone owes us anything, take it out of their share, before giving it to them, and divide it among them all."

She then appointed her husband and two sons, Charles W. and William L., executors. The husband died in August, 1881; the testatrix partially administered on his estate, and survived him until 2d October, 1883. Letters testamentary were taken out by both executors in Maryland, but Charles W., being a non-resident, declined to file the bond required in Montgomery County, and William alone took out letters there. In February, 1885, he sold the farm for $21,000, and for purpose of making a satisfactory title without proceeding in the Orphans'

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Court, a conveyance, joined in by all the legatees, was made to the purchaser.

However, the executor, William L., received the purchase money, and filed his second and final account of his administration in Montgomery County, September 3d, 1887, which after taking credit for payment of certain liens against the land discharged by the sale, and sundry other credits, showed a net balance for distribution of $11,613. Henry D. Saylor, Esq., was appointed auditor to distribute. On claim made by the executor, the auditor deducted from Edward's share, $850.12, the amount of certain costs and expenses incurred by William in a personal suit against him by Edward in the Courts of Maryland, in which William was successful. The allowance was made on the ground that, although the suit was against William, the fund in the hands of the executor would have been diminished by the amount of Edward's recovery, and being a wholly unjust claim, as determined by final adjudication, Edward's share ought to be charged with the expense of his groundless litigation.

The executor also claimed, that at the date of the will, Albert, Charles and Edward were indebted to their father on personal obligations and as surety, for money which the testatrix intended by her will should be deducted from their shares in the fund realized from the sale of the Montgomery County farm, and that these amounts should be charged against them respectively, in the distribution.

This claim was also sustained by the auditor. Other questions, involving less important items, were raised and passed on by the auditor, and eleven exceptions were filed to his report, and argued before the Court. After careful consideration, the Court passed on all of them, by a decree overruling some and sustaining others. The action of the auditor in allowing the costs and expenses of the executor in the individual suit of Edward against him in Maryland, and in deducting from the shares of Albert, Charles and Edward, the debts owing their father, was overruled, and a re-distribution ordered.

From the decree confirming this last report, we have this appeal. There are eight assignments of error, only the 5th, 6th and 7th of which call for special notice.

The 5th complains of the decree in refusing the allowance of the expenses of the Maryland suit, which ended in the judgment of the Court of Errors and Appeals of that State against Edward and in favor of William.

We think the learned Judge of the Court below rightly held, that the expenses incurred by William in this suit, had no place in the distribution of the purchase money of the farm. It is true, indirectly the estate was benefited by the suit, for it was finally adjudged by the highest Court of Maryland, that the Courts of that State had no jurisdiction to distribute this fund, and that the Orphans' Court of Montgomery County must make distribution; see 17th Atlantic Reporter, 570. But the suit was not against William as executor. By attaching his land in Maryland, in a suit against him, William was compelled to defend. His defence established that Edward's claim against him individually had no foundation; and in so far as he had any claim, it was a legatee under his mother's will, and that this could only be determined on a distribution of the purchase money of the farm in the Orphans' Court of Montgomery County. Whatever costs William should recover, are those incident to the judgment in his favor in Maryland, and must be collected under the laws of that State. He avers he was put to an expense for traveling back and forth, counsel fees, etc., of $850.12, which Edward ought to pay him out of his share. But there is no warrant for such an allowance. It was his misfortune to have to defend against an unjust claim; to successfully do so, he incurred expense, whatever is taxable in that suit, follows the judgment in his favor. The suit was not against him as executor, and he can, in this distribution, make no claim on the fund to even up matters between him and his brother as individuals. This, the learned Judge of the Court below has very clearly demonstrated. But the 6th and 7th assignments seem to us better founded.

It will be noticed, the will was made the 28th of July, 1881. The husband and father was present when it was executed, for by his writing appended to it, he consents to its provisions. The testatrix contemplated his survivorship, and says, "One-half of the price I want to be secured in the farm while my dear husband lives," and then appointed him one of the executors. Although he died the following month, and she survived nearly two years, their expectation as to life at the date of the will, as evinced by its terms, is to be considered in interpreting it. She says, after providing a life interest in one-half the purchase money of the farm for her husband, and making an equal distribution of the whole at his death: "If any one owes us anything, take it out of their share before giving it to them, and divide it among them all." Albert, Charles and Edward were, at that time, indebted to their father. The auditor finds as a fact, that this indebtedness was well known to the mother when she executed the will in the presence of the father. We think it quite clear that the testatrix meant by the expression, "if any one owes us anything, take it out of their share," any debts owing to either her or her husband by their children, and intended the father, as exe-

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cutor, to have the authority to deduct the debt from the share of the debtor in the purchase money of the farm. The auditor finds further, as a fact, that after the mother's death, at a meeting of the heirs, this was the interpretation put upon the will by them, and that they then agreed the amounts owing by them to their father should be deducted from their share in this fund.

While such an agreement would not of itself have been sufficient to give the Orphans' Court jurisdiction to determine the indebtedness between the father and his three sons, nevertheless it is corroborative of the construction put by the auditor upon the will; indicates that those interested so understood the will. The Orphans' Court, in thus interpreting the will, and determining the indebtedness of the sons to the father, does not usurp a jurisdiction belonging to the Courts of Maryland; it only ascertains a fact necessary to the proper distribution of this fund under the will. The Court must determine how much "anyone owes us," the father and mother, before it can be taken "out of their share." The legatees take their shares by the will with the condition attached, and can take them in no other right; the jurisdiction of the Orphans' Court to ascertain the amount owing the father, is just as clear as to ascertain any indebtedness to the mother.

The learned Judge of the Court below was of opinion the language of the testatrix was too vague to warrant this construction. We think, in view of the whole will, the intent was manifest. Therefore, appellant's 6th and 7th assignments of error are sustained. All the other assignments are overruled, and the record is remitted to the Court below, that distribution may be made in accordance with this opinion, and costs to be paid by appellees. W. M. S., Jr.

July '93, 12. January 8, 1894.

Titlow's Estate.
Titlow's Appeal.

Will contest—Executor sustaining the will does so in behalf of the parties interested—Costs not to be imposed upon the estate.

As a general rule an executor is not bound to defend his testator's will, and if he undertakes to do so, it must be as the agent of, and in the interest of those benefited by his action.

Appeal of Frances W. Titlow, widow of George Titlow, and the Guarantee Trust Co., guardian of Frank Titlow, from the decree of the Orphans' Court of Philadelphia County, making distribution of the estate of David Titlow, deceased.

The facts are stated in the opinion of the Supreme Court.

Joseph M. Pile and *David W. Sellers*, for appellants.

Edwin O. Michener (with him *W. Wilkins Carr* and *George L. Crawford*), for appellees.

July 12, 1894. Dean, J. The testator, David Titlow, died August 27, 1884, leaving four children and a granddaughter, Elizabeth, daughter of a deceased son, Charles N. Titlow. If he had died intestate, of course, each would have taken one-fifth of his estate under the intestate laws. He had at his death, very little personal estate, but owned improved real estate in Philadelphia, consisting of nineteen separate lots, valued at $25,600. His will was made August 25, 1881, to which were appended three codicils, the last executed fifteen days before his death. The effect of the whole will was to give: 1. To his son John, two lots valued at $3,000, but subject to a payment of $3,000. 2. To his daughter, Alcenia Schuyler, four lots valued at $5,200. 3. To his son George, five lots, valued at $6,200. 4. To his son George, in trust for Charles during life, four lots, valued at $6,000, with remainder to children of Charles born after July 14, 1883, and in default of children so born, then to George in fee. 5. To his executor, George, in trust for his daughter Sarah for life, four lots valued at $5,200; at her death, two of them in fee to George, and the other two to her children.

Charles died before his father, leaving one daughter, Elizabeth, born before July 14, 1883, so that under the will, George, in addition to his own, was entitled to the share of Charles. As matters stood at the death of testator, George D. was the largest beneficiary under the will. He got five lots, valued at $6,200, directly devised to him; by the death of his brother Charles without children capable of taking the devise over, he took the four lots valued at $6,000, and the remainder in two lots valued at $3,800, in which a life estate was given to his sister Sarah. John, practically, got nothing, for his lots were charged with a payment equal to their value. Sarah had only a life estate in hers. Alcenia took absolutely about one-fifth. George, therefore, was the only one who had a substantial interest in sustaining the will, for under it he took about five-tenths of the estate. Alcenia Schuyler took under the will, about the share that would have fallen to her under the intestate laws. John commenced proceedings to set aside the will, averring want of testamentary capacity on the part of his father; a citation was accordingly issued, and served on George D. Titlow, executor, who was also devisee of almost one-half the estate. He made no answer, further

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than to deny any reason within his knowledge why the will should not be executed. Thereupon, the Orphans' Court directed an issue to the Common Pleas for trial, in which George D., the executor, was made plaintiff, and John H., the contestant, defendant. After a trial lasting nearly two weeks, there was a verdict for the defendant, and against the will; a new trial was granted, and on submission to a second jury, there was a disagreement. In the meantime, both George and John died; Alcenia Schuyler, who had been nominated in her father's will successor to George as executor in case of his death, was put upon the record as plaintiff; the heirs of John took his place upon the record as defendants. Then, there was an agreement of compromise by all interested filed of record, with the approval of the Court, and a verdict sustaining the will taken.

The agreement, in effect, was a division of the property, two-fifths to the widow and child of George, and three-fifths to the other four children, or their representatives, in such shares as should be subsequently agreed to among them.

Samuel A. J. Salter having taken out letters of administration on the estate of George D. Titlow, filed his account of his intestate's executorship under the will of David Titlow. In the account, he charged his intestate with the inventory and rents received from the property devised, amounting to $24,087.88, and then took credit with payments amounting to $15,318.60, leaving a balance of $8,769.28. The credit side of the account is made up of many items, the only ones objected to by the other heirs being that for counsel fees, and expenses incurred in the litigation concerning the will. These expenses amounted to $3,166.89. Alcenia Schuyler and the other children who received under the compromise agreement three-fifths of the estate, excepted to the account, contending that George D. Titlow was the only one of the devisees whose interest it was to sustain the will, and in fact the only one who resisted the attack upon it; that therefore his estate should bear the expenses of the contest, the same as if he had been personally of record as a party. The counsel representing the estate of George D. Titlow, contended that in sustaining the will, he but performed his duty as executor and trustee of the estate confided to him by the testator; and, further, that under the compromise agreement, no one of the parties to it, and presumably benefited by it, could be heard as an objector to the reasonable expenditure incident to the result.

The auditing Judge sustained the exceptions in part, and surcharged the accountant with $3,166.89. His adjudication having been confirmed by the Orphans' Court, we have this appeal by the widow and guardian of the minor child of George D. Titlow.

The error assigned is, that "The Court erred in not holding that the verdict sustaining the will and the agreement requiring the same, was not a full justification to George D. Titlow in maintaining the issue, and that especially by reason of said agreement each of the parties thereto was precluded from gainsaying the expenditures made to secure such result."

It cannot be questioned that the verdict, although taken by agreement, is, in a restricted sense, conclusive. It establishes beyond reach of controversy, title to the land under the will in the devisees. But it in no sense establishes an equity on which to base a decree awarding expenses to the executor in defending the will.

Taking the whole record, it at most shows doubtful testamentary capacity. The first verdict, after a hotly-contested trial, was against the will; at the second trial, there was a disagreement of the jury. Then comes the verdict by consent of all interested, sustaining the will. This only shows that in a very doubtful case, the parties to the suit very wisely compromised it. In Yerkes' Appeal, 99 Pa. 401, in an opinion by the present Chief Justice, it is held as a general rule deducible from all the cases decided in this State, "That an executor is not bound to defend his testator's will, and if he undertakes to do so, it must be as the agent of, and in the interest of those benefited by his action."

Exceptions to the rule, doubtless, may arise. If the beneficiaries under a will sought to defeat trusts created by the testator, and by a collusive arrangement attacked the will for the purpose of setting it aside, that the estate might descend under the intestate laws, it would be the duty of the executor to defend it: or he might defend the genuine will against a forged or spurious one, and in either case equitably demand that his reasonable costs and counsel fees be paid out of the estate. But here there is nothing but the usual disparity of interests inviting favor to the antagonism of the will. George D., under the will, got about half the estate, the remaining devisees the other half, two of the children practically nothing. True, he was executor, and so named of record, but his stand for the will in the litigation was because he was a devisee, and it was largely to his interest to sustain it. He could, unequivocally, in his answer to the citation, have disclaimed any interest as devisee in the contest, and then the Court would have made such order as would have been proper touching the issue. In substance, his position on the record as executor, was that of representative of himself as devisee of one-half the estate, and in that attitude was conducted his side of the contest, until, by the agreement, two-fifths of the estate went

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to his family. Nor is there anything in the compromise agreement that negatives the individual liability which the law imposes upon him. His share is made expressly answerable for $400 fees to counsel of John Henry Titlow, the moving party to the contest, but the agreement is significantly silent as to any other expenses of the contest. The usual taxable costs, therefore, came out of the estate, as if no agreement had been made, and the individual liability of the contesting parties for counsel fees remained unaffected by the agreement.

In view of the evidence and the law applicable to it, we think the Court below properly disallowed the credits claimed for counsel fees, personal services of executor in will contest, stenographer's bill, etc. The assignment of error is overruled, and the decree affirmed at costs of appellant. J. D. B., Jr.

July, '93, 89. May 7, 1894.

Estate of Mary Cawley.
Appeal of Horace B. Cawley.

Wills—Revocation of—Res adjudicata—Practice.

Where the Supreme Court has decided that the survivor of the makers of a double will (which was not a joint will nor in the nature of a contract) had power to revoke her part by a subsequent separate will, such decision does not establish the validity of the second will, which was then before the Court as evidence of revocation, but the latter must be probated in the regular way, and is subject to the same objections as it would have been if the double will had never been executed.

Appeal of Horace B. Cawley from the decree of the Orphans' Court of Union County.

The facts are fully set out in the opinion of the Supreme Court, *infra*, and a more detailed account will be found in the previous report of this case: Cawley's Estate, 26 WEEKLY NOTES 519; 136 Pa. 628.

The matter came up on a rule on H. B. Cawley to surrender to J. H. Cawley the property of the estate and to file an account. McCLURE, P. J., was of opinion that the validity of the second will was *res adjudicata*, and made absolute the rule.

H. B. Cawley thereupon appealed, assigning for error this action of the Court.

Samuel H. Orwig and *J. Merrill Linn*, (*P. B. Linn* with them), for appellant.

The question of the validity of the second will was not passed upon by the Supreme Court, and, therefore, it cannot be said to be *res adjudicata*.

Williams *v.* Row, 62 Pa. 118.
Sheble *v.* Strong, 128 Id. 315.
Lewis *v.* Baker, 151 Id. 529.

William H. Hackenberg and *Andrew A. Leiser*, for appellee.

The validity of the second will was determined in—

Cawley's Appeal, 136 Pa. 628.

One of the errors assigned in that appeal was the decree of the lower Court that the second will was the true will, and that is evidence of what was decided then.

Armstrong's App., 68 Pa. 409.

That issue having once been decided by the Court of last resort, it is *res adjudicata*.

Myers *v* Kingston Coal Co., 126 Pa. 582.
De Chambrun *v.* Campbell, 54 Fed. Rep. 231.
Darlington *v.* Gray, 5 Wharton, 486.
Souter *v.* Baymore, 7 Pa. 415.
C. P. & A. R. R. Co. *v.* City of Erie, 27 Id. 380.
Brenner *v.* Moyer, 98 Id. 274.
Marsh *v.* Pier, 4 Rawle, 289.

July 11, 1894. WILLIAMS, J. A connected statement of the facts relating to the two wills signed by Mary Cawley will reduce the ground of controversy in this case within very narrow limits. Benjamin and Mary Cawley were brother and sister. Both were unmarried. They had lived together for many years, and in 1886 were both aged and infirm. The house in which they lived belonged to Benjamin, and was worth some three or four thousand dollars. Mary owned some bank stock amounting to near the same sum. Their furniture seems to have been owned in about equal parts by each of them.

It is apparent that in 1886 both of them realized fully that they had not long to live, and that the survivor of them would need all that both owned in order to his or her comfort during the survivorship. They accordingly sent for counsel and had a will prepared to be executed by both, so that the estate of the first to die should pass to the survivor for life, and disposing of the remainder in a manner that was at the time satisfactory to both. They executed this will in 1886. Benjamin died in August, 1887. The double will was then probated as the will of Benjamin, and letters testamentary issued to the executor named therein.

In September, 1887, Mary, having apparently changed her mind as to the disposition of her own separate estate, made a new will, naming a different remainderman and executor from that named in the double will which had been probated as the will of her brother. She died in January, 1888. The executor of the double will thereupon presented it again to the register, and it was admitted to probate as the will of Mary Cawley, and letters testamentary issued to

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him thereon. After this was done the second, or separate will of Mary Cawley was presented to the register by John Harrison Cawley, the executor named in it. He was informed of the probate of the double will, and the issuing of letters testamentary to Horace B. Cawley, and did all that was left for him to do, viz: he took an appeal from the decree of probate upon the double will, alleging that the will so proved was revoked by the later will in his possession.

The answer made by H. B. Cawley was, in substance, that the double will was a contract, as well as a will, and that it was not in the power of Mary to revoke it after the death of her brother and its probate as his will. This was the question heard and determined in the Court below on that appeal. It was the only question heard and determined in this Court when the appeal was heard here: Cawley's Appeal, 136 Pa. 628. The learned Judge of the Orphans' Court held that the double will was revocable, notwithstanding the death of Benjamin Cawley, and that the legal execution of a later will amounted to a revocation. From this ruling H. B. Cawley, executor named in the double will, appealed to this Court. He sought to maintain the position taken in the Court below, that Mary Cawley could not revoke the double will, but was bound by it as to her separate estate by her acceptance of a life interest under it from her brother. The appellee contended on the other hand that the will signed by Benjamin Cawley and his sister was revocable by either, and that the decree of the Orphans' Court should be affirmed. This was the precise question raised and determined. In concluding the opinion in Cawley's Appeal we said that the double will was revocable by the testators in the same manner that separate wills would have been, and added, "Benjamin Cawley did not revoke, and his will is to be executed according to its terms. Mary Cawley has exercised the power of revocation, and changed the ultimate destination of her property. Her last will must be followed, therefore, in the distribution of her estate."

This was said with reference to the question then before us, which was whether the double will was revocable or not. If it was not revocable, then the decree of probate appealed from was right, and the double will controlled. If revocable, then the last legally executed will, which it was alleged superseded the first, was entitled to probate so far as this question was concerned. When offered for probate it was subject to the same objections as it would have been if the double will had never been executed or proved. It is probable that the learned Judge of the Orphans' Court, had all the facts that now appear been brought to his attention on the hearing of the appeal from the probate of the double will, would have opened the decree of probate and directed the contestants to produce the second will and proceed to make proof of its execution and validity in the usual manner. Both wills would then have been before the register and the Court below at the same time. The legal question over the power of revocation and the question of fact over the actual revocation would have been considered at the same time, an issue *devisavit vel non* directed to determine testamentary capacity, and a final order deciding which of the two wills was the last will and testament of Mary Cawley would have settled the whole contention.

But the facts did not appear. The former appeal turned upon the power of revocation. The second will is now offered for probate, and it is the duty of the proponent to establish its validity in the usual way. It is not a valid revocation of the double will, unless it is a valid will executed by one having testamentary capacity and without undue influence. These questions have not been heard. The proceedings in the first appeal might have taken such shape as to enable the parties to raise them, but they did not. They are now raised regularly. The validity of the separate will as a revocation of the double one depends upon them, and the appellant has a right to be heard upon the testator's capacity and upon the exercise of undue influence over her. If the proponent can establish the alleged last will he will take under it. If he cannot, then he has no right to complain if the first or double will be again admitted to probate upon his failure to establish its revocation after full opportunity to be heard upon that subject.

The decree appealed from is reversed, and the record remitted for further proceedings in accordance with this opinion.

W. M. S., Jr.

Jan. '93, 338. February 5, 1894.

Commonwealth ex rel. v. Thomas, Register.

Mandamus—Jurisdiction of register of wills in revocation of letters.

The right of the Court to compel the register to the performance of a ministerial or clerical act, necessary to the proper adjudication of a question to be tried in Court, is undoubted.

It is a question for the higher Court to decide, whether an act done, or to be done, by a subordinate officer or lower Court, is ministerial or judicial.

Mandamus will not lie where full and ample remedy may be had either by appeal, writ of error, or otherwise, from the judgment, decree, or order of the subordinate Court.

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Appeal of Frank A. Thomas, register of wills, defendant, from the judgment of the Common Pleas of Chester County, in a suit by the Commonwealth of Pennsylvania ex rel. E. Malin Hoopes and Thomas W. Pierce.

The facts of this case are fully stated in the opinion of the Supreme Court, *infra*.

The appellant assigned for error that the Court erred in issuing a peremptory writ of mandamus commanding him to certify to the Orphans' Court of Chester County for hearing and determination certain difficult questions of fact set forth in an alternative writ of mandamus heretofore issued, and in entering judgment for the relators upon their demurrer to the respondent's return to the alternative writ.

William Butler, Jr., (with him *S. D. Ramsey*, *W. S. Harris* and *W. S. Windle*), for appellant.

The existence of another adequate legal remedy is always a bar to the relief by mandamus.

Cunningham *v.* McCuen, 75 Pa. 220.

Where full and ample remedy may be had, either by appeal, writ of error, or otherwise from the judgment, decree or order of a subordinate Court, mandamus will not lie.

High on Extraordinary Legal Remedies (2nd Ed.) pp. 157, 161, 165.

There are only two cases reported where mandamus was successfully invoked against a register compelling him to certify to the Orphans' Court questions alleged to be difficult and disputable. One is

Commonwealth ex rel. Winpenny *v.* Bunn, 71 Pa. 405.

And the other is

Taylor *v.* Commonwealth, 103 Pa. 96.

And see

Hoopes' Estate, 152 Pa. 105.
Herron's Estate, 6 Phila. 86.
Act of 1832, § 41, P. L, 146.

Although demandable of common right, a writ of mandamus is truly said to be grantable at discretion.

Commonwealth *v.* Mitchell, 2 P. & W. 517.
Overseers of Porter *v.* Overseers of Jersey Shore, 82 Pa. 279.

Alfred P. Reid, (with him *William M. Hayes*, *R. Jones Monaghan* and *J. F. E. Hause*), for appellees.

The 25th section of the Act of March 15, 1832, (P. L. 142), is mandatory in its terms. Its language is imperative. It admits of the exercise of no discretion. When the conditions prescribed in the Act arise, as they have here, the proceeding, so far as the register is concerned, is at an end. His investigation must cease, and the controversy must be sent to another tribunal.

Commonwealth *v.* Bunn, 71 Pa. 409.
Wickersham's Appeal, 75 Id. 334.
Taylor *v.* Commonwealth, 103 Id. 96.
Foster's Appeal, 87 Id. 67.

Mandamus is the proper remedy.

Commonwealth *v.* Allegheny Co., 32 Pa. 223.

October 1, 1894. DEAN, J. A. Taylor Hoopes, of Chester County, died May 10th, 1892. On May 16th, six days afterwards, E. Malin Hoopes and Thomas W. Pierce, the relators, presented to Frank A. Thomas, register of wills, a writing, purporting to be the last will of A. Taylor Hoopes, for probate. The will was proven by the subscribing witnesses, and letters testamentary were issued to E. Malin Hoopes and Thomas W. Pierce. This will was dated May 17th, 1888. On July 6th, 1892, Caleb H. Bradley presented a petition to the register, averring that there had come into the hands of said executors, among the papers of the testator, another later, and different will than the one dated May 17th, 1888; that to this second writing, although dated in the body of it January 27th, 1888, a date preceeding that of the one already proven, was appended a codicil dated August 15th, 1891, a date long subsequent to May 17th, 1888, the date of the first one. He further alleged, this second will was in the possession of the executors. Thereupon, in answer to a citation of the register, the executors produced this alleged later will. Caleb H. Bradley, the executor, then asked that the probate of the first will be vacated, and the later one be, by proper proof, admitted to registry. The application was entertained by the register, and evidence taken for and against both wills by the parties interested. After due consideration of this evidence, the register certified to the Orphans' Court these interrogatories:

1. Had the register power to revoke the letters granted on the first will?

2. Should the probate of the first will be annulled, and the letters revoked?

3. Is the writing dated January 27th, 1888, with the codicil appended, dated 15th of August, 1891, the last will of testator?

When the case came on for hearing in the Orphans' Court, the executors of the first will objected to the Court taking jurisdiction on the certification, averring that the register had no jurisdiction, such as he had taken on the application to vacate, and that the questions in dispute could only legally reach the Orphans' Court by appeal from the decree probating the first will. The Orphans' Court was of the opinion that the case should have come before it, not

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by a certificate from the register, but by appeal from his decision on the application to vacate the decree admitting of record the first will, and formally overruled the objections to the jurisdiction of the register. The parties in favor of the first will then asked the Court to proceed with a hearing of the case on its merits, and to direct an issue to the Common Pleas to determine whether the writing alleged to be the last will, was in fact the last will of A. Taylor Hoopes. This the Court refused, for the reason that it had already decided the register had jurisdiction of the dispute, and he must dispose of it before the Court could properly consider it. Caleb H. Bradley, who represented the second will, then moved the Court to send the proceedings back to the register. In answer to this motion, the Court ordered that the record be sent back to the register, and before proceeding further that he give ten days notice to all parties of the hearing. From this decree the executors in the first will appealed to this Court; we, being of opinion that the decree was only interlocutory, quashed the appeal. The register then proceeded with the hearing ordered by the Orphans' Court. The executors of the first will, at this hearing, asked that a precept for an issue to determine the dispute be directed to the Common Pleas, which the register refused. Then they asked that the Orphans' Court decide:

1. Whether the testator was of sound mind when he executed the codicil to the second will.

2. Whether the codicil was the free and intelligent act of testator, or was brought about by undue influence.

3. Whether the codicil was in fact executed by testator.

The register refused to call an Orphans' Court to pass on these questions, because he had already sent them there for answer, and that Court had sent them back to him for determination. He accordingly found from the evidence that the second writing claimed to be the last will, with the codicil of latest date, was the last will. In accord with this finding, he vacated the decree probating the first will, revoked the letters issued on it, admitted the second will to probate and registry, and issued letters thereon to Caleb H. Bradley, the executor named in it.

From the action of the register vacating the probate of the first will, and revoking the letters testamentary thereon, the executors under that will appealed to the Orphans' Court. They also applied to the Court of Common Pleas for a writ of mandamus to the register, commanding him to certify to the Orphans' Court the questions which he had refused to decide, because he had already once certified them to that Court.

The Court granted an alternative writ, to which the register made answer, setting out in substance the facts as we have stated them, and showing further that his refusal to certify the questions raised by those in favor of the first will, necessarily entered into and formed part of the decree vacating the probate and revoking the letters, which had been appealed from. The Court thereupon made a decree for a peremptory mandamus, from which decree the register prosecutes this appeal.

The right of the Court to compel the register to the performance of a ministerial or clerical act, necessary to the proper adjudication of a question to be tried in Court, is undoubted. Nor is it for the subordinate officer or lower Court to determine whether an act done or to be done by him, is ministerial or judicial; that is a question for the higher Court, wherein it must be judicially determined whether the writ shall or shall not issue.

The learned Judge of the Court below properly decided that the act he commanded was not a judicial act involving the exercise of a discretion in the register, and if the case turned on this question, the decree would be affirmed without hesitation. But we think the learned Judge inadvertently, perhaps, neglected to inquire whether the exigencies of this case called for the exercise of this extraordinary power. On the facts here, the writ was not one of right on the part of the relators. Their right to have it issued depended wholly on whether it was a necessary step to a proper adjudication of the dispute. If it accomplishes nothing of substance, aids not in the administration of justice, it is not a right. Writs of this nature are not issued to gratify the whims of suitors. It is argued by appellees, "That the right here claimed is granted to them by law. Whether it shall be invoked and enforced depends not upon the register, but upon them."

But this proposition needs qualification. The right is granted by law only when of value to him who asks it. High on Extraordinary Legal Remedies, 161, says: "In all cases where full and ample remedy may be had, either by appeal, writ of error, or otherwise, from the judgment, decree or order of the subordinate Court, mandamuses will not lie."

"It follows, therefore, that those to whom it may be appropriately directed, owe some duty to the public, and are under obligation to perform it, and for the enforcement of which there is no other specific legal remedy:" Armstrong *v.* Commissioners of Allegheny, 37 Pa. 277.

GIBSON, C. J., in Commonwealth *v.* Mitchell, 2 P. & W. 517, says: "It, however, involves an exercise of extraordinary power, which fits it for use only in extraordinary cases, where there

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would otherwise be a failure of justice." Lord KENYON, in King *v.* Bristow, 6 D. & E., 168, says: "The best way of preserving this beneficial writ, is to be sparing in the use of it." And the authorities are uniformly to the point that, unless there be a grievance which cannot be otherwise adequately remedied, the writ cannot be successfully invoked.

On the appeal to the Orphans' Court, necessarily all the evidence taken before the register will be before it, and all the questions raised by the evidence will be passed upon.

The decree of the register was that the decree of probate of the first will be vacated and annulled, and that the letters granted thereon be revoked, and that the second will is the last will of testator, and that, therefore, it be admitted to probate. From that decree the executors of the first will appealed. It is not questioned that the first will is a will made by the testator. If the second be his will, then the first is not his last will, because the second, being of later date, revokes it.

Whether the second is his will depends on whether it was executed by him, whether it was procured by undue influence, and whether he possessed testamentary capacity. If, for either reason, the will was not his last will and testament, the appeal will be sustained, and the decree of the register, admitting it to probate, will be wholly set aside.

There being no other will, then, than the first, and that not being questioned on any ground except that it was revoked by the second, it will stand of record, already proven as his last will, for there will be no decree to the contrary.

As every question necessarily comes before the Orphans' Court on the appeal, the appellees have a complete and adequate remedy to which this mandamus cannot in the least contribute. Therefore, the decree of the Court below, for that reason and that alone, is reversed at costs of appellee.

W. C. S.

Quarter Sessions.

Q. S.

Commonwealth v. Fitzpatrick.

Act of March 31, 1860, sec. 169—"Fraudulently making, signing, altering, uttering or publishing any written instrument"—Pilotage—Fees—Forfeiture.

It is enough to bring an instrument within Section 169 Act of March 31, 1860, if it (*a*) be fraudulently made, etc.; (*b*) could prejudice another's right; (*c*) was intended to defraud any person or body corporate. Possibility of injury is enough.

A master of a vessel sailing from Philadelphia can employ a Delaware licensed pilot as well as one from Pennsylvania; and a compliance with the law of Delaware would protect him against the consequences of a refusal or neglect to take a Philadelphia pilot.

The laws of Delaware and Pennsylvania command the employment of a pilot; but until navigation has actually begun there is no liability on the part of a master.

Semble, no payment before this time should be regarded as a fulfilment of the penalty of the law, unless the offer of the pilot's services and the refusal of the master be continuously and in good faith persisted in until the beginning of the voyage.

Sur motion for a new trial.

The facts are set out in the opinion.

Francis Shunk Brown, for defendant and rule.

George S. Graham, district attorney, and *William W. Ker*, assistant district attorney, for the Commonwealth.

March 26, 1894. REED, J. In the indictment the defendent is charged with fraudulently making, signing, uttering and publishing a certain written instrument, purporting to be a receipt for $31.79, for outward pilotage of the schooner "E. W. Young," dated April 14, 1893, and signed by A. H. Marshall, to the prejudice of the right of the said A. H. Marshall, and others mentioned in the indictment, and with intent to defraud.

Section 169 of the Act of March 31, 1860, under which the indictment is drawn, provides: "If any person shall fraudulently make, sign, alter, utter or publish, or be concerned in the fraudulently making, signing, altering, uttering or publishing any written instrument, other than notes, bills, checks or drafts already mentioned, to the prejudice of another's right, with intent to defraud any person or body corporate, or shall fraudulently cause or procure the same to be done, he shall be guilty of a misdemeanor, and, on conviction, be sentenced to pay a fine

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not exceeding one thousand dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding ten years."

In § 5 of the Act of March 24, 1851, relating to pilotage, it is provided: "Every vessel arriving from or bound to any foreign port or place shall be obliged to take a pilot; . . . . and it shall be the duty of the master of every such vessel, within thirty-six hours next after his arrival at said port of Philadelphia, to make a report to the master warden of the name of such vessel, her draft of water, and the name of the pilot who shall have conducted her to this port; and when any such vessel shall be outward bound, the master of such vessel, and the pilot who is to conduct her to the capes, and her draft of water at that time; and it shall be the duty of the wardens to enter every such vessel in a book to be kept by them for that purpose; and if the master of any such vessel shall neglect or refuse to make such a report, he shall forfeit and pay the sum of ten dollars, and no more; and if the master of any such vessel, being licensed as a coasting vessel, and of the burthen of one hundred tons or more, shall refuse and neglect to take a pilot, the master, or owner, or consignee of such vessel, shall forfeit and pay the sum equal to half-pilotage of such vessel; and if such vessel be not licensed as aforesaid, then, and in such case, the master, owner, or consignee thereof, shall forfeit and pay the full pilotage thereof." In § 6 of the same Act, it is provided that all penalties and forfeited pilotages shall be a lien upon the vessel, and shall be recovered by admiralty process in a suit brought by the Society for the Relief of Distressed and Decayed Pilots, their Widows and Children, to which society all such penalties and forfeitures must be paid.

The facts, under the evidence given at the trial of the case are, that on April 14, 1893, the schooner "E. W. Young," which is a vessel over one hundred tons burthen, was drawing eight feet six inches of water, and of which J. W. Wyman was captain or master, was about to sail from the port of Philadelphia to St. Jago. On the same day, while the captain was in the office of the broker who had charge of the business of the vessel, the defendant called, and there had an interview with the captain. The defendant, after stating that he was the agent for the pilots licensed under the laws of the State of Delaware, and learning from the captain the draft of the vessel, the time of sailing, and that no pilot had been engaged, asked if the captain knew that under the law the vessel was obliged to take a pilot, to which the captain made answer that he did. The defendant then stated that the lawful pilotage would be $31.79, but that if the captain would give him (the defendant) $25, he (the defendant) would give the captain a receipt that would clear the vessel from taking a pilot. After some conversation about the amount, the defendant agreed to take $20, and the captain paid the defendant $20. The defendant then wrote out a receipt for $31.79, being the full amount of the outward pilotage of the vessel, signed the receipt with the name of A. H. Marshall, who is a pilot licensed under the laws of the State of Delaware, and gave the receipt to the captain, who in turn gave it to the broker, to be used by the broker in his settlement with the owners of the vessel. The defendant, who testified in his own behalf, admitted that the receipt was to be used in case any question arose about the vessel not having a pilot, and that it was understood between himself and the captain that, in case it became necessary for the pilot to go on board and pilot the vessel to sea, the captain would pay the difference between the $20 and the full amount of the pilotage.

Under the evidence, and under the instructions of the Court, the jury rendered a verdict of guilty. The defendant has now moved for a new trial, on the ground that the receipt was not an instrument by which any person could be defrauded, that it was not made to the prejudice of the right of any person, that there was no violation of any law, and that the defendant was improperly convicted.

There is no doubt but that the master of a vessel, sailing from Philadelphia to a foreign port, can employ a Delaware pilot, as well as one licensed under the laws of Pennsylvania: Chambers *v.* S. S. Clymene, 9 Fed. R. 164; 12 Id. 346; see Reardon *v.* Arkell, 59 Id. 624. And that a compliance with the law of Delaware would protect him against the consequences of a refusal or neglect to take a Pennsylvania pilot. The laws of Delaware (Rev. Stat., 1893, page 557, chap. 449, vol. 16, § 5) provide that every vessel, etc., "shall receive a pilot, and if the master shall neglect or refuse to take a pilot, he shall forfeit and pay to any such pilot suing for the same a sum equal to the pilotage." It is not necessary to consider here what liability accrues upon the successive refusals of a master to receive both a Pennsylvania and Delaware pilot, or how far the payment of the forfeiture to a Delaware pilot will exempt him from liability to suit on the part of the Society for the Relief of Distressed and Decayed Pilots, their Widows and Children, incorporated by the Legislature of Pennsylvania, or conversely. Were the transaction in the present matter a compliance with the law of Delaware, this question might call for decision; but, in the view which I take of the case, the comedy played

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in the ship broker's office was not a compliance at all with the law of Delaware, because the time when the master must make his choice of a pilot had not yet arrived, and his payment of money to the agent of Marshall, the Delaware pilot, was purely voluntary, and was made, moreover, under a special contract, such as was held by Judge ARNOLD, in Schellenger *v.* Port Wardens, 45 Leg. Intell. 282, to be invalid. The law of Delaware, like the law of Pennsylvania, commands the employment of a pilot; but until navigation, with its incident perils, has actually begun, there is no liability for a penalty on the part of the master, for *non constat*, that he will not at the last moment take a pilot; any payment by the master before this time is uncalled for, and such payment should not be regarded as a fulfilment of the penalty of the law, unless the offer of the pilot's services, and the refusal by the master, be continuously and in good faith persisted in up to the beginning of the voyage, when a full payment of pilotage at an earlier date might operate as of the latter point of time. The statutes of both States, moreover, fix the pilotage fees as well as the precise amount of the forfeiture, and the payment of a less amount, no matter how or when made, does not satisfy the law. Whether this sum be a penalty and not a tax, as stated by Judge SHARSWOOD, in Collins *v.* Relief Society, 73 Pa. 194, or a tax and not a penalty, as asserted by Judge GRIER, in Smith *v.* The Creole, 2 Wallace, Jr., 485, is not material, and it may well be that an insurance company which has not expressly required the employment of a pilot, cannot defend upon the policy when the forfeiture has been paid instead of the pilot being taken, as was decided in Flanigen *v* Washington Insur. Co., 7 Barr, 306. But the point before the Court now is, whether the defendant, in Philadelphia, fraudulently made and published a written instrument to the prejudice of another's right, with intent to defraud any person or body corporate, and because I think that he did I must discharge the rule for a new trial. The document executed by the defendant was, firstly, no compliance with the law of Delaware; secondly, it was intended to be used, and could have been used, to defeat a proper claim of the Pilots' Society; and, thirdly, it was a false written statement of facts, which could have been made available against other third persons who, not knowing the truth of the transaction, might have had rights in the premises, such, for example, as the underwriters of either ship or cargo. It is the policy of the law that vessels should be navigated safely, both for the sake of the owners of vessels and goods, subject to maritime risks, and all others who have given credit, either to the owner or to such vessel and goods, and for the sake of the public who are interested in the preservation of human life and the protection of property. It is still more the policy of the law that the evidence of transactions in which many may have an interest shall be truthful, especially where death, shipwreck, or a distant journey might remove all the witnesses of the event. The false receipt remains ashore, the vessel and its master depart, perhaps upon a long voyage, and should the pilot die and his crew be scattered, who would suppose that he did not in fact pilot the particular ship? As under the law the vessel was commanded to take a pilot, and as under the law a licensed pilot was the only person who could perform the duty of piloting it, the receipt given by the pilot to the master was a quasi-official certificate that the law had been complied with, and, as has been said, there was no such compliance. Following the analogy of forgery, the pleadings, as sustained by the proof, make out a complete case, for possibility of injury is enough. See Wharton's Criminal Law, § 694 *et seq.*, 714 *et seq.*, and notes, and 743a. The defendant, in his testimony, stated that it has been customary for pilots to take from the captains of vessels less than the lawful pilotage, give receipts for the full pilotage, and for the vessels to sail without a pilot, and that he, the defendant, had acted under instructions from his employers. If his statement is true, the law is being used for purposes of deception, and it is time that such a practice should be summarily ended, and all concerned in it punished; and the pilot who signs, or authorizes the signing, of such a receipt, the captain, broker, or any other person who uses it, knowing its falsity, should bear in mind that in Pennsylvania the Act of March 31, 1860, declares, that if "any person . . . . be concerned in the fraudulent making, etc., of any written instrument . . . . to the prejudice of another's right, etc., he shall be guilty of a misdemeanor, and on conviction be sentenced to pay a fine not exceeding $1000, and undergo an imprisonment by separate or solitary confinement at labor, not exceeding ten years." As this is a test case, and as the defendant probably did not appreciate the seriousness of his act, while the rule is discharged, the sentence is suspended, and the defendant discharged.

F. B. N.

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WEEKLY NOTES OF CASES.

VOL. XXXV.] *FRIDAY, NOV. 23, 1894.* [No. 11.

Supreme Court.

Jan., '94, 218. March 22, 1894.

Boteler et al. v. The Phila. & Reading Terminal Railroad Company.

Eminent domain—Railroad companies—Entry upon lands for the purpose of constructing railroads—Element of damages—Evidence.

Where land is taken by a railroad company for the construction of its road, and none of the property is left to the owner, the market value of the land taken is the true measure of the damages recoverable.

In cases in which the use of the land has been restricted to a specific purpose, witnesses, who are best informed in regard to the use of property for such a purpose, are the persons usually best qualified to testify as to value, without regard to whether they are experts as to land values or acquainted with the neighboring property.

B. sublet from K. part of a house subsequently taken by a railroad company for the construction of its road. By the terms of the lease the use of the premises was restricted to being hired out for lodge meetings. In an action against the railroad by B. to recover damages for the destruction of the leasehold, B. was allowed to put in evidence the testimony of witnesses familiar with premises used for such purposes, but not acquainted with the neighborhood, or special experts as to land values:

Held, not to be error.

It appeared that K.'s lease with the owner of the land provided, that in the event of the property being taken by the railroad, the lease should be thereby terminated, without prejudice to the rights of either party in any suit for damages sustained by an appropriation of the premises:

Held, that such a provision was not a bar to a suit by the sub-tenant B. for the destruction of his leasehold.

Appeal of The Philadelphia and Reading Terminal Railroad Company, defendants, from the judgment of the Common Pleas No. 2, of Philadelphia County, in an action framed between J. C. Boteler, Charles G. Frowert, John J. Jack, Thomas E. Kirkbride and James B. Sweetwood, and the said railroad, to determine the damages sustained by the plaintiffs, from the taking, under the right of eminent domain, by the defendant, of the portion of the premises No. 1128 Arch street, Philadelphia, occupied by the plaintiffs as tenants.

Upon the trial the following facts appeared: Kline & Keys leased the premises, 1128 Arch street, from Mrs. Wilstach, the owner, under an agreement made June 1, 1888, whereby they acquired a term of five years from the date thereof at a yearly rent of $1,800 per annum. The lease contained the following provision:

"Fifth. Whereas there are rumors that a certain railroad is to be constructed in the vicinity of the property hereby demised, the location of which cannot now be ascertained with any certainty, therefore, it is hereby expressly understood and agreed by and between the parties to this lease, that in case such a railroad is or shall be located over the hereby demised premises or any part thereof, then, and in that case, this lease and the covenants thereof shall terminate and end immediately upon said premises being taken for railroad purposes, either by entry thereon on the part of the corporation or other person or persons taking or by their making or receiving compensation for such taking. And upon such termination the said lessees shall, within a reasonable time, vacate the said premises and deliver up the possession thereof to the lessor, the rent to be apportioned to the time of such vacation. Nothing herein contained shall, however, prevent the lessor or lessees from recovering damages for such taking from the corporations or other persons taking."

Kline & Keys, by a sub-lease, dated October 24, 1890, rented to the plaintiffs all of the said premises, 1128 Arch street, except the two rooms on the first floor front and the toilet room in the rear, for a term of three years and six months, from November 1, 1889, at a rent of $1,200 per annum. The sub-lease provided, Article III., that the lessee should not occupy, nor permit to be occupied, the demised premises otherwise than as lodge rooms for Hall Association, O. U. F., nor should the lessee assign the term or underlet the premises without the written consent of the lessors.

It also provided in Article VIII., that all doors, shutters, window frames, removed to adapt the rooms for the occupation of the lessees, were to be stored in the cellar and remain the property of the said lessors, and all improvements made by said lessees were to remain in said premises and become the property of said lessors after the termination of the lease.

Article IX. provided that, "The said lessees hereby agree to furnish heat to the rooms reserved on the first floor as aforesaid during the continuance of this lease."

The plaintiffs knew at the time the sub-lease was signed that Kline & Keys were lessees of Mrs. Wilstach, and they knew of the rumor that the railroad company, defendant, proposed to build its railroad to Twelfth and Market streets. The plaintiffs were trustees for what was called the "Hall Association, O. U. F."; that is, the various lodges of the Order of United Friends,

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settled with his attorney in fact, received sixty-one dollars in cash, and a note payable on demand for twenty-four hundred dollars in full for the money received by him. The relation of guardian and ward was terminated by the act of the agent of Alanson Stevens. The relation of principal and agent was then closed by his own act in making settlement in full with his agent.

The note created a new relation, that of debtor and creditor, and so far as the evidence enables us to judge that was the only relation thereafter existing between them. One witness testifies that the decedent once spoke of the note as representing money held by him in a fiduciary character. If this was so, it is clear that the word fiduciary must have been used in a popular and not in a legal sense, for there is no single fact in the case that points to the existence of any trust relation between the maker and the payee of the note. Rupp's Appeal, 100 Pa. 537, and kindred authorities are not applicable on the facts of this case.

The decree appealed from was properly entered and is now affirmed.

H. B.

Jan. '93, 271. January 29, 1894.

Roberts' Estate.
Roberts' Appeal.

Executor—Expenses of, not allowed—Wills—Construction of—Orphans' Court—Jurisdiction of.

An accountant cannot have charged against one of the distributees' share the expense of successfully defending a suit against him individually for such share in another State, although such suit indirectly benefited the estate. Whatever costs he is entitled to recover are incidental to the judgment in his favor, and must be collected under the laws of that State.

Testatrix, a resident of Maryland, ordered her farm in Pennsylvania to be sold, and one-half of the proceeds she directed to be "secured in the farm while my dear husband lives, or if it is taken out it must be secured in some other real estate, so as to keep the principal to be equally divided, after my husband's death, among all my children. My husband is to have the interest only while he lives.

"The other half I want to be equally divided among my children, or if any of them is dead, their share is to be equally divided among their heirs.

"If anyone owes us anything take it out of their share before giving it to them, and divide it among them all."

The husband died prior to testatrix, and her Pennsylvania executor sold the farm. At the adjudication of his account, he claimed that the indeb edness of the three sons to their father should be charged against their shares of the proceeds:

Held, (1) that it was the intention of the will that each child s indebtedness to either his father or mother, should be deducted, and the father's death prior to that of his wife did not alter this construction.

(2) That the Orphans' Court had jurisdiction to determine the amount of indebtedness of the sons to their father, as that was necessary to a proper distribution of the fund under the will.

Appeal of William L. Roberts, individually and as executor, from the decree of the Orphans' Court of Montgomery County, in the matter of the estate of Jane P. Roberts.

The facts of the case, and the material assignments of error, are set out in the opinion of the Supreme Court, *infra*.

J. P. Hale Jenkins, for appellant.

N. H. Larzelere and *James Rich Grier* (*J. S. Freeman* with them), for appellees.

October 1, 1894. DEAN, J. The domicile of Jane P. Roberts, the testatrix, at her death was Harford County, Maryland. Besides some personal property, she was the owner of a farm of 52¼ acres in Abington Township, Montgomery County. Her husband was William H. Roberts, who owned in his own right some property in Maryland. They had six children: Charles W., Mary Jane, and Edward H., who lived in Maryland; Isaac L., William L., and Ruth Ann, in Pennsylvania. On the 28th of July, 1881, while her husband was living, she made her will, wherein, after dividing her personal effects among her children, she disposed of the farm:—

"I desire my farm to be sold as soon as it can be sold to advantage after my death, that is, if it is not sold before. But no one shall force a sale to get their share without the majority is willing for it, and one-half the price I want to be secured in the farm while my dear husband lives, or if it is taken out, it must be secured in some other real estate, so as to keep the principal to be equally divided after my husband's death, among all my children. My husband is to have the interest only while he lives. The other half I want to be equally divided among my children, or if any of them is dead, their share is to be equally divided among their heirs. If anyone owes us anything, take it out of their share, before giving it to them, and divide it among them all."

She then appointed her husband and two sons, Charles W. and William L., executors. The husband died in August, 1881; the testatrix partially administered on his estate, and survived him until 2d October, 1883. Letters testamentary were taken out by both executors in Maryland, but Charles W., being a non-resident, declined to file the bond required in Montgomery County, and William alone took out letters there. In February, 1885, he sold the farm for $21,000, and for purpose of making a satisfactory title without proceeding in the Orphans'

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Court, a conveyance, joined in by all the legatees, was made to the purchaser.

However, the executor, William L., received the purchase money, and filed his second and final account of his administration in Montgomery County, September 3d, 1887, which after taking credit for payment of certain liens against the land discharged by the sale, and sundry other credits, showed a net balance for distribution of $11,613. Henry D. Saylor, Esq., was appointed auditor to distribute. On claim made by the executor, the auditor deducted from Edward's share, $850.12, the amount of certain costs and expenses incurred by William in a personal suit against him by Edward in the Courts of Maryland, in which William was successful. The allowance was made on the ground that, although the suit was against William, the fund in the hands of the executor would have been diminished by the amount of Edward's recovery, and being a wholly unjust claim, as determined by final adjudication, Edward's share ought to be charged with the expense of his groundless litigation.

The executor also claimed, that at the date of the will, Albert, Charles and Edward were indebted to their father on personal obligations and as surety, for money which the testatrix intended by her will should be deducted from their shares in the fund realized from the sale of the Montgomery County farm, and that these amounts should be charged against them respectively, in the distribution.

This claim was also sustained by the auditor. Other questions, involving less important items, were raised and passed on by the auditor, and eleven exceptions were filed to his report, and argued before the Court. After careful consideration, the Court passed on all of them, by a decree overruling some and sustaining others. The action of the auditor in allowing the costs and expenses of the executor in the individual suit of Edward against him in Maryland, and in deducting from the shares of Albert, Charles and Edward, the debts owing their father, was overruled, and a re-distribution ordered.

From the decree confirming this last report, we have this appeal. There are eight assignments of error, only the 5th, 6th and 7th of which call for special notice.

The 5th complains of the decree in refusing the allowance of the expenses of the Maryland suit, which ended in the judgment of the Court of Errors and Appeals of that State against Edward and in favor of William.

We think the learned Judge of the Court below rightly held, that the expenses incurred by William in this suit, had no place in the distribution of the purchase money of the farm. It is true, indirectly the estate was benefited by the suit, for it was finally adjudged by the highest Court of Maryland, that the Courts of that State had no jurisdiction to distribute this fund, and that the Orphans' Court of Montgomery County must make distribution; see 17th Atlantic Reporter, 570. But the suit was not against William as executor. By attaching his land in Maryland, in a suit against him, William was compelled to defend. His defence established that Edward's claim against him individually had no foundation; and in so far as he had any claim, it was a legatee under his mother's will, and that this could only be determined on a distribution of the purchase money of the farm in the Orphans' Court of Montgomery County. Whatever costs William should recover, are those incident to the judgment in his favor in Maryland, and must be collected under the laws of that State. He avers he was put to an expense for traveling back and forth, counsel fees, etc., of $850.12, which Edward ought to pay him out of his share. But there is no warrant for such an allowance. It was his misfortune to have to defend against an unjust claim; to successfully do so, he incurred expense, whatever is taxable in that suit, follows the judgment in his favor. The suit was not against him as executor, and he can, in this distribution, make no claim on the fund to even up matters between him and his brother as individuals. This, the learned Judge of the Court below has very clearly demonstrated. But the 6th and 7th assignments seem to us better founded.

It will be noticed, the will was made the 28th of July, 1881. The husband and father was present when it was executed, for by his writing appended to it, he consents to its provisions. The testatrix contemplated his survivorship, and says, "One-half of the price I want to be secured in the farm while my dear husband lives," and then appointed him one of the executors. Although he died the following month, and she survived nearly two years, their expectation as to life at the date of the will, as evinced by its terms, is to be considered in interpreting it. She says, after providing a life interest in one-half the purchase money of the farm for her husband, and making an equal distribution of the whole at his death: "If any one owes us anything, take it out of their share before giving it to them, and divide it among them all." Albert, Charles and Edward were, at that time, indebted to their father. The auditor finds as a fact, that this indebtedness was well known to the mother when she executed the will in the presence of the father. We think it quite clear that the testatrix meant by the expression, "if any one owes us anything, take it out of their share," any debts owing to either her or her husband by their children, and intended the father, as exe-

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cutor, to have the authority to deduct the debt from the share of the debtor in the purchase money of the farm. The auditor finds further, as a fact, that after the mother's death, at a meeting of the heirs, this was the interpretation put upon the will by them, and that they then agreed the amounts owing by them to their father should be deducted from their share in this fund.

While such an agreement would not of itself have been sufficient to give the Orphans' Court jurisdiction to determine the indebtedness between the father and his three sons, nevertheless it is corroborative of the construction put by the auditor upon the will; indicates that those interested so understood the will. The Orphans' Court, in thus interpreting the will, and determining the indebtedness of the sons to the father, does not usurp a jurisdiction belonging to the Courts of Maryland; it only ascertains a fact necessary to the proper distribution of this fund under the will. The Court must determine how much "anyone owes us," the father and mother, before it can be taken "out of their share." The legatees take their shares by the will with the condition attached, and can take them in no other right; the jurisdiction of the Orphans' Court to ascertain the amount owing the father, is just as clear as to ascertain any indebtedness to the mother.

The learned Judge of the Court below was of opinion the language of the testatrix was too vague to warrant this construction. We think, in view of the whole will, the intent was manifest. Therefore, appellant's 6th and 7th assignments of error are sustained. All the other assignments are overruled, and the record is remitted to the Court below, that distribution may be made in accordance with this opinion, and costs to be paid by appellees. W. M. S., Jr.

July '93, 12. January 8, 1894.

Titlow's Estate.
Titlow's Appeal.

Will contest—Executor sustaining the will does so in behalf of the parties interested—Costs not to be imposed upon the estate.

As a general rule an executor is not bound to defend his testator's will, and if he undertakes to do so, it must be as the agent of, and in the interest of those benefited by his action.

Appeal of Frances W. Titlow, widow of George Titlow, and the Guarantee Trust Co., guardian of Frank Titlow, from the decree of the Orphans' Court of Philadelphia County, making distribution of the estate of David Titlow, deceased.

The facts are stated in the opinion of the Supreme Court.

Joseph M. Pile and *David W. Sellers*, for appellants.

Edwin O. Michener (with him *W. Wilkins Carr* and *George L. Crawford*), for appellees.

July 12, 1894. Dean, J. The testator, David Titlow, died August 27, 1884, leaving four children and a granddaughter, Elizabeth, daughter of a deceased son, Charles N. Titlow. If he had died intestate, of course, each would have taken one-fifth of his estate under the intestate laws. He had at his death, very little personal estate, but owned improved real estate in Philadelphia, consisting of nineteen separate lots, valued at $25,600. His will was made August 25, 1881, to which were appended three codicils, the last executed fifteen days before his death. The effect of the whole will was to give: 1. To his son John, two lots valued at $3,000, but subject to a payment of $3,000. 2. To his daughter, Alcenia Schuyler, four lots valued at $5,200. 3. To his son George, five lots, valued at $6,200. 4. To his son George, in trust for Charles during life, four lots, valued at $6,000, with remainder to children of Charles born after July 14, 1883, and in default of children so born, then to George in fee. 5. To his executor, George, in trust for his daughter Sarah for life, four lots valued at $5,200; at her death, two of them in fee to George, and the other two to her children.

Charles died before his father, leaving one daughter, Elizabeth, born before July 14, 1883, so that under the will, George, in addition to his own, was entitled to the share of Charles. As matters stood at the death of testator, George D. was the largest beneficiary under the will. He got five lots, valued at $6,200, directly devised to him; by the death of his brother Charles without children capable of taking the devise over, he took the four lots valued at $6,000, and the remainder in two lots valued at $3,800, in which a life estate was given to his sister Sarah. John, practically, got nothing, for his lots were charged with a payment equal to their value. Sarah had only a life estate in hers. Alcenia took absolutely about one-fifth. George, therefore, was the only one who had a substantial interest in sustaining the will, for under it he took about five-tenths of the estate. Alcenia Schuyler took under the will, about the share that would have fallen to her under the intestate laws. John commenced proceedings to set aside the will, averring want of testamentary capacity on the part of his father; a citation was accordingly issued, and served on George D. Titlow, executor, who was also devisee of almost one-half the estate. He made no answer, further

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than to deny any reason within his knowledge why the will should not be executed. Thereupon, the Orphans' Court directed an issue to the Common Pleas for trial, in which George D., the executor, was made plaintiff, and John H., the contestant, defendant. After a trial lasting nearly two weeks, there was a verdict for the defendant, and against the will; a new trial was granted, and on submission to a second jury, there was a disagreement. In the meantime, both George and John died; Alcenia Schuyler, who had been nominated in her father's will successor to George as executor in case of his death, was put upon the record as plaintiff; the heirs of John took his place upon the record as defendants. Then, there was an agreement of compromise by all interested filed of record, with the approval of the Court, and a verdict sustaining the will taken.

The agreement, in effect, was a division of the property, two-fifths to the widow and child of George, and three-fifths to the other four children, or their representatives, in such shares as should be subsequently agreed to among them.

Samuel A. J. Salter having taken out letters of administration on the estate of George D. Titlow, filed his account of his intestate's executorship under the will of David Titlow. In the account, he charged his intestate with the inventory and rents received from the property devised, amounting to $24,087.88, and then took credit with payments amounting to $15,318.60, leaving a balance of $8,769.28. The credit side of the account is made up of many items, the only ones objected to by the other heirs being that for counsel fees, and expenses incurred in the litigation concerning the will. These expenses amounted to $3,166.89. Alcenia Schuyler and the other children who received under the compromise agreement three-fifths of the estate, excepted to the account, contending that George D. Titlow was the only one of the devisees whose interest it was to sustain the will, and in fact the only one who resisted the attack upon it; that therefore his estate should bear the expenses of the contest, the same as if he had been personally of record as a party. The counsel representing the estate of George D. Titlow, contended that in sustaining the will, he but performed his duty as executor and trustee of the estate confided to him by the testator; and, further, that under the compromise agreement, no one of the parties to it, and presumably benefited by it, could be heard as an objector to the reasonable expenditure incident to the result.

The auditing Judge sustained the exceptions in part, and surcharged the accountant with $3,166.89. His adjudication having been confirmed by the Orphans' Court, we have this appeal by the widow and guardian of the minor child of George D. Titlow.

The error assigned is, that "The Court erred in not holding that the verdict sustaining the will and the agreement requiring the same, was not a full justification to George D. Titlow in maintaining the issue, and that especially by reason of said agreement each of the parties thereto was precluded from gainsaying the expenditures made to secure such result."

It cannot be questioned that the verdict, although taken by agreement, is, in a restricted sense, conclusive. It establishes beyond reach of controversy, title to the land under the will in the devisees. But it in no sense establishes an equity on which to base a decree awarding expenses to the executor in defending the will.

Taking the whole record, it at most shows doubtful testamentary capacity. The first verdict, after a hotly-contested trial, was against the will; at the second trial, there was a disagreement of the jury. Then comes the verdict by consent of all interested, sustaining the will. This only shows that in a very doubtful case, the parties to the suit very wisely compromised it. In Yerkes' Appeal, 99 Pa. 401, in an opinion by the present Chief Justice, it is held as a general rule deducible from all the cases decided in this State, "That an executor is not bound to defend his testator's will, and if he undertakes to do so, it must be as the agent of, and in the interest of those benefited by his action."

Exceptions to the rule, doubtless, may arise. If the beneficiaries under a will sought to defeat trusts created by the testator, and by a collusive arrangement attacked the will for the purpose of setting it aside, that the estate might descend under the intestate laws, it would be the duty of the executor to defend it: or he might defend the genuine will against a forged or spurious one, and in either case equitably demand that his reasonable costs and counsel fees be paid out of the estate. But here there is nothing but the usual disparity of interests inviting favor to the antagonism of the will. George D., under the will, got about half the estate, the remaining devisees the other half, two of the children practically nothing. True, he was executor, and so named of record, but his stand for the will in the litigation was because he was a devisee, and it was largely to his interest to sustain it. He could, unequivocally, in his answer to the citation, have disclaimed any interest as devisee in the contest, and then the Court would have made such order as would have been proper touching the issue. In substance, his position on the record as executor, was that of representative of himself as devisee of one-half the estate, and in that attitude was conducted his side of the contest, until, by the agreement, two-fifths of the estate went

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The plaintiff in the issue, who is the defendant in this action, asked the Court to instruct the jury that if they believed that James "intended the paper offered as his will to take effect only after his death, the verdict must be for the plaintiff." This point was affirmed and the case was therefore tried upon the question of fact whether the intent of James Rogers was that the paper should only take effect after his death. As this was at the instance and request of the plaintiff in the issue we could not reverse the Court below for affirming his point and charging the jury as they were requested. And in that condition of the record we could not reverse for the refusal of the Court below to give a binding instruction to find for the plaintiff, as such an instruction would have been entirely inconsistent with the instruction to find according to the intent as to the time the instrument should take effect. We were of opinion then, as we are now, that the paper-writing in question is testamentary on its face, and in view of the circumstances in which it was found, and that it would have been the duty of the Court below to so instruct the jury if they had been asked to do so.

The only material question worthy of present consideration is whether in the state of the record as we find it in this action, the request of the defendant for a binding instruction to find in his favor should have been granted. It is useless to discuss the question whether the paper can be sustained as a present gift of the land. To sustain that view it would be essential to determine that the gift was complete in the lifetime of the donor. But that is impossible because the instrument was retained in his possession up to the moment of his death and therefore it was never delivered. Had it been a regular deed in fee simple for the land, properly signed and executed in all respects, and duly acknowledged as such, it could not have passed any title because it was never delivered, and without delivery it was utterly ineffective. Taking possession and making improvements after the death of the donor could in no manner help such a title. That may do in support of a parol sale in certain circumstances, or a parol gift followed by possession, but this was not a parol sale in any point of view, and it was not a parol gift for the reasons already stated.

Recurring then to the question whether the defendant was entitled to a binding instruction in his favor, we have to remark that he was not hampered by any contradictory request of his own to send the case to the jury on a question of intent. It is true also that he did not ask for a binding instruction that the paper was a will, but he did ask that on all the evidence he was entitled to a verdict. Now this paper was in evidence. It is a part of the record. It purports to be a testament giving to the defendant the title to the property in question. The action is an ejectment for the recovery of the land. If this paper conveys the land to the defendant by a valid testament the plaintiff has no case. The learned Court below was in error in saying that this Court had decided in the former case that the paper was null and void as a will. We did not make any such decision nor did we intend to do so. On the contrary we intimated very strongly that it was a valid will, and we only abstained from deciding it because the question in that form had not been raised on the record.

But on the trial of the present action the question of the character and legal effect of this instrument necessarily arises, because if it is a valid will the defendant has the title and the plaintiff does not have it. The interpretation of the paper is undoubtedly for the Court. In form and in substance it is perfectly good as a testament. It contains disposing language, language which in its primary and its essential meaning purports to pass away the title of the owner to another. "High James Rogers do give to John Jackson, Sr., my property known as Penn Argyl Hotel and the land adjoining in Pen Argyl, in Northampton County, P. A.

"JAMES ROGERS."

How could there be any more direct, emphatic and positive expression of a purpose on the part of James Rogers to give the property described to John Jackson, Sr.? It is not possible. There is not the least uncertainty or ambiguity of meaning in these words, and no legitimate contention can arise upon that aspect of the subject. The property is adequately described, a definite person as donee is expressly named, the donor names himself both in the body of the paper and in his signature, and the words employed are absolutely and with conclusive force apt words of gift of the entire title by the donor to the donee. On this whole subject there is nothing to discuss. The interpretation of such a paper is exclusively for the Court. In no circumstances can a jury be permitted to deal with it. So apparent and so manifest is the meaning and legal effect of the paper that it is not seriously questioned. Why then does it not have operation? It is on this record, it is a paper in the case, something must be done with it. The learned Court below treated it only as raising a question of a present gift in the lifetime of the testator, and very properly decided it could have no effect as such an instrument. But the question remains why is it not operative as a testament? The learned Court below thought that question was adjudged by the decision of this Court in the feigned issue. But that, as we have seen, was a mistaken view of that decision.

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And now the testamentary question remains and must be disposed of.

There is but one allegation that has at any time been set up against the testamentary character of the paper, and that is, that it may have been intended only as a gift in the lifetime of the donor, and if so it could not be operative as a testament. *Prima facie* that is not its character because, being land, a deed would have been the appropriate instrument to convey the title. The language employed is the language of a will, not of a deed. It would be naturally, therefore, the duty of the plaintiff who claims against it as a will to rebut the presumption arising from the language of the instrument. But whether it is his duty or not, the argument can find no support except in a consideration of the circumstances in which the paper was found. While it may be very possible in a given case that there might be circumstances which would give rise to a question whether such a paper was only intended to operate in the present as a gift, and not in the future as a testament, we think that the circumstances in this case quite preclude any such inference.

The paper was dated August 17, 1887. The deceased James Rogers died on September 6, 1887. He came to his death by an act of suicide committed in his own bed room. He was found very soon after he shot himself lying on his bed and dead, the body still being warm. The man who found him went out for policemen who immediately came to the room and examined the body and the furniture and other surroundings. While they were doing this there was discovered an envelope, unsealed, with the name "John Jackson" written on the outside, and on the inside was the paper in question. The envelope with the paper in it was lying on the top of a trunk which stood on the floor, at the foot of the bed. There was no dispute about these facts.

It is manifest, therefore, that at the moment of the death of James Rogers, the paper was in his possession, and that fact alone conclusively disproves the theory that he intended it to take effect in his lifetime. He had never delivered it, there was not a particle of evidence to that effect, and it was therefore inoperative as a gift *in præsenti*. In addition to this the paper was exposed conspicuously, lying on top of the trunk where it could readily be seen. As he was alone in his room immediately prior to his death it must be assumed that he placed it there himself. He then destroyed his life. These circumstances are only consistent with the theory that so far as the intention of the deceased was concerned, it was his purpose that the gift of the property should become effective after his death. In truth the undisputed facts entirely exclude any other inference.

In the case of Cock *v.* Cooke, L. Rep. 1 Prob. and Div. 241, the following paper was offered for probate:—

I wish my sister, Louisa Cock, of 104 York Road, Lambeth, to have my Schering (Charing) Cross bank book for her own use.

Dec. 7, 1865. SARAH JENKINS.

Witness:

SARAH HAMON,

JOSEPH SELLICK.

It was held that this was a testamentary paper intended to take effect after the death of the testatrix although she did not die until some time later and tried to get the money out of bank before her death. The Court said, "The expression, 'I wish my sister to have,' etc., appears to me to imply, 'I wish her to have after my death,' because when she wrote those words she was dangerously ill and did not expect to live, and if she had merely wished to make her sister a present she would not have taken the trouble to write anything at all, but would simply have handed over the bank book to her, as she afterwards did the stock receipts. . . . . It is undoubted law that whatever may be the form of a duly executed instrument, if the person executing it intends that it shall not take effect until after his death, and it is dependent upon his death for its vigor and effect, it is testamentary. . . . . The very nature of the transaction points to her intention that the paper should only take effect in the event of her death, an event which she and her sister considered certain and imminent."

With how much greater force does this reasoning apply to the facts of the present case. Here the deceased, instead of destroying the paper as he would necessarily have done if he did not intend it to become operative, preserves it, encloses it in an envelope, addresses the envelope to the person who is named as donee, and places it in a conspicuous position where it would certainly be discovered, and then takes his life. It is impossible to conceive of a stronger or more convincing act of testamentary purpose and intent. There is, of necessity, no room for any other inference. It follows hence that there is nothing in the facts in evidence to detract from the natural testamentary meaning of the words, but, on the contrary, conclusive proof that such was the meaning both of the words and acts of the decedent. The facts being entirely undisputed and without the least contradiction, it was the plain duty of the Court below, as it is our duty, to pass upon them and to decide upon their effect.

In the case of Frew *v.* Clarke, 80 Pa. 170, Mr. Justice MERCUR, delivering the opinion of the Court, said, "An instrument in any form, whether a deed poll or indenture, if the obvious

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purpose is not to take place till after the death of the person making it, shall operate as a will: Habergham *v.* Vincent, 2 Ves. Jr. 204. It may be by an endorsement on a note: Hunt *v.* Hunt, 4 N. H. 434; or by letter: Morell *v.* Dickey, 1 John Ch. 153. Whatever be the form of the instrument, if it vests no present interest, but only directs what is to be done after the death of the maker, it is testamentary: Turner *v.* Scott, 1 P. F. Smith, 126. The essence of the definition is that it is a disposition to take effect after death: Redfield on Wills, 5; Turner *v.* Scott, *supra*. Nor does it matter that the person intended to make a note instead of a will. If he used language which the law holds to be testamentary his intention is to be gathered from the legal import of the words he employed: Id. No form of words is necessary to make a valid will. The form of the instrument is immaterial if its substance is testamentary: Patterson *v.* English, 21 P. F. S. 458; see also Rose *v.* Quick, 6 Casey, 225; Frederick's Appeal, 2 P. F. Smith, 338."

In Schad's Appeal, 88 Pa. 111, we held an assignment of a policy of insurance for $4,000 by a husband to his wife after his death when she could do with it as she pleased, to be a will, such being the apparent intent of the party.

In Wilson *v.* Van Leer, 103 Pa. 600, Mr. Justice PAXSON said, "The form of the instrument is immaterial if its substance is testamentary," citing several cases.

In Fosselman *v.* Elder, 98 Pa. 159, a sealed envelope was addressed thus, "Dear Bella, this is for you to open," in the handwriting of the alleged testatrix. The contents of the envelope were a promissory note for $2,000, and the following paper also in the handwriting of the testatrix: "Lewiston, Oct. 2, 1879. My wish is for you to draw this 2,000 dollars for your use should I die sudden. ELIZABETH FOSSELMAN."

We held that the papers combined with the envelope constituted a valid will, although no person was named as donee in the paper, and no person was named by a full name on the envelope, and the envelope was a separate paper with no physical attachment to either of the other papers.

But it is useless to multiply authorities. All the foregoing were recognized in Knox's Estate, 131 Pa. 220, where some lead pencil notes with only the name "Harriet" attached were held to be a good will.

In the present case there is no difficulty growing out of a want of certainty of the parties, the subject matter, apt language to convey the title from the donor to the donee or any other formal circumstance. In addition to this the instrument was in the possession of the testator to the moment of his death. One of the last acts of his life was to place it in such a position that it would immediately be discovered by those who found his body, and it was contained in an envelope addressed to the beneficiary named in the body of the paper as the grantee of the property. It never could have any effect in the lifetime of James Rogers. Its language proves conclusively that it was intended to have the effect of conveying the property described to John Jackson, Sr., and it could not possibly have that effect until after the death of James Rogers, and the language used was entirely appropriate to that end. We are clearly and decidedly of the opinion that it is a good and valid testament, and that under it John Jackson, Sr., takes the title in fee simple to the land described.

This much has been written for the purpose of expressing our views upon the main question whether the paper is a will or not. Of course, to be effective as a will it must have been probated. In point of fact it was duly probated on the twelfth day of September, 1887, by the Register of Wills of Northampton County, and letters of administration c. t. a. were granted upon it to Richard Jackson, Jr., who proceeded with the settlement of the estate of the deceased, and duly settled and filed his account as administrator. It was not until January, 1892, that any steps were taken to call in question the probate of the will. At that time the petition of persons claiming to be the heirs of James Rogers was presented to the Orphans' Court and a citation was prayed for against Richard Jackson, Jr., and John Jackson, Sr., to appear and show cause why an appeal should not be entertained, and why an issue of *devisavit vel non* should not be granted to the Common Pleas of Northampton County to determine whether the paper was in the handwriting of the decedent, whether the paper was the legal direction of the intention of the deceased which he willed to be performed after his death, whether the deceased was of sound mind at the execution of the instrument, and whether the paper was obtained by undue influence exerted by John Jackson, Sr., and others. Upon this petition a citation was awarded as prayed for, except as to the allegation of mental unsoundness. On June 13, 1892, the Orphans' Court directed a precept for an issue to the Common Pleas on the question whether the paper in controversy was, or was not, the last will and testament of James Rogers, but declined to award an issue as to mental unsoundness. The pleadings in the Common Pleas were in the usual form upon a wager, the question being, whether the paper-writing was the last will and testament of James Rogers, deceased. The case was tried before a jury and a verdict was found by the jury, that it was the wish of James Rogers that the paper should take effect at

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the time it was written. Afterwards on the petition of the contestants the Court amended the verdict and entered a general verdict for the defendant. After that an appeal was taken to this Court by the plaintiff in the issue, but the judgment was affirmed for the special reasons stated in the opinion. On the trial of the present action of ejectment the plaintiff offered in evidence the record of the feigned issue in the Common Pleas for the purpose of showing that the trial of the issue resulted in a verdict for the contestants and that the judgment was affirmed by the Supreme Court. To this it was objected that it was not proposed to show any final decree of the Orphans' Court, or that the probate granted by the Register of Wills had been vacated, annulled or set aside, that there was no certificate by the Common Pleas, nor any return made to the Orphans' Court, nor was it proposed to prove that there was any decree of the Orphans' Court sustaining the appeal from the register's probate. To these objections the learned Court below replied that while there certainly ought to have been a certificate from the Common Pleas, and a decree of the Orphans' Court, these were both mere matters of form, and that they would consider that as done which ought to be done, and then overruled the objections and sealed a bill of exceptions for the defendant.

Thereupon the defendant offered and gave in evidence the full record of the proceedings in the Orphans' Court, which showed that there never was any final decree in the Orphans' Court annulling the probate granted by the register.

We are clearly of opinion that it was error to admit in evidence the record of the Common Pleas without proof of a final decree of the Orphans' Court, and that upon proof afterwards by giving in evidence the whole record of the Orphans' Court, that there never was any final decree annulling the register's probate, the Court below was not authorized to assume that the appeal from the probate had been sustained, or that the probate had been annulled. That could not be done except by a formal and actual decree of the Orphans' Court, and no such decree has ever been made.

In this state of the record it was error to instruct the jury to return a verdict for the plaintiff. A reversal of the judgment in the present action for these reasons would result in another trial after a final decree in the Orphans' Court annulling the probate. But as our views of the whole case on its merits would prevent the Orphans' Court from ever making such a decree, and in fact would require that Court to disregard the record of the Common Pleas and enter a final judgment dismissing the appeal and confirming the probate of the register, it seems unnecessary to send the record back for the purpose of having another trial, which could never proceed for want of a decree vacating or annulling the probate. This being so we think it unnecessary to grant a new venire. We sustain the fourth, fifth, sixth, seventh, eighth, and ninth assignments of error. It is unnecessary to consider the others. Judgment reversed.

S. H. T.

Jan. '93, 453. January 5, 1894.

The Charles Tyrell Loan and Building Association v. Haley.

Building associations—Value of shares—How ascertained—Profits—Course of business—Estoppel.

The proper method of apportioning the profits of a building association, having more than one series of stock, is to divide them equally among the shares in proportion to the amount paid in on each share; and to ascertain the value of any particular share at a given time there must be added to the amount paid on the share a proportion of the profits thus ascertained.

The fact that a shareholder has acquiesced for a number of years in a different method adopted by the association, by which the profits were divided equally among all the shares without regard to the amount paid in, will not estop him from requiring that the method of ascertaining the value of his share be changed to that indicated above as the proper method.

MITCHELL and FELL, JJ., dissent.

Appeal of the Charles Tyrell Loan and Building Association from the judgment of the Common Pleas No. 4, of Philadelphia County.

The association entered judgment on a bond given by Jeremiah Haley, to accompany a mortgage given by the latter to the association, on account of his failure to pay instalments and monthly interest. Subsequently, this judgment was, upon motion, opened and defendant let into a defence. The case was tried before a jury, and an appeal was taken from the judgment entered on the verdict (see report in 139 Pa. 476), and the case was sent back for further hearing. The case was then referred to A. J. Maloney, Esq., as referee, under the Acts of May 14, 1874, and May 4, 1889. The referee found that the stock of Haley had matured at the time of the alleged default, and that in accordance with the constitution and by-laws, the debt was fully paid, and directed that judgment be entered for the defendant, and that the bond and mortgage be satisfied.

Numerous exceptions were filed which the Court dismissed, and judgment was subsequently entered upon the referee's report, whereupon this appeal was taken.

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William Henry Lex and *John H. Sloan*, for appellant.

Only those members of a building association who remain in it until the maturity of their stock are entitled to participate in profits.

Watkins *v.* Building and Loan Association, 97 Pa. 514.

One may be estopped by mere non-action.

Tracy *v.* Lincoln, 145 Mass. 357.
Putnam *v.* Tyler, 117 Pa. 570.
Bank *v* Morgan, 117 U. S. 96.

Haley participated in the previous division of profits under the method adopted by the company, and is now estopped from denying the correctness of that method.

Kilgore *v.* Smith, 122 Pa. 58.
Bank *v.* Bailey, 147 Id. 116
Logan *v.* Gardner, 136 Id. 600.

Payments on stock and the value of stock are not *ipso facto* credits on the loan of a borrower.

Link *v.* Building Association, 89 Pa. 15.

See

O'Rourke *v.* Building Association, 93 Pa. 308; S. C. 8 WEEKLY NOTES, 176.

William Gorman, for appellee.

The refereee's finding of facts was conclusive, except in case of manifest error.

Kisor's Appeal, 62 Pa. 428.
Sproul's Appeal, 71 Id. 137.
McCullough *v.* Manning, 132 Id. 55.
Kutz's Appeal, 100 Id. 75.
Thompson's Appeal, 103 Id. 603.
Logue's Appeal (1883), 104 Id. 136.
Appeal of Bugbee (1885), 110 Id. 331.
Bowers *v.* Bunnethum (1890), 133 Id. 307.
Kirby *v.* Bradford (1890), 134 Id. 109.
Warner *v.* Hare (1893), 154 Id. 548.

To make an estoppel in any case it must appear that there was a representation made, and that this representation of facts was made with knowledge of those facts, and the party to whom the representation was made must have been ignorant of the truth of the matter alleged, and also destitute of all right means to acquire such knowledge by the use of ordinary diligence.

Martin *v.* Ives, 17 S. & R., 364.
Waters' Appeal, 35 Pa. 523.
Miles *v.* Miles, 8 W. & S., 135.
Sunderlin *v.* Struthers, 47 Pa. 411.
Diller *v.* Brubaker, 52 Id. 498.
Hepburn *v.* McDowell, 17 S. & R., 383.
Barnett *v.* Barnett, 6 J. J. Mar. 499.
Maloney *v.* Horan, 10 Am. Rep. 335.
Copeland *v.* Copeland, 28 Me. 525.
Shaw *v.* Beebe, 35 Vt. 205.
Hill *v.* Epley, 31 Pa. 331.
6 Wait's Action and Defenses, 685.

October 1, 1894. GREEN, J. When this case was here before (139 Pa. 476,) the judgment was reversed because of the rejection of the defendant's offer to prove that the stock of the eighth series, in which he was a stockholder, had reached a value of $200, and was really worth $218.24 in November, 1887. We said, PAXSON, C. J., "But when the stock has fully matured, I am unable to see what right the association has to recover a judgment against one of its stockholders for the amount of his loan." And again, "If his series has matured, he was entitled to stop paying, and to rely upon the association surrendering his securities when the proper time arrived. If, instead of doing this, the association brings suit upon his mortgage, he can surely set up an equitable defence and show that his stock has matured. . . . . If the defendant can sustain his offer, he has a full defence to the mortgage, and we are of opinion the evidence should have been admitted."

Acting upon this ruling, the referee in the present case admitted the evidence offered, and upon a consideration of the whole evidence upon this subject, he decided that the testimony sustained the offer, and that in point of fact, the stock of the eighth series fully matured in November, 1887, and was at that time worth $215.66.

The referee also found that because of this value of the defendant's stock, the debt in suit was fully paid in November, 1887, under and in accordance with the constitution and by-laws of the association, and that therefore the defendant was entitled to have his bond and mortgage satisfied of record and returned to him. If this finding was correct, the judgment must be affirmed.

Now, the correctness of the finding is not really attacked or impeached, but it is contended that the association pursued another mode of determining when its stock was matured, and according to that mode its stock had not quite matured by becoming of the value of $200, in November, 1887, and that the defendant is bound by the method of computation adopted by the association, and is estopped from alleging or setting up any other mode.

As to the application of the doctrine of estoppel in such a case, and upon such facts, it is quite out of the question. Practically there is no element which is essential to estoppel that is present in this case. It is most certain that no action or omission to act, on the part of the defendant ever induced the plaintiff to adopt or follow the method of computation upon which the plaintiff insists. The association never parted with any money in consequence of being misled by the defendant. The fact that the defendant did not object to the method pursued, at previous times, proves nothing. He was not called

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upon to object, he was not obliged to take any action at those times. His interests were not then affected, and he was not obliged to speak. He may not have known anything about this somewhat mysterious subject which has puzzled the brains of so many intelligent men, lawyers and laymen alike, and about which so many experts differ. We are not referred to any evidence which proves or tends to prove, that he had any knowledge of it whatever. Further, the language of the twelfth article of the constitution, which is invoked as obligating the defendant to a particular mode of computation, says nothing about any mode. It simply says, "When it shall be ascertained that the value of each share of stock amounts to $200, a meeting of the shareholders shall be convened, at which time a division shall take place, and the holder of each share of stock shall receive the sum of $200, or his or her own securities to that amount, with the same fully satisfied and discharged of record." Ascertained how? The article does not say. Then, it must be ascertained according to right and justice, and that is law. If any particular mode is unjust, it is wrong and ought not to be adopted, and if adopted ought not to be followed. But, substantially, we decided this question in the former hearing of this Court. Because, notwithstanding the very same objection made then as now, we decided that the defendant was at liberty to show what the real value of the stock was in November, 1887.

It seems to us the contention is narrowed to the inquiry, which is the just and proper method of ascertaining the value of the stock of the particular stockholder who is one of a particular series? Is it the method pursued by the plaintiff, or the method found and adopted by the referee?

The referee states his method quite clearly and at length, after first stating his objections to the method pursued by the plaintiff. He thus speaks of the latter method, "An examination of the mode demonstrates beyond question its injustice and inequality. The division of profits for the year, as it is called, is to every share in every series alike; this is only superficially fair, because it ignores the amount of money accumulated as capital in the various series. At the beginning of the year, in November, 1886, each share of the sixth series had an accumulated capital of $132; each share in the seventh series $120; each share in the eighth series $114; while each share in the nineteenth series had only $12, and each share in the twentieth series had none. It is true that each share during the year paid in alike, $12, but can it be that the share having no capital should receive equal profits for the year with the share having a capital of $132? Surely not. In addition to which this mode makes no allowance for a great loss or unusual profit. It is not in the least elastic, and under it no provision is made for profit and loss. It might possibly do for a single series, but should never be used where there are a number of series."

This is the method adopted by the referee. "The annual report of the association plaintiff, made in November, 1887, shows assets $44,678.96, of which amount $30,891 were stock payments, and the balance, $13,787.96, were profits; these profits evidently belonged in a fair proportion to the stockholders of the various series. It is obvious that the stockholders in the oldest series should be entitled not only to a share of the profits *pro rata*, but that the time during which the payments had been made, should be also considered in reaching a fair and equitable division. If this be conceded, then the number of shares of each series would be multiplied by the number of months during which payments were made upon them, to find the amount paid in each series; then multiply the result by one-half the number of months the particular series had run (that is averaging the time) would produce for the purpose a just distribution of the capital invested for one year by that series; doing the same with each series, and adding together the various amounts of capital thus found gives the whole capital of the association for the year; dividing the profits by this aggregated capital gives the per cent. of the profits for each share for the year. The multiplying the amount actually paid on each share by the percentage gives the exact profit on each share in each series, and then adding the profit to the actual payment gives the exact value of each share."

The referee then annexes a table showing the number of each series, the number of shares of each series, the months paid by each, the average time of each, the amount paid in by each, and the amount invested for one year by each. He states the result, as follows:

Assets $44,678.96.	$30,891.	$13,787.96 profits.
$13,787.96,	$98,873,	13.9 percentage.

"Therefore, taking one share of stock in the eighth series, the one in question, which in November, 1887, had run 10½ years, and averaging its time at 5¼ years at 13.9 per annum, makes 72½ per cent., which on $126 paid on stock produces a profit of $89.66, and adding to it the amount paid on stock, $126, makes each share worth $215.66."

We are obliged to say that after a careful examination of the testimony on this subject, we regard this as a fair, just and equitable method of computing the value of the stock where it is issued in several series, and that in these respects it is altogether superior to the mode pursued by

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the plaintiff. The referee was sustained in his conclusion not only by his own reasoning upon the subject, but by a large preponderance of the expert testimony taken before him. One of the witnesses, Joseph Shehan, who had many years experience in building association matters, and was treasurer of one for eight years, testified that the just and equitable mode of computing the value of the stock when issued in several series, was the mode adopted by the referee, and stated his reasons more fully, and he explained also the injustice of the plaintiff's method.

Another witness, Michael J. Brown, who had an experience of twenty-five years in building association matters, testified to the same effect, and gave the most ample and satisfactory reasons for his conclusions. He was asked, "Q. You have heard Mr. Shehan's explanation of dividing profit according to capital paid in. Should it be done in that way or how would you do it? A. That is the way I do it, and that is the way probably that 75 per cent. of the societies in the United States divide their profits now. There was a time when they did not do it, but this is of course absolutely ridiculous. There is no doubt about that."

Much more testimony of the same character was given, and we are clearly of opinion that the conclusion of the referee, as to the method of computing the profits, was entirely justified by the evidence.

A question is suggested whether there should not be a valuation of all the shares of all the series, at any time when a question arises as to the valuation of the shares of a particular member, and whether, therefore, a bill in equity ought not to be filed in order to bring in all parties in interest. We held in this case when it was before us last, that the defendant could make his defence in the action on the bond without being obliged to resort to such a proceeding. But it would be an appropriate course to pursue, and one with which it would not be possible for any member to find fault as the absolute value of every share would, or might, by that means be determined with accuracy. As at present advised, we are not disposed to turn the defendant out of Court for not pursuing his remedy in that way, in view of the testimony and findings in the Court below. The assignments of error are all dismissed.

Decree affirmed, and appeal dismissed at the cost of appellant.

Eo die. FELL, J., dissenting. There are two methods of dividing profits in use by building associations having more than one series of stock. By one method the total annual profits are divided equally among all the shares, by the other the annual profits are divided among the shares in proportion to the amount paid on each. The first method is open to the objection that it gives to a share on which one year's dues have been paid the same profit that is given to a share on which a much larger amount has been paid. The second method is better, as by it each share is given each year the exact portion of the profits it is entitled to on the basis of the amount paid—and it is the money paid on the stock that earns the profits.

To this point I fully agree with the learned referee, but I cannot accept the conclusion which he reached.

It was competent for the association to adopt the first plan, or any plan which did equal justice to all its members. It adopted the first, and has worked under it since its organization in 1859. If, as a matter of business, this plan was not the wisest, still it was a just plan. It operated equally on every share of stock. A share was given too much the first years and too little the last. It received its exact proportion only at the middle of the life of the series, but it received in the end the full amount to which it was entitled. The plan worked equally as to all the shares, and exact justice was done to each stockholder.

This plan was deliberately adopted by the stockholders at the beginning in 1859, and each year since it has been submitted to and approved by them at their annual meeting. It has been the basis upon which all the business of the association has been conducted—its stock matured, its loans settled, the withdrawal value of shares fixed.

Under this plan the defendant's stock was during the earlier years credited with an undue portion of the profits. Now, that the time has come when he will receive less, and by the process of adjustment get only his exact portion he, for the first, objects, and seeks to have applied to him a new plan which will mature his stock eighteen months earlier. This is not equitable, it is not honest. It is unfair to every other stockholder.

The legal aspect of the defendant's contention is no better than its moral aspect. If the plan was just it was binding, and that is the end of it. A Court may well say that the plan adopted must be a just one, and having done that, it has reached the limit of the proper exercise of its power. It should not, and I submit, that with propriety, it cannot, say that one plan for the management of corporate business is better than all others, and that that one shall be adopted. The division of profits and the maturing of the stock of a building association are subjects for corporate action. If the plan adopted is not unjust, with its wisdom a Court has nothing to to do. If it is unjust, the remedy is by bill, under

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which the rights of all the stockholders may be considered and adjusted on a plan equitable to all. If the plaintiff, without proof of fraud or unfair dealing, is permitted to take the management of the affairs of the association out of the hands of its stockholders and have them submitted to a jury for supervision and change, any other borrower may do the same, and instead of one uniform plan selected by those who are to be affected by it, there may be as many as the wisdom or whim of a jury may devise.

There is no conflict between these views and the opinion of this Court when this case was before it in 1891. The decision reported in 139 Pa. 480, goes no further than to say that it was competent for the defendant to prove that his stock had matured. He may certainly do that but the rule by which it is to be determined is the rule of the association—not a new rule.

For the reasons stated, I do not concur in the judgment rendered in this case.

MITCHELL, J., concurred.

W. M. S., JR.

Jan. '94, 67. January 16, 1894.

Coleman's Appeal.

Register of wills—Control of Common Pleas over records—Act of June 17, 1839, P. L. 678—Duty of Judges of Common Pleas.

Under the Act of June 17, 1839, P. L. 678, the Judges of the Common Pleas are given supervisory power over certain work of the register of wills. It is their duty as often as he is superseded, and as much oftener as shall be requisite, to ascertain if the records, books and papers of his office are kept in conformity with law, and if neglect is apparent, to direct the performance of the deficiency occasioned by it.

The power of supervision thus conferred does not extend to his judicial acts, from which an appeal lies to the Orphans' Court. Admitting a will to probate is a judicial act.

A paper having been admitted to probate as a certified and true copy of a will which was claimed to have been probated in France, and having been recorded, and letters testamentary issued upon it, parties interested cannot, after an interval of fifteen years, invoke the aid of the Act of June 17, 1839, P. L. 678, to have the record corrected by the substitution of a true copy of the original will. The Act has no application to such a state of facts.

Appeal of Rosalie Parant Coleman and the Pennsylvania Company, etc., trustee under the will of Robert Coleman, deceased, from the decree of the Common Pleas No. 1, of Philadelphia County.

A petition was filed by Louise Ybanez Coleman *et al.*, praying for an order to the register of wills for the County of Philadelphia, under the Act of June 17, 1839, (P. L. 678) to correct the transcription of the will of Robert Coleman, deceased, made by his predecessor in office in 1878. William G. Shields, Esq., Register of Wills, Rosalie Parant Coleman and Bertram Dawson Coleman were named as respondents.

The facts as developed by the petition and answer were that Robert Coleman died July 26, 1878, leaving an olographic will in English, dated July 23, 1878, with codicils dated July 23 and July 24. Mr. Coleman was a resident of Paris, and his will under the French law was deposited with a notary in Paris. On September 4, 1878, a commission to prove the will was issued by the register of wills of Philadelphia County. This commission was executed in Paris on September 18, 1878, and when subsequently returned to the register's office, a copy of the original will was annexed to it. On September 19, 1878, there was presented to the register in Philadelphia a paper in French duly authenticated as being a copy of the certified translation of Mr. Coleman's will on file in the office of the notary in Paris. Accompanying this paper was a translation of it into English, made by a professor of the French language in Philadelphia. Upon this document, on the date last named, letters testamentary were granted to Horace Brock. In the book containing the record of the matter there was recorded this English translation of the French translation of Mr. Coleman's will. The commission to which a copy of the will is attached, is on file in the register's office, but not recorded, and without official date or mark as to filing.

Upon the death of George Dawson Coleman, the son of Robert Coleman, in 1891, a controversy arose as to whether the estate which he took under his father's will was in fee or for life. The petitioner was the widow of George Dawson Coleman.

The Court made the following order:

"And now June 17, 1893, the Court having considered the said petition of Louise Ybanez Coleman *et al.* and the answer filed thereto by Wm. G. Shields, Esq., register of wills, and John W. Brock, Esq., appearing for Horace Brock, executor of Robert Coleman, deceased, and it appearing that divers errors exist in the transcription of the will of Robert Coleman, deceased, in the will book in the office of said register owing to the neglect or omission of one of his predecessors in office, it is ordered and decreed that said Register of Wills, Wm. G. Shields, Esq., do cause said errors to be corrected by altering said transcription so that the same will correspond with the copy of said will annexed to the commission which issued to make probate of the will at the instance of Horace

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Brock, the executor thereof, and which remains on file in the office of said register."

An appeal was taken by Rosalie Parant Coleman, the widow of Robert Coleman, and the Pennsylvania Company, etc., trustee under his will, the errors assigned being the entry of the above order, the entry of the order after five years from the date of probate, failure to dismiss the petition, and:

"4. The petitioners had no interest in the question presented by them. They are, as appears by their own petition, strangers to the estate of Robert Coleman. Under neither will did George Dawson Coleman take more than a life estate and the petitioners have no right to have any record of Robert Coleman's will corrected."

F. Carroll Brewster, for appellants.

The provisions of the Act of June 17, 1839, (P. L. 678) do not include an amendment of the record, such as is prayed for by petitioners. It contemplates only a correction of errors, or where the officer has failed to record a paper, to supply his neglect, by ordering it to be transcribed.

The probate of the register is final and conclusive as to personalty in three years, and as to realty in five years, unless revoked upon appeal to the Orphans' Court. The validity of the decree cannot be inquired into by a collateral attack.

Act of March 15, 1832, sec. 31, P. L. 144.
Act of April 22, 1856, sec. 7, P. L. 533
Carpenter *v.* Cameron, 7 Watts, 51.
Loy *v.* Kennedy, 1 W. & S. 396.
Holliday *v.* Ward, 19 Pa 485.
Wilson *v.* Gaston, 92 Id. 207.
McCort's Appeal, 98 Id. 33.
Cochran *v.* Young, 104 Id. 333.
McCay *v.* Clayton, 119 Id. 133.
Shoenberger's Estate, 139 Id. 132.
Wells' Estate, 46 Leg. Int., 476.

Rowland Evans and *Richard L. Ashhurst*, for appellees.

There would certainly seem to be no question that there must be some means of correcting such an error as was made in this case by the clerks of the former register, and of preventing the words of the French professor from taking the place for all time of those which the testator himself made use of.

We might, were it not for the Act of 1839, have proceeded by mandamus, under the Act of June 14, 1836, § 14:

Commonwealth *v.* Bunn, 71 Pa. 405.
Taylor *v.* Commonwealth, 103 Id. 97.

But this will not lie where a special statutory remedy covering the case is given, as is the case here.

Act of June 17, 1839, P. L. 678.

We are not assailing the decree of the late register, and the argument as to its conclusiveness is immaterial. Appellant's argument, however, that letters were granted September 19, 1878, on a *certified copy* of the will is incorrect. No *certified copy* had reached the register until the commission was returned some time later. What we complain of is that this was not recorded.

The papers produced showed no certificate of probate as required under the second branch of the statute and therefore could amount to nothing more at most than a verification of a copy under the first branch, the probate to be made by the production of witnesses either here or under a commission. But indeed the certificates do not profess to certify the paper as a copy but merely as a translation, and therefore do not bring the case within the Act at all.

Act of March 15, 1832, sec. 12, Purdon, 507, pl. 7.
McDonald's Estate, 130 Pa. 480.
Dubreuil's Will, 8 Phila. 596.
Bowlby *v.* Thunder, 105 Pa. 178.
Wall *v* Wall, 123 Id. 545.
Torrance *v.* Torrance, 53 Id. 505.

John G. Johnson (*John W. Brock* with him), in support of appeal, on behalf of Bertram Dawson Coleman, contingent remainderman under the will of Robert Coleman, intervening.

The intervener protests against any consideration of the point raised by appellant in the fourth assignment of error, and earnestly requests that until all the parties are before the Court, in a proceeding properly settling their rights, no decision will be rendered, or dictum uttered, interpreting, or prejudicing the interpreting, the will of Robert Coleman.

The Act of 17th June, 1839, was meant to give general supervisory power to the Court of Common Pleas in the matter of examining whether the books, records, indexes, etc., were kept and maintained in the manner required by law, not to confer jurisdiction to order specific corrections in particular cases.

There was no duty upon the register of wills to record the copy of the will returned under the commission.

Act of March 15, 1832, Purdon, 507, pl. 7; 509, pl. 11.

The act of the register of wills in recording the copy of the will complained of, and in granting letters testamentary thereon, amounted to a probate of said will, and to the performance of a judicial duty. For error in his action in such respect there was no remedy but by an appeal to a register's Court.

Holliday *v.* Ward, 19 Pa. 490.
Loy *v.* Kennedy, 1 W. & S. 398.
Logan *v.* Watt, 5 S. & R. 214.

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The copy of the will returned under the commission was never proven by the register. Until this was done, it should not have been recorded. After refusal to prove such copy the only remedy was by appeal to the register's Court.

The register of wills had no power to prove, as the will of Robert Coleman, the copy returned to him under the commission.

October 1, 1894. McCollum, J. This is an appeal from an order of the Court of Common Pleas commanding the register of wills of Philadelphia County to alter a record made on the 19th of September, 1878, by one of his predecessors in office.

The first contention of the appellants is that the order was not authorized by the statute relied on by the appellees to sustain it. By this statute it is made the duty of the Judges of the Courts of Common Pleas of the several counties of the Commonwealth as often as the register of wills of any county shall be superseded, and as much oftener as shall be requisite, to ascertain if the records, books, indexes and files of his office be kept and left as the law contemplates, and if neglect is apparent, to direct the deficiency to be performed by the proper officers. How is the duty thus imposed to be discharged and what is the scope of it? There is nothing in the statute which suggests the necessity or propriety of the institution of proceedings by interested parties and the formation of issues for the settlement of disputes between them. It is obviously a duty which may be performed by inspection. A petition for the performance of it is not required, nor a suggestion of inaccuracy in the record. No provision is made by the statute for bringing parties or witnesses into Court or for the ascertainment of any fact by the production of testimony. It seems, therefore, that the Judge charged with the duty in question, is required to ascertain by an inspection of the records, books and papers of the office whether they are kept as the law contemplates. Apparent neglect in keeping them may be readily discovered by inspection, and it is the most satisfactory if not the only method of discharging the duty imposed by the statute. But the form of the proceeding in this case is not so objectionable as the purpose of it. A petition for the performance of the duty will not necessarily invalidate an order within the purview of the statute and proper to be made on inspection alone. The real and controlling question, therefore, is whether there is any statutory warrant for the order under review. The appellees contend there is, and that it is to be found in the Act of June 17, 1839. We have already referred to this Act and the duty it enjoins. It undoubtedly gives the Judges of the Courts of Common Pleas supervisory power over certain work to be performed by the register. It requires them as often as he is superseded "and as much oftener as shall be requisite," to ascertain if the records, books and papers of his office are kept in conformity with law, and if neglect is apparent, to direct the performance of the deficiency occasioned by it. But the power of supervision thus conferred is limited to the work of the register in keeping and preserving the records, books, indexes and files of his office. It does not extend to his judicial acts and decisions. From these an appeal lies to the Orphans' Court. Admitting a will to probate is a judicial act. Recording it and issuing letters testamentary thereon are acts which naturally follow its admission to probate and constitute *prima facie* evidence of it.

In the case before us it appears that an instrument purporting to be a certified and true copy of the will of Robert Coleman which was claimed to have been duly probated in Paris, France, was presented to the register of wills of Philadelphia County, Pa., who accurately recorded the same and issued letters testamentary thereon. He recorded it as the law required him to record "all original wills, after probate, and the copies of all original wills produced under the provisions" of the Act of March 15, 1832. Fifteen years after recording it and issuing letters testamentary, during which time the record so made was regarded as authorized and authentic, this proceeding was instituted to change it. We regard the proceeding as unprecedented and founded upon a misapprehension of the true scope and meaning of the Act of 1839. It follows from the views expressed that the order complained of was improvidently made.

We do not deem it necessary or advisable at this time to discuss or consider the other questions raised in the case. All that we now decide is that the order of June 17, 1893, is null because the learned Judge of the Court below was not authorized to make it.

Order reversed and set aside.

J. D. B. Jr.

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Jan. '94, 330, 331. April 5, 1894.

City of Philadelphia to Use, etc., v. Jenkins.

Judgments—When stricken off—Practice—Act of June 10, 1881—Canstitutionality of—Filing suggestions of death of party—Effect of.

A Court has no power to strike off a judgment except for want of jurisdiction or other fatal irregularity upon its face and an appeal from a refusal to strike off a judgment brings up the record alone.

The Act of June 10, 1881, authorizes service of a scire facias sur municipal claim on non-resident registered owners of real estate in Philadelphia by posting and publication. Upon an appeal from a refusal to strike off a a lien based upon a service under this Act on the ground that the Act was unconstitutional:

Held, 1. That the Legislature has the constitutional right to direct this mode of service, and a judgment based on such service will not be stricken off.

2. An Act may be unconstitutional in some respects and constitutional in others and there is no constitutional prohibition against any legislation affecting the case shown by this record.

Acts of Assembly relating to service by publication discussed and commented upon.

The filing of a suggestion of the death of a defendant and that A. and B. are his legal heirs does not make the latter parties to the action or give them any standing in Court without some order of substitution or a writ of scire facias to bring them in.

Appeal of Laura E. Jenkins, from the order of the Common Pleas No. 2, of Philadelphia, refusing to strike off a judgment from the records. The record disclosed the following facts:

On February 7, 1879, a lien for paving and curbing was filed against property at the corner of Orleans and Marville streets against James W. Jenkins as owner.

On January 5, 1884, a suggestion was filed that Jas. W. Jenkins was also the registered owner. On the same day a sci. fa. was issued against Jenkins as owner, and registered owner, and was returned as served or made known by posting and advertising and *nihil habet* as to Jenkins.

On November 22, 1884, judgment was entered for want of an affidavit of defence. This judgment was revived after two returns of *nihil habet*.

On Jan. 4, 1894, a suggestion of the death of Jas. W. Jenkins, on March 7, 1888, was filed, and that the title to the above property descended to and vested in his two children Frederick W. Jenkins and Laura E. Jenkins, and on same day the counsel for said children took a rule to strike off the judgment of Nov. 22, 1884, and quash proceedings after that date.

After argument the Court discharged the rule, whereupon this appeal was taken.

Bradbury Bedell, for appellant.

The Act of 1881 is unconstitutional; it is local.

Davis *v.* Clark, 106 Pa. 384.

It authorizes the creation and extension of liens, regulates practice, changes the rules of evidence and the methods of collecting debts.

Strine *v.* Foltz, 18 WEEKLY NOTES, 359.

The Act of June 27, 1883 (P. L. 161), which contains the same vices, was declared unconstitutional in:

City of Phila. *v.* The Church, 115 Pa. 291.

The unconstitutionality of the similar Act of March 22, 1877, was declared in:

Trust Co. *v.* Fricke, 152 Pa. 231.

The judgment was irregular because not entered in open Court.

City to Use *v.* Taylor, 4 WEEKLY NOTES, 36.

F. Carroll Brewster (*Byron Woodward* with him), for appellee.

The appellant is not a party to the record and has no standing in Court.

McClay *v.* Benedict, 1 Rawle, 424.

Appellant is barred by laches.

Machine Co. *v.* Larimer, 5 Pa. C. C. R. 661.
Brooks *v.* Smyser, 48 Pa. 86.
Harper *v.* Biles, 115 Id. 594.

The Act of 1881 is constitutional; all doubts as to constitutionality of Act must be resolved in its favor.

Powell *v.* Com'th, 19 WEEKLY NOTES, 24.
Perkins *v.* Phila., 156 Pa. 569.

The Act comes within the range of the right of classification.

Wyoming Street, 137 Pa. 503.
Reeves *v.* Traction Co., 152 Pa. 162.

Even if the Act of 1881 were unconstitutional, it would not necessarily follow that a service by posting and publication was invalid and the judgment void.

Mss. case. City *v.* Unknown, C. P. 2, June T., 1875, No. 208.

July 11, 1894. WILLIAMS, J. This appeal is from the refusal of the Court below to strike a judgment off the records.

The Court has no power to strike off a judgment except for want of jurisdiction or other fatal irregularity appearing on the face of the record: France *v.* Ruddiman, 126 Pa. 257. If a judgment appears upon the face of the record to be a nullity the Court may be properly asked to declare it so, and strike it off. This action amounts to a determination by the Court that what appeared to be a judgment is not such

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in law, and that it has no right to remain on the records because it is improperly there. When the Court below refuses to strike from its records what is in law a nullity, and treats it as a valid judgment, the defendant may appeal, and his appeal will be in effect a certiorari bringing up the record for examination. No other question will ordinarily be presented on such an appeal than the sufficiency of the record to sustain the judgment. This is such an appeal. It brings up nothing but the record. We turn to it therefore in order to see on what the judgment complained of rests. We find that in 1879, a municipal lien for paving and curbing was entered by the plaintiff against a lot of land at the west corner of Orleans and Marville streets, in the Twenty-fifth ward of the City of Philadelphia, and against James W. Jenkins as owner. Before a scire facias was issued on this lien, a suggestion was filed by the plaintiff, setting forth that James W. Jenkins was also the registered owner of the land. The scire facias issued against Jenkins as owner and registered owner, and was returned as served or made known, by posting and advertising and *nihil habet* as to Jenkins. A judgment was entered in November, 1884, for want of an affidavit of defence. This judgment was revived, after two returns of *nihil habet* had, in 1889. The Court below was asked by the present appellant in January, 1894, to strike off the judgment entered in 1884 and all the subsequent proceedings.

The alleged apparent defect in this record is the want of personal service upon Jenkins, the owner and registered owner of the lot. The plaintiff replies that as Jenkins was a non-resident owner, the service was in accordance with the directions of the Act of 1881, P. L. 91. The defendant, as we understand, concedes the service to be good under the Act of 1881, but asserts that the Act is unconstitutional, and the service authorized by it is for that reason not sufficient to support a judgment by default. The Act of 1881 does not provide a new system so that it must stand or fall as a whole, but is a supplement to an Act approved on the fourteenth of March, 1865, entitled "An Act to promote the more certain and equal assessment of taxes in Philadelphia." It changes the mode of service in one class of cases, viz: municipal liens upon property owned by registered owners who are non-residents, and therefore personally out of reach of process. It authorizes service on such owners by posting a copy of the writ of scire facias on the premises, and by publication in a daily paper published in the city, twice each week for two weeks before the return day. This it declares shall be equivalent to a personal service of the writ on such non-resident owner. The only question that we need consider therefore is whether the Legislature had the constitutional power to authorize proceedings against property bound by a municipal lien in cases where the owner was a non-resident of the city.

If not, then such liens would be uncollectable. Resident owners must pay because within the reach of process. Non-residents if they keep out of reach of the sheriff need not pay. Such a mischief certainly required a remedy. What the remedy should be, so far at least as the property bound by the lien was concerned, was clearly a legislative question.

A somewhat similar question was before the Legislature in 1851, and it was solved by the Act of 14th of April, 1851, which provided that a vendor bringing an action of ejectment to enforce the execution of the contract against a vendee who had ceased to reside on the land or within the reach of a summons, might make service by publication; and on proof of publication as required by the Act, the Court was authorized to proceed to judgment in the action. This remedy was extended in 1858, P. L. 256, so as to be applicable in all cases where a claimant or a mortgagee might desire to bring an action of ejectment for land which was unoccupied and the owner of which did not reside in the county and had no known agent or employé in charge of the land who was a resident. A somewhat similar provision for service upon non-resident owners of unseated lands, was made early in 1824. In the case of mechanics' liens, the Act of 16th June, 1836, section 17, provided that the scire facias should be served on the defendant in the same manner as a summons, if he could be found in the county. If he could not be found, and the building bound by the lien was occupied as a residence, a copy of the writ might be left with the person residing in the house, and this should be a good service on the defendant. But if the house was unoccupied then service was to be made by posting a copy of the writ on the door or front part of the unoccupied building.

A service so made will support a judgment, and authorize the sale of the property bound at sheriff's sale. Other similar provisions have been made from time to time to facilitate the enforcement of liens, and the settlement of titles, both at law and in equity, which it is not necessary to enumerate. We recall none of these that has been held to be unconstitutional, nor do we find any provision of the Constitution that prohibits such legislation.

It is urged that the Act of 1881 changes the rules of evidence, and the practice in the Courts. If so neither the defendant nor the appellant has suffered from such provisions, and for that reason neither is in a position to complain of them. An Act may be unconstitutional in some respects

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and constitutional in others. Our question, the only question raised on this record, is whether the defendant was lawfully served with the scire facias. If he was served in the manner provided by the Act of 1881, and the Legislature had the constitutional right to direct this method of service on a non-resident property holder bound by a municipal lien, then the judgment resting on such service is regular and the Court below was right in refusing to strike it off.

The other questions discussed it is not important to consider. They are not material to the decision of this appeal. A question of practice is raised, however, over the position of the appellant, upon which a few words may be appropriate.

The judgment was rendered in 1884 against James W. Jenkins, and it has been regularly revived by scire facias against him. In 1894, a suggestion was filed by appellant's counsel setting out that Jenkins died in 1888, and that his title to the property bound by the municipal lien descended to F. W. Jenkins and Laura E. Jenkins as his heirs at law. This is all that appears. They do not allege that they are still interested as owners. They do not ask to be made parties, or to be allowed to defend as the holders of the title of their father. What is the legal value of such a suggestion? Simply to give notice to the Court and the plaintiff of the facts stated, in order that any further action may be taken intelligently. If the plaintiff should need to revive the judgment again he would be bound by the notice of the defendant's death and would bring in the heirs at law by scire facias. The suggestion alone does not bring them in. It simply points them out. No man can make himself a party to pending litigation between others by his own act or statement on the record; nor can he bring another into such litigation as an adverse party without his consent or the order of the Court. If a defendant dies, that fact may be suggested by the plaintiff, and the name of his executor, administrator, or heir at law embodied in the suggestion. This will not operate as a substitution but will support a scire facias directly to the parties so named: Hall's Appeal, 1 Pennypacker, 223. The suggestion may be made also by the proper representative or successor of the deceased defendant, and the plaintiff will be fixed with notice of the facts so brought to his attention and must govern his future action accordingly. But without some order of substitution or a writ of scire facias to bring in the suggested representative or successor no change is made in the parties. The suggestion states facts of which the plaintiff and the Court should take notice, and upon which their further action should be based, but it does not stand in the place of such action or render it unnecessary. The appellant is therefore not yet a party to this action. The truth of her suggestion has never been inquired into. She has asked no order based upon it and the plaintiff has taken no action because of it. It stands as a notice of danger, a caution to proceed no further, given by one claiming to know the facts; and it says to the plaintiff and the Court, "The defendant is dead. He died six years ago, and his title then passed to us as heirs at law. Proceed henceforward at your own risk." We place the determination of this appeal, however, on the ground that no irregularity appears upon the record, and that the Court had, therefore, no power to strike off the judgment.

The action of the Court below is now affirmed.

W. M. S., Jr.

Oct., '94, 295. October 9, 1894.

Hysong et al. v. School District of Gallitzin Borough et al.

School law—Religion no disqualification to hold office of teacher—Discretion of school directors—Members of religious order—Use of religious dress by teacher—Sectarian teaching—Teachers' certificates.

The discretion of a board of school directors in selecting teachers is absolute, within the bounds of law, and when it appears that the board has appointed a teacher of good moral character, who has presented a certificate of qualification as to scholarship and aptness to teach, that is an end of judicial inquiry into the action of the board in making the appointment.

A member of a religious order is not, by the fact of such membership, disqualified to hold the position of teacher in the public schools.

The fact that a member of a religious order who has earned a salary as a public school teacher pays the amount into the treasury of the order to which she belongs, in obedience to a requirement of the order, does not render the payment of the salary a diversion of school funds to sectarian purposes; when the salary is earned the recipient has a right to do what she pleases with it.

The use by a teacher, while engaged in her work as such, of the religious garb or habit of an order to which she belongs is not unlawful, and is not sectarian teaching, although the use of the dress imparts to the pupils knowledge of the church to which the wearer belongs. (Williams, J., dissents.)

A teacher's certificate is not illegal because made out in the name of the religious name of the holder, and not in her secular name.

Appeal of John Hysong, David Y. Williamson, A. R. Salkeld, Charles H. Decker, Alfred J. Hancuff, James Pearce, Scott Stoner and James McLaughlin, plaintiffs, from the decree of the Common Pleas of Cambria County, dissolv-

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ing a preliminary injunction granted in a suit in equity against the school district of Gallitzin borough, Michael Fitzharris (president), James G. Bender (secretary), Charles Quinn (treasurer), T. S. Troxell, J. I. Campbell, William Criste, the school directors of said school district; and Sister Mary De Sales (or Clara Clark), Sister Mary Colletta, Sister Mary Marcella (Mary Preston), Sister Mary Gonzaga (or Elizabeth Cunningham), Sister Mary John (or Mary Keenan), and Sister Mary Sebastian, teachers in the public schools of said school district, defendants.

The plaintiffs in this cause filed a bill setting up that—

I. The plaintiffs were residents, citizens and taxpayers of the school district of Gallitzin Borough, of the County of Cambria, State of Pennsylvania, and some of them parents of children attending, or entitled to attend, the public schools of said district, whose sectarian or religious views, consciences and convictions were different from those who belong to the Roman Catholic Church.

II. That the defendants were the school district of Gallitzin Borough, the school directors of the said district, and six women who were not citizens and residents of said borough, but formerly itinerant teachers of the parochial schools of the Roman Catholic Church, engaged, employed or acting as teachers in the public schools of said district.

III. That said women were all sectarian or religious Sisters of the Order of the Sisterhood of St. Joseph, of the said Church, and had taken vows whereby they have renounced the world and have given up their worldly names and worldly interests, and largely such connections, associations and pursuits as ordinary individuals usually have in secular communities and society.

IV. That the school directors constituted the school board of the district, and by the Constitution and laws of this State, had control of the public school funds, public school property, and public schools of said district; the hiring and discharging of said teachers, and the admission or exclusion of pupils, and the general control and management of the public schools of said district.

V. That the said directors were bound to provide for the maintenance and support of a thorough and efficient system of public schools, wherein all the children of the said school district above the age of six years may be educated, and to that end should have controlled, managed and conducted said schools with due regard to the religious liberties and rights of conscience of each and all, and on a purely non-sectarian basis, and without preference to any religious establishments or modes of worship or distinction of one religious sect or following over another, and were prohibited from appropriating or using money raised for the support of the public schools of said district for the support of any sectarian school.

VI. That the said school district and the said school directors thereof, in disregard of their said duties and in violation of the law, had resolved that the said directors would employ no teachers for six of the rooms in the said public schools of the said district, except Sisters of the Sisterhood of St. Joseph, and had employed and were employing the said six Sisters aforesaid, as teachers in said public schools, the said Sisters receiving or claiming the right to receive monthly pay as teachers in the public schools from the public school funds of said district and of the State of Pennsylvania for the use of said Sisterhood of St. Joseph, and said school directors had actually paid, and claimed the right to continue to pay, said religious teachers out of the public school funds of said district and of said State for the purposes aforesaid.

VII. That the said teachers wore distinctive, characteristic and known religious garbs or habits as emblems, marks, or insignia of the religious order and church to which they belonged, consisting of such black dresses, white caps, white coronets, crucifixes, rosaries and waist cords, with tassels, as were peculiar to their religious order, and continued, while teaching in said public schools, to wear said religious garbs or habits during school hours and in the discharge of their duties as said teachers, and did teach and use their said garbs, insignia and emblems in such a manner as to impart to the children under their instruction certain religious and sectarian lessons and ideas peculiar to said Roman or Holy Catholic Church.

VIII. That the said Sisters, teachers as aforesaid, applied for and received their certificates as such teachers in their religious or sectarian names alone, and were contracted with and employed as teachers by said school directors in their said religious or sectarian names, and kept their school records, made their reports, and performed their duties as teachers in their said religious or sectarian names, and the said board of school directors and the said teachers had adopted and announced rules for the government of said public schools, whereby the children are required to address said teachers as "Sister," and call them by their religious names, with penalties for the enforcement of the said rules, and by similar rules the resident and other priests of the Roman Catholic Church were encouraged thereto, and did visit the said public schools very frequently, and took the

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books and heard the recitation of lessons by classes, and go around in the school rooms and inspect the studies and work of the scholars individually, and the scholars were taught and required to rise and address the said priests as "Father," and thank them for their visits and request them to come again.

IX. That the catechism of the Roman Catholic Church and other religious instruction was studied and taught in said public schools before, during and after school hours, said catechisms being furnished to the pupils by the authorities or representatives of the said Roman Catholic Church. That the said religious teaching was carried on under the supervision and by the said religious teachers, defendants aforesaid, and was permitted by the said school directors, and the said religious teachers aforesaid unlawfully used the public school building and the musical instruments therein, for the purpose of teaching private pupils instrumental music for a money consideration for the use of the Order of the Sisters of St. Joseph, before, during and after school hours.

X. That in pursuance of the control and management of the aforesaid schools in the manner as herein set forth, Grace Hysong, age thirteen years, and Maud Hysong, age ten years, daughters of John Hysong, one of the plaintiffs aforesaid, were deprived of the use, benefit and education in said public school, for the reason that the said defendants would not permit the said children to attend the said schools unless they went to a school department taught by one of the said Sisters; and that Frank Williamson and other children of David Y. Williamson, and of other plaintiffs, and of other residents, citizens and taxpayers, were deprived of the use, benefit and education of the said public schools by reason of the said Sisters being employed as aforesaid, and teaching in their religious garb, emblems and insignia, and the use of the said catechism and other religious instruction in said schools against the protests and objections of said plaintiffs and parents.

XI. That the said teachers were, by the requirements of their Sisterhood, disqualified from fully performing all the duties of teachers in the common schools, as follows: That the same prevented and disqualified a Sister from associating or conversing with a male over the age of fourteen years, and, consequently, the scholars in room No. 7 of said public school building were all males, and taught by a male teacher, and in room No. 8, taught by a Sister, all were females; and in the other rooms taught by Sisters there were very few boys, and very improperly distributed, the result being that the scholars in all rooms were not properly classified and graded, so that the males, aged from ten to twenty years, were taught in the third, fourth and fifth reader in room No. 7, and other branches in the like manner. And that from same causes the said teachers were disqualified from teaching hygiene and physiology efficiently, and more especially to males over the age of fourteen years, as required by the laws of said State. And said directors knowingly approved of said improper system and neglect of legal requirements in said public schools.

XII. That the result of the management of the said schools of said district by said directors and sectarian teachers was illegal, a transformation of the public schools into sectarian schools, and the support of private sectarian schools out of the public school funds, and in furtherance of this illegal purpose the said defendants proposed and have arranged, after the present term closed to replace the same by parochial schools in said public school building, taught entirely by said sectarian Sisters, defendants above named; all of which was in derogation of the rights of children, parents, citizens and taxpayers of said district and said State, in violation of laws aforesaid, and more especially in violation of the rights of conscience of plaintiffs and their children.

The bill prayed—

1. An injunction against said school district and said district directors, and their successors, restraining them from employing and continuing to engage and allow said teachers in said public school, and from permitting said teachers to remain in said public school as teachers, or otherwise, while wearing said garb, habit, emblems or insignia, or in a known religious or sectarian capacity, and restraining them and each of them from permitting the use of said catechisms, or any sectarian books, as books of instruction in said public schools, and restraining them and each of them from the use of the said public school property in any way for sectarian purposes, and restraining them and each of them from continuing to employ said teachers under said certificates, issued as aforesaid in their religious or sectarian names.

2. An injunction against said teachers, and each of them, restraining them and each of them from continuing to act in the capacity of teachers, or otherwise in said public schools while wearing said garb, habit, emblems or insignia, or in a known religious or sectarian capacity, and restraining them and each of them from using or furnishing for use the said catechisms or other methods of sectarian instruction in said schools, and restraining them and each of them from causing or permitting the pupils under their charge to address them or others by any sectarian title or name whatsoever, and restraining them and each of them from using or per-

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mitting the use of said public school property for any other than free, common, public school purposes.

3. An injunction restraining defendants from in any way or manner appropriating or using the money raised for the support of the public schools of said district for the support of any sectarian schools, or any sectarian school purpose, or for any purpose other than the support of the free, common, public schools of said district.

A preliminary injunction was granted as prayed.

The defendants filed an answer which admitted paragraph I. of the bill, except that it alleged that defendant did not certainly know what the plaintiffs' religious views were; as to II., set up that the Sisters, defendant, were not itinerant teachers, had not been engaged for some time as teachers in parochial schools of the Roman Catholic Church, but were citizens of Cambria County, and were engaged as teachers in the public schools; as to III., set up that the persons named as Sisters were members of the Order of the Sisters of St. Joseph, and have taken the vows of said Order; but it was not true that they had thereby renounced the world and had given up their worldly names and interests, and largely such connections, associations and pursuits as ordinary individuals have in secular communities and societies, but on the contrary, the renunciation of the world was to be understood in a religious sense alone, and not as an absolute separation from the world and worldly associations, connections and interests; that they were known by their family names, and did engage in secular pursuits and employments in which other women engaged who were not members of the said order or of similar societies.

Admitted IV.; did not deny V. so far as it set forth the duty of the board to provide schools on a non-sectarian basis, but did not admit the full import of all that was contained in the paragraph; denied all illegal action as alleged in VI., but admitted the employment of six Sisters, some of whom were formerly teachers in parochial schools; as to VII., admitted the wearing of the religious habit, but denied that by so wearing it was sought to impart to the pupils any ideas or doctrines peculiar to the Roman Catholic Church; as to VIII., denied the violation of any school laws, and averred that no such rules as were alleged to have been adopted had been adopted; as to IX., denied that the catechism of the Roman Catholic Church, or any other religious instruction, was taught in said public schools before or during school hours, but admitted that after the schools were dismissed for the day catechism was taught to such children as voluntarily remained to receive the same; denied that the said catechisms were furnished and placed in said public schools by the authorities or representatives of the Roman Catholic Church, or by any person whomsoever, during public school hours; and averred that the study of the catechism and religious instruction of any kind during school hours was strictly forbidden; that the musical instruments in said building were not the property of the said school district, and that no provisions of the school laws of this State have been or are now being violated in the use of said instruments, or the teaching of instrumental or vocal music during or after school hours.

Denied X. and XI., and averred that the said teachers are not disqualified from any cause from teaching hygiene and physiology or any other branch or branches of study required in the public schools.

Denied XII., and averred that it was not intended so to use the public school building, or for any other unlawful use.

The defendants prayed that the preliminary injunction be dissolved, and the bill be dismissed with costs.

The case came up for hearing before BARKER, P. J. After considerable testimony had been taken it was agreed by counsel that the testimony should be considered as taken upon final hearing, and that the parties would proceed to a final hearing at the sitting then in progress.

The facts found by the learned Judge thus appear in the following extract from his opinion:—

"For some years the members of the religious order known as the Sisters of St. Joseph. and spoken of in these proceedings as Sisters, have taught in the public schools at Gallitzin. Until the erection of the building now in use, and which was used for the first time for the term just closed, four Sisters had been employed by the school board as teachers, and taught public schools in a building belonging to them or to the Catholic congregation at Gallitzin, which was rented by the school board for that purpose, and in the public school building in another part of the town there were two schools taught by teachers other than Sisters. On the completion of the new building, which contained eight rooms, in the fall of 1893, the six Sisters made defendants here were employed as teachers, and Mr. Gray and Miss McGlade were also employed, Miss McGlade teaching in room No. 1, the lowest grade, and Mr. Gray in room No. 7, having all boys as pupils, and Sister Mary John in room No. 8, having all girls as pupils. The pupils in No. 6 were also all girls, the other rooms having pupils of both sexes.

"It does not appear that there was any prin-

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cipal in the sense that any one teacher had any supervision or control over any rooms other than his or her own. The grading was done by Mr. Gray and Sister Mary John, under the direction of the school board; and while there was some evidence of improper grading in the testimony of Mr. Gray, there was none that the sexes were separated to accommodate any disqualification of the Sisters to teach males. The term commenced about the first of November, 1893, and continued until the 30th of April, 1894, when it was interrupted by the service of process in this case. The contract with the teachers, when the term commenced, was for seven months, but by resolution of the board of directors, concurred in by the teachers, it had been agreed, a few days before the service of this injunction, that the term should end at the expiration of six months. The term, therefore, had really ended, under the agreement between the parties, before the commencement of the taking of testimony.

"The day that the schools opened for the present term, Mrs. Hysong and Mrs. Williamson, parents of Protestant children who theretofore attended the schools not taught by the Sisters, made objection to the directors and to the teachers against having their children taught by the Sisters. Their children were temporarily placed in Miss McGlade's room, and in a day or so were informed by her, and their parents were informed by a director, that a proper grading would place them in rooms taught by Sisters, and that unless they went to these rooms they would have to leave the school. They did leave the school, and did not return during the term.

"The Sisters employed as teachers had regular certificates granted to them in their religious names by the county superintendent, after a private or special examination given them at the Mother House in Ebensburg. They contracted with the directors in their religious names, and used them in the transaction of any business connected with their occupation as teachers. They wore at all times the familiar and distinctive garb of their order, with crucifix suspended from the neck and black beads or rosary attached to a cincture, or girdle, which they wore around their waists; but there was no sufficient evidence that they used the garb or insignia mentioned in such a manner as to attract particular attention to them or their signification, or endeavored to so use them as to impart sectarian or religious instruction.

"There were two pianos in the public school belonging to the Sisterhood, one in Sister Mary John's room, and one in the director's room, the former being used to accompany the school in vocal musical exercises, and on the other Sister Mary John gave lessons to private pupils after school hours, and they sometimes practiced on it during school hours.

"In the rooms where Sisters were employed as teachers, the Catholic catechism was taught by them each day, excepting Friday, immediately after the close of the regular school exercises, to children of Catholic parents, or, to state the matter more precisely, all Catholic children were expected by the teachers and their parents to remain after 4 o'clock and recite lessons previously assigned them, and which they were expected to have prepared the same as any other lessons, from catechisms containing religious instructions applicable to the Roman Catholic Church, and containing explanations and instructions as to the observances, ceremonies and beliefs peculiar to the Roman Catholic Church. These books were furnished by the Sisters to the pupils, or purchased by the parents from the church authorities. They were taken to the schoolhouse by the children with their other books and kept in their desks with them. It was a common occurrence for the children to take the catechisms from their desks or school bags and study their lessons in them during school hours, sometimes one hearing another recite the lesson. This was forbidden by the Sisters, and frequent instances were given in evidence of reproof administered by them whenever this prohibition was violated. So far as the evidence shows that the Sisters had any knowledge of this use of the catechism during school hours, they invariably forbade such use and reproved the children detected in it. This catechism instruction after school hours was with the knowledge of the directors and was permitted and allowed by them. There was but one instance in evidence of any instruction in the catechism excepting after school hours, and that was where a recitation was given two or three children before school hours, during which Protestant children were not permitted to enter the room, and the Sister giving this lesson stated in evidence that it was done as a punishment to these children.

"There was no evidence of any religious instruction or religious exercises of any character whatever during school hours.

"None of the Sisters engaged as teachers attended the Teachers' Institute, held at Ebensburg in the fall of 1893. Their schools were closed during the sittings of institute, and most of them visited during that week at the Mother House at Ebensburg. The schools taught by the Sisters were closed on December 8th and on the day preceding Good Friday, these being days of obligation or holidays in the Roman Catholic Church; but the Sisters did not receive pay for the days when their schools were closed.

"It was the custom of the scholars attending

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schools taught by Sisters to address them as 'Sister,' although there was no rule of the board or written or announced requirement by the directors or teachers that this should be done. The pupils, with very few exceptions, conformed to this custom and addressed them as 'Sister.' The same custom existed as to addressing Catholic priests as 'Father,' when they visited the schools; and the resident Catholic priest, as well as others who had formerly been located at Gallitzin, quite frequently visited the schools. We find no evidence that they conducted themselves in any manner different from any other person visiting the schools, either in the hearing of recitations or otherwise, nor that there was any difference observed in the treatment of them by the scholars from that accorded to any other visitor, the same custom being observed as to rising and saluting any other grown person who visited the schools; as, for instance, where a physician visited the schools, the scholars would rise and say, 'Good morning, Doctor;' and as to any grown person not having a title, he would be addressed by his proper name, when it was known.

"The population of Gallitzin is about three thousand, consisting of about two hundred and fifty Catholic families and about fifty Protestant families. The average attendance at the public schools during the term just closed was about four hundred. All the scholars in Rooms 7 and 8 were Catholics, excepting one or two. In the room taught by Sister De Sales—No. 2—there were about fifty Catholics and thirty Protestants. In the room taught by Sister Gonzaga—No. 6—the average attendance was about thirty, two-thirds of whom were Catholics. In the room taught by Sister Sebastian—No. 5—there were about thirty-five pupils, about one-half of them being Catholics. In the room taught by Sister Marcella—No. 4—the average attendance was about fifty, three-fourths of whom were Catholics. The proportion in the other rooms does not appear in the evidence.

"The principal vows taken by the Sisters are obedience and poverty. They own no property individually, and their earnings as teachers are paid to the Sister in charge of the house where they are at the time residing. They are required to wear the garb of the order, and are not allowed to take it off 'during the day, either on account of their work or the heat of the day.' It was not proven, either by the Constitution of the Order, offered in evidence, or by any other evidence, that the Sisters are prohibited from associating or conversing with males over the age of fourteen years, or that there is anything in their vows, or elsewhere, to prevent them from teaching physiology and hygiene efficiently.

"The Sisters who had been employed to teach public schools in the parochial school buildings usually taught terms of free school after the close of the public schools, to which all were admitted, regardless of religion or residence, and in which they had prayers according to the forms of their church and imparted catechism instruction during school hours; and there was some evidence of an intention to teach a similar school after the close of the public term, which was interrupted by the injunction.

"While it was not proven that the school directors had 'resolved' that they would employ no teachers for six of the rooms in the public school building, except Sisters, in the sense that a resolution had been formally adopted and recorded to that effect, yet it was as clearly established as though spread on the minutes in unambiguous terms, that the intention existed to employ none but Sisters in certain of the rooms. The evidence of this intention is found in the history of the schools during the period concerning which evidence was admitted, and in the correspondence of the board with the county superintendent. It was further established that such Sisters were employed as were detailed by the Mother Superior of the order at Ebensburg to reside at the Gallitzin House."

The learned Judge entered the following decree:—

And now, August 20, 1894, this case having been previously heard and fully considered, it is ordered and decreed as follows: That the preliminary injunction heretofore granted be dissolved in so far as the same restrains the school district of Gallitzin Borough, the school directors of said district, and their successors, from employing the other defendants named in the bill as teachers in said public schools under the certificate issued by the county superintendent in their religious names, and permitting said teachers to remain as such while wearing the garb of the Order of Sisters of St. Joseph, and in so far as it restrains the said teachers from acting in the capacity of teachers while wearing the garb of said order, and it is also dissolved in so far as it restrains the said teachers from permitting the pupils to address them by the title of "Sister," or a visiting priest as "Father."

And the said preliminary injunction is made perpetual in so far as it restrains the defendants from permitting the use of the catechisms of the Roman Catholic Church as books of instruction in said public school buildings at any time, whether during school hours or otherwise, and from using the said catechisms for said purposes therein, and from giving or permitting any religious sectarian instruction therein at any time, and from using or permitting the use of the public school property for any other than free, common school purposes.

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And it is further ordered and decreed that the defendants pay all docket costs taxed in this case and the costs of their witnesses and service of subpœnaes thereon, and that the plaintiffs pay the costs of their witnesses and the service of subpœnaes thereon.

The plaintiffs took this appeal, and assigned as error, *inter alia*, as follows:—

The Court erred in limiting plaintiffs' complaints as matter of law to the one question of misuse of school funds and school property and to undoubted sectarian religious instruction, admittedly and openly indulged in, and excluding the questions of free and equal enjoyment of the public school system without even the appearance of anything objectionable to the conscience of any and without any compulsory maintenance or preference of any religious establishment or mode of worship by finding as follows, viz:

"'The first and second sections of Article X., in the Constitution of Pennsylvania, read as follows:—

"'Section 1. The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public schools wherein all the children of this Commonwealth, above the age of six years, may be educated, and shall appropriate at least one million dollars each year for that purpose.

"'Sec. 2. No money raised for the support of the public schools of the Commonwealth shall be appropriated to, or used for, the support of any sectarian school.'

"The relief sought for by the plaintiffs is claimed on the ground that the conduct of the defendants has been in violation of the second section above quoted; they contend that they have proven that sectarian influence was exerted and sectarian teaching engaged in, in the public schools of Gallitzin, and that sectarian control was exercised in their management, and thereby these schools were transformed from public schools into sectarian schools in the meaning of the Constitution, and its spirit, as well as its letter, disregarded and their constitutional rights infringed upon.

"There are two other sections of our Constitution to be considered in connection with the ones quoted above, in order to determine whether the constitutional rights of the plaintiffs have been invaded. Section 3, of Article I, of the Constitution, which is the Declaration of Rights, reads as follows:—

"'All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience, and no preference shall ever be given by law to any religious establishments or modes of worship.'

"Section 18 of Article III., relating to legislation, reads as follows:—

"'No appropriations, except for pensions or gratuities for military services, shall be made for charitable, educational, or benevolent purposes to any person or community, nor to any denominational or sectarian institution, corporation, or association.'" (Second assignment of error.)

The Court erred in finding that the payment of the public school funds to the Sisters and Sisterhood of St. Joseph could not be enjoined. (Fifth assignment.) In finding that certificates, contracts, reports, and performance of school duties in sectarian religious names and character by Sisters could not be enjoined. (Sixth assignment.) In finding that the Sisters were not disqualified by their sectarian constitution, vows and relations from acting as public school teachers. (Seventh assignment.) In finding that the employment of the Sisters of St. Joseph as teachers in the public schools, and their acting as such while wearing the distinctive sectarian garb, crucifixes, and rosaries of their order and sect, could not be enjoined. (Eighth assignment.) In finding that the permission and use of the sectarian religious titles or addresses "Sister" and "Father" could not be enjoined. (Ninth assignment.) In refusing to restrain the employing, permitting, and acting as teachers in the public schools "nuns" or "Sisters," who are required by their obligations to their church to wear garbs, including crucifix or crucifixes, which mean and teach "the Catholic Church," and rosaries, meaning and teaching the prayers of the fifteen mysteries in the Roman Catholic Church. (Thirteenth assignment.) In refusing to restrain the allowance of use of religious sectarian names in the public schools, and the permission of the pupils to customarily and usually address the religious sectarian teachers as "Sisters," and their visiting and overseeing priest of the same sect as "Father," on the ground of there being no rule of the school requiring pupils to do so. (Fourteenth assignment.) In refusing to restrain the employment, permission, and acting of "nuns" or "Sisters" as teachers in the public schools in known sectarian characters and names, garbs, and insignia objectionable to Protestant plaintiffs, so as to compel Protestant children of plaintiffs and others to attend schools so taught by "nuns" or "Sisters" or do without education for conscience' sake. (Fifteenth assignment.)

T. H. Baird Patterson (with him *A. D. Wilkin* and *H. W. Storey*), for appellants.

The wearing of the habit of a religious order

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by the Sisters while engaged in their duties as teachers is a constant object lesson in sectarianism, besides this, the garb and the accompaniments must constantly suggest questions by the children which will not be unanswered. Such sectarian teachers, with their peculiar and attractive missionary garb and the sanctity and subtilty, enticing and winning ways of trained Jesuit methods, cannot safely be placed as teachers over young and tender children with their inquiring and impressible minds without some sectarian idea or influence being imparted to the children under their instruction by such teachers. Especially when you consider that their training and seclusion from the struggles and hardships of ordinary life give them mild and courteous manners and dispositions, which win the affections and respect of children, as compared with the harsher and more practical teachers taken from ordinary walks and relations of life, and consequently the children by comparison would be led to inquire as to why these Sisters were lovelier than others; why they were called by the endearing name of "Sister," when no relation to them; why their visiting, supervising, kind priest was called by these nun Sisters "Father;" what kind of a church is it that such nice, lovely, kind and affectionate people belong to; why do these Sisters always wear the same picturesque, peculiar dresses, different from everybody else? The wearing of the garb renders the school in which it is worn sectarian, and it is illegal to apply to the support of a school in which the practice obtains public moneys.

The payment to the Sisters in this case is an appropriation of tax moneys, and giving a preference to one religious sect or following over another in violation of the Constitution, Art. X., secs. 1, 2; Art. I. sec. 3, Art. III., sec. 18.

Spires *v.* The Treasurer and School Directors of Gallitzin District, No. 73, S. T. 1882, of C. C. P. of Cambria County.
State *v.* District Board, 76 Wis. 177.
Nevada *v.* Hallock, 16 Nevada, 385.
County of Cook *v.* Industrial School, 125 Ill. 540.
The People *v.* The Board of Education of Brooklyn, 13 Barb. 410.
Synod of Dakota *v.* State, 2 South Dakota Rep. 366.

The payment of money to the Sisters was a payment to the Sisterhood of St. Joseph, as the Sisters themselves can have no individual property.

David L. Krebbs (with him *F. J. O'Connor*, *M. D. Kittell* and *P. J. Little*), for appellees.

The Constitution provides, "All men [*i. e.*, all mankind] are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness." Art. I., sec. 1.

And "No person who acknowledges the being of a God and a future state of rewards and punishments shall on account of his religious sentiments be disqualified to hold any office or place of trust or profit under this Commonwealth." Art. I., sec. 4.

These sections protect the rights of members of the Sisterhood of St. Joseph equally with those of any other citizen of the Commonwealth.

They have an "inherent" right of "pursuing their own happiness," and because they "believe in the being of a God and a future state of rewards and punishments" they are qualified "in pursuing their happiness" to fill any office or *place* of trust or profit which any other citizen may fill.

The word "office" is of vague and indefinite import, but everything concerning the administration of justice and the general interests of society is within the meaning of the Constitution.

Com'th. *ex rel.* Lehman *v.* Sutherland, 3 S. & R. 148.

The position of teacher is a place of trust and responsibility, affecting *the general interests of society*, having fees or emoluments attached thereto, and the statutes regulating the organization of the public school system provide for the selection, appointment and removal of persons from the "office or place" of teacher.

There is no part or provision of our common school law which in any wise interdicts the employment of the members of any religious sectarian society, order or association as teachers.

The garb of the members of the order of the Sisterhood of St. Joseph should not disqualify them from teaching:—

a. Because the Court has found affirmatively that they did not "use their garb or insignia of their order in such a manner as to attract the attention to them or their signification, or endeavor to so use them as to impart sectarian or religious instruction."

b. Because there is no evidence in the cause that the wearing of the garb or any part thereof attracted the attention of any pupil, or influenced in the slightest degree his or her religious views.

c. Because there is no evidence that a single Protestant pupil *inquired* to ascertain the signification of any portion of the garb or insignia worn.

d. Because the wearing of any particular kind of dress, garb, or insignia, not subversive of good morals, cannot be alleged as an effort to

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"control or interfere with the rights of conscience" within the meaning of Section 3, Art. I., Const. 1874, however distasteful or objectionable.

e. Because the absence of all proof that the dress or garb did attract attention, or influence any Protestant pupil after the prolonged hearing in this case, is positive proof that it has no tendency to impart or teach sectarian or religious doctrine or tenets.

f. Because, even if the garb or dress teaches the existence of a sectarian order, it does not teach or impart the doctrine or sectarian tenets of the order.

The use made by the Sisters of the earnings is immaterial, salary once earned is no longer public school funds but private property to be used for any lawful purpose. The vice of the appellants' position in this respect is that it maintains "once public school funds always public school funds," forgetful of the transmutation from public to private funds by the alchemy of labor.

The constitutional protection of the liberty and "rights of conscience" guaranteed to all is not directed against some *imaginary* influence, which is inferred to exist from daily contact only with our fellow beings who hold "beliefs" differing from our own; but against the *active* control and interference with our conscientious convictions, by others who strive to bring us to their beliefs by teaching, persuading, and convincing us.

The silent influence of a life of morality, or the dress of an individual, is not such control or interference with the rights of conscience as is enjoined by the 3d Section, Art. I., of the Constitution of 1874.

November 12, 1894. DEAN, J. This bill was filed to restrain the school directors of Gallitzin Borough from permitting sectarian teaching in the common schools of the borough, and from employing as teachers, Sisters or members of the Order of St. Joseph, a religious society of the Roman Catholic Church. What seem to us the most material averments of the bill were denied in the answer. The employment, however, of the members of this society was admitted. The Court, after a full hearing, found as a fact: "There was no evidence of any religious instruction or religious exercises of any character whatever during school hours." But the Court further found that after school hours the schoolroom was used by the teachers in imparting Catholic religious instruction to children of Catholic parents, with the consent of or by request of the parents. This the Court enjoined, because it was a use of the school property for sectarian purposes after school hours.

As to the fact admitted, that of the eight teachers six of them were Sisters of a religious order of the Catholic Church, and while teaching wore the habit of their order, the learned Judge of the Court below says "We conclude as to this branch of the case that in the absence of proof that religious sectarian instruction was imparted by them during school hours, or religious sectarian exercises engaged in, we cannot restrain by injunction members of the order of Sisters of St. Joseph from teaching in the public schools in the garb of their order, nor the school directors from employing or permitting them to act in that capacity."

This legal conclusion is reached after a very able and impartial opinion, in which the facts are reviewed, and the law bearing on the question very fully cited. The opinion is so convincing that it seems to us it must compel the assent of the unprejudiced mind, whether layman or lawyer. In thus expressing our full accord with the learned President Judge of the Court below, we intimate no opinion as to the wisdom or unwisdom of the action of the school board in selecting six Catholic school teachers, members of an exclusively religious order. In this matter was involved solely the exercise of discretion by the school board in the performance of an official duty, for which they alone are responsible; this discretion when it does not transgress the law, is not reviewable by this or any other Court. When a teacher of good moral character applies for a school, and presents a certificate of qualification as to scholarship and aptness to teach, that is an end of judicial inquiry into the action of the board in appointment, because the law makes no further inquisition up to this point. The burden of appellant's complaint here is set out in the 8th assignment of error as follows:—

"The Court erred in finding that the employment of the Sisters of St. Joseph as teachers in the public schools, and their acting as such while wearing the distinctive sectarian garb, crucifixes and rosaries of their order and sect, could not be enjoined."

Unquestionably these women are Catholics, strict adherents of that faith, believing fully in its distinctive creed and doctrine. But this does not disqualify them. Our Constitution negatives any assertion of incapacity or ineligibility to office because of religious belief. Article I of the Bill of Rights declares: "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; . . . . no human authority can in any case whatever control or interfere with the rights of conscience."

If by law any man or woman can be excluded from public office or employment because he or she is a Catholic, that is a palpable violation of

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the spirit of the Constitution; for there can be in a democracy no higher penalty imposed upon one holding to a particular religious belief than perpetual exclusion from public station because of it. Men may disqualify themselves by crime, but the State no longer disqualifies because of religious belief. We cannot now, even if we wanted to, in view of our law, both fundamental and statutory, go back a century or two to a darker age and establish a religious test as a qualification for office. In this case the school board committed no unlawful act in selecting these Catholic women as teachers, because by moral character and certified attainments they were qualified, and their religion did not disqualify. The board may have thought that because of their previous training and discipline they were specially qualified as teachers, just as Protestant school boards sometimes think graduates of particular schools or colleges make the best teachers; but there is no proof that they were appointed because they were Catholics in preference to others as well or better qualified, but not members of that Church. It appears that the members of the school board are Catholics. The voters of the borough number between four and five hundred, and all but about fifty of these are Catholics. Under such circumstances, it is probable that often the board will be wholly Catholic, just as we see all over the Commonwealth in school districts largely Protestant, the whole board composed of non-Catholics. We suppose in many cases the Catholic school director is of the opinion that the schools and colleges controlled by his church train the best teachers; the Protestant director is of an opposite opinion, and prefers as teachers those educated in Protestant denominational schools or colleges. Inevitably in a popular government by the majority, public institutions will be tinged, more or less, by the religious proclivities of the majority; but in all cases where a discretion is reposed by law, we must assume, in the absence of evidence to the contrary, that the public officer has performed his duty. We cannot infer from the mere fact that a school board composed of Catholics has selected a majority of Catholic teachers, therefore it has unlawfully discriminated in favor of Catholics; because the selection of Catholic teachers is not a violation of law or, which is the same thing, is not an abuse of discretion. Unless this be the case, no Court has power to revise the exercise of this discretion, for the very sufficient reason the law has not made the Court school directors, while it has devolved on six citizens of Gallitzin Borough the duties of that office.

Nor does the fact that these teachers contributed all their earnings beyond their support to the treasury of their order, to be used for religious purposes, have any bearing on the question. It is none of our business, nor that of these appellants, to inquire into this matter. American men and women, of sound mind and twenty-one years of age, can make such disposition of their surplus earnings as suits their own notions. We might as well, so far as any law warranted it, inquire of a lawyer, before admitting him to the bar, what he intended to do with his surplus fees, and make his answer a test of admission. What he did with his money could in no way affect his right to be sworn as an officer of this Court, therefore it would be impertinent in us to inquire.

But it is further argued, that if the appointment of these Catholic teachers was lawful, they ought to be enjoined from appearing in the school-room in the habit of their order. It may be conceded, that the dress and crucifix impart at once knowledge to the pupils of the religious belief and society membership of the wearer. But is this, in any reasonable sense of the word, sectarian teaching, which the law prohibits? The religious belief of many teachers, all over the Commonwealth, is indicated by their apparel. Quakers or Friends, Omnish, Dunkards and other sects, wear garments which at once disclose their membership in a religious sect. Ministers or preachers of many Protestant denominations, wear a distinctively clerical garb. No one has yet thought of excluding them as teachers from the school-room on the ground that the peculiarity of their dress would teach to pupils the distinctive doctrines of the sect to which they belonged. The dress is but the announcement of a fact, that the wearer holds a particular religious belief. The religious belief of teachers and all others is generally well known to the neighborhood and to pupils, even if not made noticeable in the dress, for that belief is not secret, but is publicly professed. Are the Courts to decide that the cut of a man's coat, or the color of a woman's gown, is sectarian teaching, because they indicate sectarian religious belief? If so, then they can be called upon to go further. The religion of the teacher being known, a pure unselfish life, exhibiting itself in tenderness to the young, and helpfulness for the suffering, necessarily tends to promote the religion of the man or woman who lives it. Insensibly, in both young and old there is a disposition to reverence such an one, and at least to some extent, consider the life, as the fruit of the particular religion. Therefore, irreproachable conduct, to that degree, is sectarian teaching. But shall the education of the children of the Commonwealth be entrusted only to those men and women who are destitute of any religious belief?

Our recollection extends back almost to the

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beginning of the common school system of the Commonwealth; in many counties, there never was a time when ministers of Protestant sects were not frequently selected as teachers; some of them wore, in the school-room where children of Catholic parents were pupils, a distinctively clerical garb; when the office of county superintendent was first created in 1854, in many counties preachers were chosen to fill the office; the present State superintendent of public instruction is a Protestant preacher. It is fair to presume that high moral character, the result of Christian sectarian teaching, as well as scholarly attainments, prompted their selection. Ordination vows binding them to a particular creed, were considered no disqualification; it was not assumed, that the fact of membership in a particular church, or consecration to a religious life, or the wearing of a clerical coat or necktie, would turn the schools into sectarian institutions. In the sixty years of existence of our present school system, this is the first time this Court has been asked to decide, as matter of law, that it is sectarian teaching for a devout woman to appear in a school-room in a dress peculiar to a religious organization of a Christian church. We decline to do so; the law does not so say. The Legislature may, by statute, enact that all teachers shall wear in the school-room a particular style of dress, and that none other shall be worn, and thereby secure the same uniformity of outward appearance as we now see in city police, railroad trainmen, and nurses of some of our large hospitals. But we doubt if even this would repress knowledge of the fact of a particular religious belief, that, if the teacher had any, would still be effectively taught by unselfish devotion to duty; no mere significance or insignificance of garb could conceal it; the daily life would either exalt or make obnoxious the sectarian belief of the teacher.

After a most careful consideration, we see nothing of merit in any of the assignments of error which have been so earnestly pressed in the argument. The decree is affirmed and appeal dismissed, at costs of appellants.

Eo die. WILLIAMS, J., dissenting. I can go with my brethren on all the questions involved in this case save one. I cordially assent to the proposition that teachers should be selected for the common schools because of their fitness and not because of their religious belief or their church affiliation. I am glad that in this State and in this country the rights of conscience are no less sacred than the rights of property, and that test oaths and religious disqualifications belong to a period further back than the memory of the present generation can reach. I hope they may never be restored. But the Constitution and laws of this Commonwealth provide for open free schools, for all children of the proper age, that shall be secular in character. Schools in which the consciences and the sectarian bias of both parents and children shall be respected, or at least not interfered with. Their purpose is to provide an elementary education that shall help to fit the rising generation for actual business, and the duties and privileges of citizenship. Is the public school in the Borough of Gallitzin so conducted? It is a school with eight departments and a separate teacher for each. The eight teachers are members of the same church or sect. This is unusual but not unlawful. Six of these teachers presiding over six of the departments are nuns of the Sisterhood of St. Joseph. They have renounced the world, their own domestic relations, and their family names. They have also renounced their property, their right to their own earnings, and the direction of their own lives, and bound themselves by solemn vows to the work of the church and to obedience to their ecclesiastical superiors. They have ceased to be civilians or secular persons. They have become ecclesiastical persons known by religious names, and devoted to religious work. Among other methods by which their separation from the world is emphasized, and their renunciation of self and subjection to the church is proclaimed, is the adoption of a distinctly religious dress. This is strikingly unlike the dress of their sex whether Catholic or Protestant. Its use at all times and in all places is obligatory. They are forbidden to modify it. Wherever they go this garb proclaims their church, their order, and their separation from the secular world as plainly as a herald could do if they were constantly attended by such a person. The question presented on this state of facts is whether a school that is filled with religious or ecclesiastical persons as teachers, who come to the discharge of their daily duties wearing their ecclesiastical robes and hung about with the rosaries and other devices peculiar to their church and order is not necessarily dominated by sectarian influences and obnoxious to the spirit of the constitutional provisions and the school laws? This is not a question about taste or fashion in dress, nor about the color or cut of a teacher's clothing. If it was only this I would favor the largest liberty. It is deeper and broader than this. It is a question over the true intent and spirit of our common school system as disclosed in the provisions referred to. If this is a proper administration of the school laws in Gallitzin it would be equally so in any other school district of the State; and if every common school was presided over by ecclesiastics in their distinctive ecclesiastical robes, supplying pupils with copies of their church catechism on application, and

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teaching it before and after school hours to all who chose to remain for that purpose, it seems to me very plain that the common schools would cease to be such and would become to all practical intents and purposes parochial schools of the church whose ecclesiastics presided over them. Clergymen sometimes wear on the street a coat or hat that affords some evidence of their profession, but they do not appear in churchly robes when about their daily work, or in any garb that points out the church to which they belong or the creed to which they adhere. But these six teachers in Gallitzin do just that. They wear, and must wear, at all times a prescribed unchangeable ecclesiastical dress which was plainly intended to proclaim their non-secular and religious character, their particular church and order, and their separation from the world. They come into the schools not as common school teachers, or as civilians, but as the representatives of a particular order in a particular church whose lives have been dedicated to religious work under the direction of that church. Now the point of the objection is not that their religion disqualifies them. It does not. Nor is it thought that church membership disqualifies them. It does not. It is not that holding an ecclesiastical office or position disqualifies, for it does not. It is the introduction into the schools as teachers of persons who are by their striking and distinctive ecclesiastical robes necessarily and constantly asserting their membership in a particular church, and in a religious order within that church, and the subjection of their lives to the direction and control of its officers. No priest or bishop in full canonical dress more plainly declares his church, and his office therein, than do these non-secular and ecclesiastic persons when they come into the school-room of a secular public school wearing the peculiar uniform and insignia of their sisterhood. The common schools are supported by general taxation. The Catholic and the Protestant, the Jew and the infidel, help support them, and have an equal right to their benefits. The common schools cannot be used to exalt any given church or sect, or to belittle or override it; but they should be like our political institutions, free from ecclesiastical control and from sectarian tendencies. Is the public school of Gallitzin such an one? The Protestant children of that borough do not think so. Their parents do not think so, as appears most plainly by this litigation. The directors evidently did not think so, for they repulsed the mothers who came to them to beg that their children might be put in a department not presided over by one of these ecclesiastical persons. The learned Judge of the Court below did not think so, for he enjoined against the teaching of the catechism and all other sectarian instruction, but he left the ecclesiastics in full charge. With faces averted from the world they have renounced; wearing their peculiar robes which tell of their church, their order and their subordination to the guidance of their ecclesiastical superiors; using their religious names and addressed by the designation, "Sister," they direct the studies and the deportment of the children under their care, as ecclesiastical persons. They cannot or they will not attend teachers' institutes. They have no touch with those engaged in the same pursuit about them. They do not attend public examinations; but examined in the seclusion of the "Mother House" of their order after having been selected by the "Sister Superior" in compliance with the written request of the directors, they come to their work as a religious duty, and their wages pass, under the operation of their vows, into the treasury of the order. If a school so conducted is not dominated by sectarian influence, and under sectarian control, it is not easy to see how it could be. If in some neighboring borough the several departments of the public school should be filled by Episcopal clergymen as teachers, who should appear only in their canonical robes, and with their prayer books suspended from their necks; and if Catholic parents of children entitled to admission into the school should appeal to the Courts for relief for their children from the presence and influence of ecclesiastics who insisted upon keeping the name of their church and their relation to it before the minds of their pupils, I should no more doubt their right to such relief than I can doubt the right of the plaintiffs in this case.

H. B.

Oct. '94, 5. October 1, 1894.

Arthur and the School District of French Creek Township v. School District of Polk Borough and E. J. Hutchinson, Collector of Taxes.

School district—Taxes—Injunction—Act June 1, 1883, sec. 1, P. L. 51.

A. owned a tract of land divided by a line separating Polk Borough from French Creek Township, the former assessed for school taxes the land in the latter, and the owner asked for an injunction to restrain the assessment.

Held, 1. The assessment was unlawful.

2. That the proper remedy was by injunction at the suit of the land owner.

3. That as the French Creek Township's power of taxation was not affected by the illegal act of the Polk Borough District, it could not claim an account from the latter.

Appeal of Robert Arthur and the School Dis-

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trict of French Creek Township, plaintiffs, from the decree of the Common Pleas of Venango County, dismissing a bill praying an injunction against the School District of Polk Borough and E. J. Hutchinson, collector of taxes, to restrain them from assessing upon and collecting a school tax from certain land in the Township of French Creek.

The facts of the case are sufficiently set forth in the opinion of the Court.

J. H. Osmer (*A. R. Osmer* with him), for appellants.

Robert F. Glenn, for appellees.

October 22, 1894. WILLIAMS, J. Two questions are presented by this appeal. The first relates to the power of a school district to levy and collect taxes upon lands lying outside of its boundaries. The second is over the proper remedy for the owner of the lands against whom the collection of such extra-territorial tax is attempted.

Both questions are well settled. The power of borough and township officers to levy taxes upon persons and property rests upon residence and location. The persons who live within the borough, and the lands enclosed by its lines, are subject to the jurisdiction of the borough and its officers. Persons and property located in some other borough or township are subject to the jurisdiction of the town or borough in which they belong.

No power to levy and collect taxes on property outside the lines that bound the district was ever asserted until the Act of June 1, 1883. This Act provided that whenever the lines that separate a borough from a township or from another borough pass through the lands of any person such lands shall be assessed where the mansion house is situated. It is probable that the assessment of school taxes on the land of the plaintiff lying in French Creek Township, by the school directors of Polk Borough, was begun under the provisions of this Act. But in La Plume Borough *v.* Gardner, 148 Pa. 192, we held the Act of June 1, 1883, to be unconstitutional in so far as it related to townships and boroughs not separated by a county line. The rights and powers of the several taxing officers in townships and boroughs in the same county remain, therefore, just as they were before that Act was passed. They may be exercised within the districts for which the officers were elected, but not outside of them.

The plaintiff has a tract of land containing about thirty acres, which is crossed by the line separating Polk Borough from French Creek Township so as to leave about fifteen acres in the township. There is no mansion house upon either part of the land. The school district of Polk Borough has assessed the fifteen acres lying in the township with school taxes. This is not merely irregular, it is unlawful. There is no foundation whatever on which this exercise of extra-territorial jurisdiction can rest, and the collection of an unlawful tax may be restrained by injunction.

The learned Judge of the Court below held that the remedy for the plaintiff was by an appeal from the assessment, and that having neglected this he was now remediless. But from what could he appeal? It is not alleged that the valuation of the land is too high, or that the quantity assessed to him is too great. He might have applied to have the assessment divided, but the authorities of both township and borough were bound to know how much of the tract was within their lines respectively, and to know that they could not levy taxes on that which was not within them. A taxpayer is not bound to anticipate that the officers will violate the law or attempt to enforce the collection of a tax which they have no power to impose. When they do this he has a clear right to relief by injunction to restrain the illegal act: Markoe *v.* Hartranft, 15 Am. L. Reg., 487; Campbell *v.* Campbell, 26 Leg. Int., 261; Conner's Appeal, 103 Pa. 357; Harper's Appeal, 109 Pa. 9.

When the act of the taxing officers complained of is lawful, but is done in an oppressive or unfair manner the remedy is by appeal. But if the officers are without jurisdiction and the act is illegal, as in the case before us, the proper remedy is by injunction.

This makes it necessary to reverse the decree so far as it relates to Arthur, but the consideration just referred to disposes of the claim of French Creek Township. That township had the right to levy and collect taxes on all the land within its boundaries. It did not do so, so far as the land of Arthur is concerned. Polk Borough had no right to levy and collect taxes on land in the township. Its attempt to do so violated the rights of the land owner, but it in no way interfered with the discharge of their duties by the officers of the township. Polk Borough must therefore settle with the persons whose money it has unlawfully obtained, so far as upon all the circumstances it is liable to refund at all, and not with the township of French Creek.

And now, upon consideration of the appeal in this case, it is ordered, adjudged and decreed that the decree of the Court below be reversed so far as it relates to Robert Arthur and that an injunction issue as prayed for to restrain the collection of the tax levied by the defendants upon the lands of the plaintiff lying in French Creek township, and that the defendants pay the costs accrued in this case. W. D. N.

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Common Pleas.

C. P. No. 4. Dec. 1893, 311.

Ehret v. Gunn et al.

Right of way—Appurtenant to land—Grant of portion of land—Effect on right of way—Grantee of a lot—Estoppel.

A right of way appurtenant to land is appurtenant to every part of it, and if the owner divides it into several lots, the grantee of each lot has an equal right over the servient land.

A grantee who accepts a deed which reserves a right of way for all occupiers of lots bounding upon it is estopped from denying such right.

In equity, on bill and answer.

The facts of this case are set out in the opinion of the Court.

John R. Read, Silas W. Pettit and *Harry B. Gill*, for plaintiff.

Henry B. Robb and *George W. Norris*, for defendant.

March 24, 1894. THAYER, P. J. This case, which was heard on bill and answer, was brought to determine a controversy which has arisen between the plaintiff and the defendants relative to the right of the latter to the use of a certain twelve feet wide alley-way, which furnishes the only means of entrance to, and exit from, the rear of their several lots on Fifteenth street, south of Allegheny avenue. If the defendants are cut off from the use of the alley-way they have no other means of entrance to, or exit from, the rear of their several properties, and everything brought into, or carried out of, their respective houses must go by the front door.

It appears that one Hiram Miller was originally the owner of the whole property now belonging to the plaintiff and the defendants. He also owned the land in the rear of the plaintiff's lots, extending from Fifteenth to Sixteenth streets, over which he laid out the twelve feet alley, now in dispute, before he made any conveyance to the plaintiff, and after he had conveyed to the grantor of the defendants. On August 2, 1872, Hiram Miller conveyed to Eli Hess a lot of ground on the west side of Fifteenth street, 200 feet south of Allegheny avenue, containing 100 feet on Fifteenth street. This lot came subsequently by several mesne conveyances to George V. Gunn, who cut it up into five smaller building lots, three of which he conveyed to Thomas Dudley, one to Thomas J. Taylor, and retained one for himself. Subsequent to the conveyance to Hess, Hiram Miller laid out a twelve feet wide alley on the south of the lot conveyed to Hess, bordering on the Hess property, and running back from Fifteenth street to the rear of Ehret's property, which fronts on Allegheny avenue. This alley was recited in the deeds to the plaintiff for the lots on Allegheny avenue (which were conveyed to the plaintiff by Miller by two deeds, dated respectively May 19, 1882, and June 13, 1883,) as having been "laid out for the use of those lots *and the other lots bounding on said alley*," and is described in the plaintiff's deeds thus: "Together with the free use and privilege of the said alley as a passage-way and water-course, and for the use of horses, carts and carriages, in common with the said Hiram Miller, his heirs and assigns, *owners, tenants and occupiers of the other lots of ground bounding thereon*, at all times hereafter forever." The lithographic plan attached to the plaintiff's bill shows very clearly the location of the twelve feet wide alley thus laid out by Miller for the accommodation of the several lots bounding upon it.

The plaintiff contends that, inasmuch as Miller's conveyance to Hess was made anterior to the laying out of the twelve feet alley, neither Hess nor any of the subsequent grantees claiming under him have any right to the use of the alley. I cannot agree with the plaintiff in this contention. I think it is clear that it was the intention of Miller when he laid out the twelve feet alley that all the properties bounding upon it should have the use of it. It is so declared in the plaintiff's deeds from Miller, where it is explicitly stated that the alley was laid out for the use of the lots granted to Ehret, "*and the other lots bounding on said alley*," and the grant to Ehret in both deeds is "with the free use and privilege of said alley, in common with the said Hiram Miller, his heirs and *assigns, owners, tenants and occupiers of the other lots of ground bounding thereon*." It makes no difference, in my opinion, that Hess, who was one of the "assigns, owners, tenants and occupiers of the other lots of ground bounding thereon," derived his title by assignment from Miller before the way was laid out, for it was the plain intention of Miller in laying out the alley to reserve the use of it for all who owned lots bordering upon it. It was competent for Miller, as owner of the land, to dedicate it to the use of all owners whose lots bordered upon it, whether their titles originated before or after the laying out of the alley, and that he intended to do so is, I think, plain from the language used in the deeds, which is of the broadest description, "for the use of the lots granted, and the other lots bounding on said alley," which means all lots bounding thereon. To undertake to restrict the grant to the subsequent grantees

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of Miller would be, in my opinion, to defeat the purpose which he had in view in laying out the alley, which was, by the plain language which he used, to devote the alley to the common use of all persons, owners of lots bounding upon it, without distinction as to the time at which they acquired their several titles from him. He, doubtless, foresaw that the large lot which he had conveyed to Hess, and which was bounded on three sides by other ground belonging to himself and on the other side by Fifteenth street, would be cut up into building lots, and that the occupants of houses built upon these lots would have no outlet whatever except by their front doors, unless by means of the alley intended for the benefit of all owners bordering upon it, and he therefore, in the reservation of the way, used language broad enough to secure the right of user for all owners whose lots bounded upon the alley, and that without regard to the time at which their titles might have been acquired.

I am therefore clearly of the opinion that the way laid out and reserved by Miller was a way intended to be appurtenant to all the lots bounding upon the alley, whether acquired before or after the alley way was laid out, and that consequently the defendants have an equal right with the plaintiff to the use of the twelve feet wide alley. The law is well settled that a right of way appurtenant to land is appurtenant to every part of it, and if the owner divides it into several lots, the grantee of each lot, however small, has an equal right over the servient land: Watson *v.* Bioren, 1 S. & R. 227; Underwood *v.* Carney, 1 Cushing, 285; Lansing *v.* Wiswall, 5 Denio, 218; Myers *v.* Birkey, 5 Phila. 167; Walker *v.* Gerhard, 9 Id. 116.

The plaintiff having accepted the deeds which reserved the use of the alley for all occupiers of lots bounding upon it, and the Hess lot being one of those which bounded upon it when the alley was laid out and reserved for the common use of all, the plaintiff is estopped from denying the right of the defendants who derived their title from Hess: Watson *v.* Bioren, 1 S. & R. 227.

This view of the case renders it unnecessary to consider the effect of the agreements made between Miller and Gunn, dated respectively March 6, 1893, and January 19, 1894, and the conveyance of the soil of the alley by Miller to Taylor January 20, 1894. These papers were evidently made with the view of strengthening the title of the defendants—a title which, in my opinion, was good enough before their execution, and did not require their support. I may add that the affirmance of the title of the defendants to the use of the alley-way plainly works no injury to the plaintiff. No one can pretend that the use of the alley by the defendants impairs or injures in any manner the plaintiff's enjoyment of it. The only effect of the decree will be, so far as he is concerned, to prevent him from speculating upon the necessities of his neighbors.

Ordered that the bill be dismissed, the plaintiff to pay the costs. F. B. N.

C. P. No 4. September 17, 1894.

Carstairs v. Knapp, Adm'r.

Practice — Summons — Service — Attendance in Magistrate's Court.

Parties attending on or returning from a magistrate's Court are exempt from the service of summons.

Motion to set aside service of summons.

The summons in this case was served upon the defendant, who was at the time a resident of Montgomery County, while he was in this County attending a hearing before a magistrate.

Isaac Chism, for the motion.

F. S. Drake, contra. There is no authority for setting aside a service when defendant is attending a magistrate's Court.

THE COURT. Rule absolute.

W. M. S. JR.

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WEEKLY NOTES OF CASES.

VOL. XXXV.] *FRIDAY, NOV. 30, 1894.* [No. 12.

Supreme Court.

Jan. '94, 168. March 20, 1894.

Campbell v. The Foster Home Association.

Agency—Principal and agent—Letter of attorney to sell land—Limitations on—Fraud—Subrogation—Volunteer not entitled to—Mortgages.

The rule of law, that a power to sell land includes a power to mortgage, is entirely inapplicable in the interpretation of a mere letter of attorney with a naked authority to sell uncoupled with any interest in the land or the fund.

Lancaster *v.* Dolan, 1 Rawle, 231, and kindred cases distinguished.

Such a letter of attorney establishes simply the relation of principal and agent between the parties to it. It must therefore be regarded as subject to the rules and requirements of that branch of the law, and it cannot be used for any purpose not permitted by them.

The authority of a letter of attorney is never extended beyond that which is given in terms, or which is necessary and proper for carrying the authority so given into full effect.

Although subrogation may be decreed where no contract exists, it will not be allowed in favor of a mere volunteer, who without any duty moral or otherwise, pays the debt of another.

The payment of a prior lien by one about to lend money upon mortgage, for the purpose of making the mortgage a first mortgage, is not a payment made under any compulsion, or for the protection of any rights or interests previously acquired, and such payment does not give any right of subrogation to the debt discharged.

McCleary's Appeal, 20 WEEKLY NOTES, 547, followed.

C., being the owner of certain real estate, executed a letter of attorney to R. authorizing him to sell it. R., instead of selling, mortgaged the premises to F. for $7,500, and at the settlement F. paid off a prior mortgage of $6,000, and certain taxes and other charges, the balance being handed to R., who did not inform C. of what he had done, or pay over any of the money in his hands. Subsequently C. filed a bill in equity to have the mortgage declared void and cancelled. In the answer, F. claimed that if the mortgage was cancelled, he should be subrogated to the amount of the debt against the property discharged by him:

Held, 1. That R. had no power under the letter of attorney to mortgage the property, and that the mortgage was void.

2. That F. acted merely as a volunteer in making payments in relief of C., and therefore had no equity to be subrogated to the rights of those paid by him.

Appeal of The Foster Home Association, defendant, from the decree of the Common Pleas No. 4, of Philadelphia County, granting relief as prayed for in a bill in equity filed by Mary W. Campbell against The Foster Home Association, praying for an order that the said defendant should deliver up a certain mortgage to be cancelled, and satisfied of record, and that an injunction should issue in restraint of any suit upon the bond accompanying said mortgage.

The bill in equity averred that the plaintiff was the owner of the premises No. 1039 Walnut street, in the City of Philadelphia. That on December 26, 1888, she executed a letter of attorney to one William B. Robins of said city, appointing him, "my true and lawful attorney, for me and in my name, to grant, bargain and sell, in fee simple, all real estate owned by me, including all ground rents, on such terms and for such prices as he may see fit, and to make, execute, and deliver all necessary deeds and assurances to the purchasers, and to assign all policies of insurance on said properties, or with said ground rents," which was duly acknowledged and recorded May 6, 1889. That on June 10, 1889, she executed another letter of attorney authorizing Mr. Robins to place a mortgage of $6,000 in favor of the Western Saving Fund Society, for three years on said premises, which was acknowledged and duly recorded on the same day. Accordingly on June 20, 1889, William B. Robins, acting under the above powers of attorney, executed a mortgage for $6,000 in favor of the Western Saving Fund, and another of $500, dated May 9, 1890, to the same mortgagee. Subsequently on December 23, 1890, acting under the first letter of attorney of December 26, 1888, he executed in the name of the plaintiff a bond and mortgage for $7,500 upon the premises to The Foster Home Association, which was duly recorded. The $7,500 received by William B. Robins was used in paying off the mortgages of $6,000 and $500, which were duly marked satisfied, and the other encumbrances on the property, and the balance was retained for his own use. The bill alleged that this mortgage of $7,500 was executed without her knowledge and without any authority from her, and prayed that the mortgage be delivered up and cancelled, and that defendant be restrained from proceeding upon the bond. The answer filed by the defendant admitted the plaintiff's ownership of the premises; the execution of the letters of attorney, and of the bond and mortgage in question; averred that the authority of Robins was real and not pretended, and that the bond and mortgage are the acts and deeds of the plaintiff; and claimed that inasmuch as the prior mortgages were valid encumbrances, and the moneys received upon

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the mortgage of $7,500 were appropriated to pay them, the defendant was in any event entitled to hold the mortgage of $7,500 to the extent of such appropriation. The case was referred to A. J. D. Dixon, Esq., as examiner and master, who found the facts as set forth above, and held that there was no power to mortgage under the letter of attorney from the plaintiff to William B. Robins, dated December 26, 1888, and therefore that the mortgages executed by Robins as attorney for Mrs. Campbell were not valid liens upon the premises; and further, that the defendant was not entitled to subrogation against the property of Mrs. Campbell to the extent of the moneys furnished and used in payment of liens and charges thereon. The master recommended a decree in accordance with the prayer of the bill directing that the bond and mortgage be cancelled, and the mortgage be marked satisfied of record, and that an injunction be issued restraining the defendant from instituting any proceedings thereon. Exceptions filed to the report of the master were dismissed by the Court, and a decree entered accordingly, whereupon the defendant took this appeal, assigning for error the findings of law by the master given above, and the decree as entered by the Court.

John G. Johnson, for appellant.

The power given to Robins to sell included a power to mortgage.

Lancaster *v.* Dolan, 1 Rawle, 231.
Zane *v.* Kennedy, 73 Pa. 182.
Maurer's Appeal, 86 Id. 384.
Fidelity Ins. Co. *v.* Wurfflein, 15 WEEKLY NOTES, 28.
McCreary *v.* Bomberger, 31 Id. 41.

The distinction contended for by the appellee, that words which, in a deed or will, must be interpreted as conferring a power to mortgage, when used in a letter of attorney, must be interpreted differently, is not valid.

The decisions of other States, that a power to sell contained in a letter of attorney gave no power to mortgage, are of no avail, since these decisions were made in States where the rule of Lancaster *v.* Dolan, even in the case of a deed or will, was not conceded to be correct. In any event the plaintiff was not entitled to a decree of cancellation, or satisfaction, of the mortgage of $7,500, except upon terms of reimbursement to the defendant of its advances in payment of the mortgage for $6,000 and of the taxes due by her.

Maurer's Appeal, 86 Pa. 380.
Snelling *v.* McIntyre, 6 Abbott New Cases, 469.
Sidener *v.* Pavey, 77 Ind. 241.
Everston *v.* Central Bank, 33 Kan. 352.
Hammond *v.* Barker, 61 N. H. 53.
Payne *v.* Hathaway, 3 Vt. 212.
Gans *v.* Thieme, 93 N. Y. 225.
Dixon on Subrogation, 165.
Estate of Graff, Bennett & Co., 27 WEEKLY NOTES, 228.

Subrogation is founded on principles of equity and benevolence, and it may be decreed where no contract or privity exists between the parties.

Mosier's Appeal, 56 Pa. 80.
Cottrell's Appeal, 23 Id. 294.
McCormick *v.* Irwin, 35 Id. 117.
Keener on Quasi Contracts, 388.
2 Beach on Modern Equity Jurisprudence, 869.
Wallace's Estate, 59 Pa. 405.
People's Nat. Bk. of Charleston *v.* Epstin, 44 Fed. 404.

The case of McCreary's Appeal, 20 WEEKLY NOTES, 547, is not applicable, as in that case the judgment relieved the owner of the property of no part of the burden imposed upon him. He had paid $325 cash, and executed an outstanding mortgage for the balance. Here the only encumbrance on the property is the $7,500 mortgage in question, and subrogation is only asked, if this encumbrance is declared void.

The plaintiff must repudiate the payment and re-establish the encumbrances; or, if she accepts the payment, she binds herself to make good the act of her unauthorized agent.

If the decree of the lower Court is sustained, the effect will be to enable the plaintiff to benefit by the fraud of her agent.

Thomas Hart, Jr. (*John G. Lamb* with him), for appellee.

The doctrines of Pennsylvania law upon the subject of the powers of agents are altogether opposed to the proposition, that a power to an agent to sell and convey real estate empowers the agent to mortgage the same.

Peck *v* Harriott, 6 S. & Rawle, 145.
Strohecker *v.* Farmer's Bank, 6 Watts, 96.
Heffernan *v.* Addams, 7 Id. 116.
Devinney *v.* Reynolds, 1 W. & S. 328.
Baring *v.* Pierce, 5 Id. 548.
Sugden on Powers, 255.

The bond for $7,500, given under the power of attorney of December 26, 1888, was not good against the plaintiff. Therefore the mortgage given to secure the same was also void.

Presby. Corp. *v.* Wallace, 3 Rawle, 109.
Thomas' Appeal, 30 Pa. 378.
Wilson *v.* Shoenberger's Ex., 31 Id. 295.
Rice, Trustee *v.* Southern Pa. I. & R. Co., 9 Phila. 294.
Lance's Appeal, 17 WEEKLY NOTES, 513.
Riddle *v.* Hall, 99 Pa. 116.
Brigham *v.* Potter, 14 Gray, 522.
Wearse *v.* Pierce, 24 Pick. 141.
Hannan *v.* Hannan, 123 Mass. 441.
Heburn *v.* Warner, 112 Id. 271.

There is no case anywhere which decides that an attorney in fact, with power to sell and convey real estate, may mortgage the same.

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Wood *v.* Goodridge, 6 Cush. 117.
Morris *v.* Watson, 15 Minn. 212.
Jeffrey *v.* Hursh, 49 Mich. 31.
Mechem on Agency, secs. 318, 321, 323.
Story on Agency, sec. 68.
1 Fisher's Law of Mortgages, 260.
1 Jones on Mortgages, sec. 129.
Wharton on Agency, sec. 193
Fitch Law of Real Estate Agency, 140.

The power in this case only allowed a sale, "IN FEE SIMPLE," while in Pennsylvania a mortgage is nothing more than a bare encumbrance. The words "sell in fee simple" are restrictive of any other kind of sale, and do not authorize a sale upon condition of any sort.

P. & R. R. R. *v.* Leh. C. & Nav. Co., 36 Pa. 204.
Horwitz *v.* Norris, 49 Pa. 213.
Wickersham *v.* Savage, 58 Id 365.
Pepper's Appeal, 21 WEEKLY NOTES, 388.
Perry on Trusts, sect. 783
Jenkins *v.* Funk, 33 Fed. Rep. 915.
Deputron *v.* Young, 134 U. S. 241.

An examination of the Pennsylvania cases cited by the defendant will show that in them there is no such restriction; and further, they are to be distinguished, as in all of them the power was coupled with an interest. In none was the principle of agency involved.

The rule of these Pennsylvania cases should not be extended, for it has been disapproved of in England and other States, and the doctrine is applicable to a certain class of cases only.

Mills *v* Banks, 3 P. Wms. 1.
Ball *v.* Harris, 4 Myl. & C. 264.
Haldenby *v.* Spofforth, 1 Beavan, 390.
Stroughill *v.* Anstey, 1 De G, M. & G. 635.
Page *v.* Cooper, 16 Beavan, 396.
Devaynes *v.* Robinson, 24 Id. 86.
In re Dimmock, 52 Law Times, N. S.
31 Am. Law Register and Review, 17.
Ferry *v.* Laibel, 31 N. J. Eq 566.
Loebenthal *v.* Raleigh, 36 Id. 169.
Hoyt *v.* Jacques, 129 Mass. 286.
Kent *v* Morrison, 153 Id. 137.
Hill on Trustees, *475.
1 Sugden on Vendors, 591.
Sugden on Powers, 425.
Chance on Powers, sec. 2553.
4 Kent's Comm. *147, *331.
2 Washburn on Real Prop, 708, Pl. 5.
1 Fisher on Mortgages, 285.
1 Powell on Mortgages, 61.
1 Jones on Mortgages, sec. 129.
2 Perry on Trusts, sec. 768.
2 Spence Eq. Juris. 369.
1 Lewin on Trusts, 426.

The $7,500 mortgage being unauthorized and void, subrogation cannot be allowed, for the defendant had no more relation to the property than the veriest stranger.

Beach on Modern Equity Jurisprudence, secs. 798, 801, 807.
Sheldon on Subrogation, sections 1, 11, 240, 241, 243.
Evans *v.* Duncan, 4 Watts, 24.
Homestead Co. *v.* R. R. Co., 17 Wall, 153.
Langley *v.* Chapin, 134 Mass. 82.
Downer *v.* Wilson, 33 Vt. 1.
Wilson *v.* Soper, 44 Me. 118.
In re North River Construction Co., 38 N. J. Eq. 433.
Woods *v.* Gilson, 17 Ill. 218
Wolff *v.* Walter, 56 Mo. 292.
Moody *v.* Moody, 68 Me. 155.
VanWinkle *v.* Williams, 38 N. J. Eq. 105.

The cases cited in Sheldon on Subrogation, section 8, are to be distinguished, as in all of them some element of mistake of fact, or fraud, existed. Here the only mistake made was in the construction of the power of attorney of December 26, 1888.

Bispham on Equity, 5th Ed. 448.
Everston *v.* Central Bank, 33 Kansas, 352.
Cockrum *v.* West, 122 Ind. 372.
Gerdine *v.* Menage, 41 Minn. 417.
Oury *v.* Sanders, 77 Texas, 278.
Dutcher *v.* Hobby, 86 Ga. 198.
Lockwood *v.* Marsh, 3 Nevada, 138.
Clark *v.* Clark, 58 Miss. 68.
Brunner's Appeal, 47 Pa. 67.
Bank *v.* Clute, 33 Hun. 82.

There is no equity in the case to prevent its being decided as one of purely technical law; as a matter of fact the plaintiff has received no benefit from the payments made by the defendant. The mortgage of $6,000 was made without any authority from her, and the taxes paid had already been charged against other moneys of hers in the hands of her attorney.

This case is entirely governed by

McCleary's Appeal, 20 WEEKLY NOTES, 547.

October 1, 1894. GREEN, J. After a laborious study of this case, and a most serious consideration of the elaborate and exhaustive arguments of the learned counsel on both sides, we are constrained to say that we think the case was correctly decided in the Court below. On the question whether the letter of attorney from the plaintiff to her attorney in fact, Robins, dated December 26, 1888, is to be construed as conferring a power to mortgage the premises in question, we are quite clear as to the correctness of the decision made both by the master and the Court below. It is true the precise question does not seem to have been before us heretofore, but we are convinced that the considerations which prevailed in Lancaster *v.* Dolan and its train of cases, resulting in the declaration that a power to sell land includes a power to mortgage, are entirely inapplicable in the interpretation of a mere letter of attorney with a naked authority to sell uncoupled with any interest in the land or the fund.

The instrument now in question was essentially of this latter class. So far as this matter is concerned it is in the following words, "Do

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make, constitute, and appoint William B. Robins, of said city, attorney-at-law, my true and lawful attorney for me and in my name, to grant, bargain, and sell in fee simple all real estate owned by me, including all ground rents, on such terms and for such prices as he may see fit, and to make, execute and deliver all necessary deeds and assurances to the purchasers, and to assign all policies of insurance on said properties or with said ground rents."

It cannot be questioned that this is but an ordinary letter of attorney to sell real estate in fee simple. It is nothing but a naked authority to sell and make deeds to the purchasers, without any interest whatever in the proceeds, without any power to invest the same, or to exercise any kind of control over them. There was no power to raise money for any trust, or to pay debts or charges, or to provide a fund for any charitable or other purpose, or for the support of any third person. In short, there was no power of any kind whatever to do more than simply to sell the property and to make deeds to the purchasers.

Under this narrow, specially defined and closely limited authority, the agent executed a bond in the name of his principal for the payment of $7,500, and to secure the payment of the bond, he executed a mortgage of her real estate, also in her name, and thereby made her a debtor in a large sum, when his only authority to act for her was to sell her real estate and bring her the proceeds. Instead of being the seller of real estate in the enjoyment of the fruits of the sale, she was converted into a debtor with all the duties and obligations which that relation implies. We do not know of any doctrine in the law of principal and agent which will permit such a result to be accomplished in such a mode. The books abound with endless decisions which are in utter hostility with such a transaction as a valid act.

Being a debtor, the plaintiff would be subject to an obligation to pay, not only the principal sum of $7,500, but also annual sums of interest. For failure in her payments she would become personally liable for the moneys due, and be subject to a general judgment which would be a lien upon all her real estate, and upon which process of execution might issue and be levied upon her personal property. In point of fact, a warrant of attorney for the entering of judgment against her for the debt, was contained in the bond executed in her name by her attorney, under an authority which gave him only a bare right to sell her lands. It is not credible that the citizen can be held subject to such consequences, so entirely inconsistent, unexpected and hostile to his express intent, in an instrument of such a character. Whatever else may be said of such a paper, it must be conceded that in its terms, and in its legal substance, it is a plain, simple letter of attorney establishing the relation of principal and agent between the parties to it. It must therefore be regarded as subject to the rules and requirements of that branch of the law in any event, and if these will not permit it to be used for an ulterior purpose such as is claimed in the present case, then it cannot be so used.

Regarded simply as a letter of attorney establishing an agency, the law concerning it is very clear. Thus in Devinney *v.* Reynolds, 1 W. & S. 328, Mr. Justice ROGERS, delivering the opinion, said "An agent constituted for a particular purpose and under a limited power cannot bind his principal if he exceeds his power. A special power must be strictly pursued, and whoever deals with an agent constituted for a special purpose deals at his peril when the agent passes the precise limits of his power." This was said of a deed made by an attorney in fact who was authorized to convey a tract of land after he had redeemed it, and he conveyed it without redemption, and it was held the purchaser took no title.

In Story on Agency (Ed. 1882), sec. 68, the author says, "Indeed formal instruments of this sort (letters of attorney), are ordinarily subjected to a strict interpretation, and the authority is never extended beyond that which is given in terms, or which is necessary and proper for carrying the authority so given into full effect. Thus a power of attorney to sell, assign, and transfer stock will not include a power to pledge it for the agent's own debt." 1 Jones on Mortgages, sec. 129. A mortgage executed under a power of attorney, authorizing an attorney to sell and convey only is void. Said Mr. Justice COOLEY in Jeffrey *v.* Hursh, 49 Mich. 31, "J. M. Hursh had power to sell the land but not to mortgage it. The power is not to be extended by construction. The principal determines for himself what authority he will confer upon his agent, and there can be no implication from his authorizing a sale of his lands that he intends that his agent may at discretion charge him with the responsibilities and duties of a mortgage. Wood *v.* Goodridge, 6 Cush. 117; Albany Fire Ins. Co. *v.* Bay, 4 N. Y. 9; Ferry *v.* Laible, 31 N. J. Eq. 566; Kinney *v.* Matthews, 69 Mo. 520; Patapsco Co. *v.* Morrison, 2 Woods, 395; Deva. *v.* Robinson, 24 Beav. 86."

Deputron *v.* Young, 134 U. S. 241. In the case of a naked power, not coupled with an interest, every prerequisite to the exercise of that power should precede it. A power to make and execute deeds to convey real estate, as the same may be sold to purchasers in tracts by a third party, is a naked power to convey as sales may be made, and a deed made otherwise is a fraud upon the power.

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Morris *v.* Watson, 15 Minn. 212. As a general rule a power to sell and convey real estate, does not confer a power to mortgage, and a mortgage executed under a power of attorney to sell and convey is void. The Court said, "The power of attorney in this case by Mary C. Hargin to Charles S. Hargin is a power to sell and convey only; therefore the mortgage executed by Charles S. Hargin to Moses Sherbrome under this power of attorney is void."'

In the case of Wood *v.* Goodridge, 6 Cush. 117, a power of attorney authorized the attorney in the name and for the benefit of the principal, to buy and sell real and personal property, and to execute and deliver deeds, to transfer the same, to move and institute all necessary suits for the recovery and collection of his demands. . . . . Especially to carry on his saw mill and buy and sell logs and lumber . . . . and in general to make such contracts for the profitable improvement and use of such property and other means as he possessed for the enlargement of his estate. The attorney made a mortgage and note for a sum of money, and the question of his power to make them arose and was decided. The Court said, "Levi Goodridge, who made the mortgage and note, had no authority under his power of attorney from Benjamin Goodridge to do these acts, so that the mortgage and note are both invalid and without any legal effect. In accordance with the general and well settled principles of law, the power of attorney to Levi must be so interpreted as not to extend the authority given to him beyond that which is given in terms, or which is necessary and proper for carrying the authority expressly given into full effect. Now the power of attorney in this case very clearly did not in terms give to Levi authority to mortgage the real estate of his principal; still less does it in terms, give him the power to borrow money and to bind his principal by a promissory note. . . . In the absence of all evidence that the money was in fact obtained for the principal or that it was necessary for the execution of the authority given, there being no express authority to make a mortgage or negotiable note, there is an entire failure to show that Levi had any authority to make the note and mortgage, and the title of the plaintiff being derived under that mortgage wholly fails." It is not necessary to quote further authorities for a proposition so plain in its character, and not opposed by any contrary decisions. As we have already said, the cases of Lancaster *v.* Dolan, and those that follow it, are not pertinent to the discussion because they depend upon different principles, and upon facts which have no existence here. We are therefore brought to the consideration of the remaining question whether the appellant is entitled to subrogation to the $6,000 prior mortgage which was paid off with the proceeds of the mortgage in suit.

Upon that subject it is to be observed that the payment of the prior mortgage was the act of a mere volunteer. The plaintiff was not consulted about it and had no knowledge of it. There was no privity of any kind between the plaintiff and the defendant, and the latter was under no compulsion to make the payment for the protection of its interests. The payment was doubtless made so as to make its mortgage a first instead of a second mortgage. But that consideration would give no right of subrogation to the holder of the second mortgage. It seems to us that the case of McCleary's Appeal, 20 WEEKLY NOTES, 547, covers every aspect of this. There the first mortgage was an undoubtedly valid lien upon the property for $925. The second mortgage was a forgery, and the holder, as here, desiring to have the first lien extinguished paid $600 of the mortgage money, $1,400 to the agent of the owner of the property, who with $325 furnished by the owner, paid the $925 due on the first mortgage, had it satisfied, and surrendered the bond and the mortgage to the owner. When the forgery was discovered, the holder of the second mortgage filed a bill praying a cancellation of the entry of satisfaction, and subrogation. Both the Court below and this Court held that this could not be done and dismissed the bill upon the express ground that, although the first mortgage was an unquestioned lien, and the money to the extent of $600 was paid by the holder of the second mortgage, he was a mere volunteer in making such payment and was not entitled to subrogation.

The same doctrine was enforced in the case of Webster and Goldsmith's Appeal, 86 Pa. 409, the syllabus of which is as follows, viz: While subrogation is founded on principles of equity and benevolence, and may be decreed where no contract exists, yet it will not be decreed in favor of a mere volunteer, who without any duty, moral or otherwise, pays the debt of another. It will not arise in favor of a stranger, but only in favor of a party who on some sort of compulsion discharges a demand against a common debtor. There the maker of a promissory note for $700 gave a judgment for that amount to his endorser to protect him against liability on his endorsement. Afterwards, at the maturity of the note, another person consented to endorse a new note to take up the first one upon the express assurance of the maker, that the judgment should be assigned to the second endorser for his protection against liability for the same debt. The judgment was assigned shortly after to the second endorser, who was ultimately obliged to pay the note. The property of the maker being

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sold upon execution process, the holder of the assigned judgment claimed a share in the distribution of the proceeds as against judgments obtained subsequently to the assigned judgment. Priority in the distribution was allowed to the assigned judgment in the Court below, but this Court reversed the decree, holding that the second endorser was a mere volunteer, and that as the first judgment had served its purpose of protecting the first endorser, it could not be used to protect the second endorser although assigned to him for that purpose by the first endorser as a condition of the second endorsement. While we decided that if the judgment had been held by the bank which discounted the note, as a part of their security, subrogation would have been granted, even against intervening judgment creditors, we held also, that it could not be granted to one who came in as the endorser of a new note given to take up the first note, because he was a stranger to the first contract, and was to be regarded as a mere volunteer. WOODWARD, J., said, "While subrogation is founded on principles of equity and benevolence, and may be decreed where no contract exists, yet it will not be decreed in favor of a mere volunteer, who without any duty, moral or otherwise, pays the debt of another: Hoover *v.* Epler, 2 P. F. Smith, 522. It will not arise in favor of a stranger but only in favor of a party, who on some sort of compulsion discharges a demand against a common debtor: Mosier's Appeal, 6 P. F. Smith, 76." . . . . "There was no privity of interest, and no contract relation between Bauer and Banker. Bauer could create no duty to himself by a volunteered intervention for Banker's relief. He became Adam's endorser without being under any legal or moral compulsion, and he had no existing interest, ascertained or contingent, to protect. He has no equity to entitle him to subrogation."

So here the payment of the $6,000 due under the first mortgage was not made under any compulsion, or for the protection of any rights or interests previously acquired. The defendant simply loaned the money, and, in order to remove a prior lien, paid it off without the knowledge or consent of the plaintiff. If a right of subrogation is acquired in such a state of facts we see no reason why it may not exist in every case of officious payment of the debt of another. Yet it is perfectly clear under all the authorities that such payments do not give any right of subrogation to the debt discharged.

In Beach on Modern Equity Jurisprudence, section 801, the writer says, "But one who is only a volunteer cannot invoke the aid of subrogation, for such a person can establish no equity. He must have paid upon request or as surety, or under some compulsion made necessary by the adequate protection of his own right. In such a case instead of creating any right of subrogation, the payment operates as the absolute discharge of the debt so paid. Thus one who discharges an encumbrance upon property which he has no interest in having relieved, is not thereby subrogated to the rights of the holder of the encumbrance; and the loaning of money to discharge a lien does not subrogate the lender to the rights of the lien holder."

Sheldon in his work on Subrogation, sec. 240, says, "The doctrine of subrogation is not applied for the mere stranger or volunteer who has paid the debt of another without any assignment or agreement for subrogation, being under no legal obligation to make the payment, and not being compelled to do so for the preservation of any rights or property of his own."

There can be no question of the soundness of the foregoing propositions, and where the facts are such as to make them applicable they are controlling. We think, for reasons already stated, they are directly applicable to the undoubted facts of the present case. It is not practicable within the proper limits of a judicial opinion to engage in a critical review of the numerous decisions cited in the arguments of counsel on both sides. A great many of them furnish their own answer when the facts which distinguished them are duly noted and considered. Others which are apparently in point are affected by the presence of exceptional circumstances which authorize the introduction of different principles with a controlling effect. But a minute and patient attention to, and consideration of, the very able and exhaustive argument for the appellant has failed to convince us of any error in the treatment of the case by the learned master and the Court below, and substantially for the reasons stated by them we think the decree should be affirmed.

Decree affirmed and appeal dismissed at the cost of the appellants. S. H. T.

July '94, 131. May 14, 1894.

Stauffer v. The Penn Mutual Fire Ins. Assoc. of Lancaster Co., Pa.

Insurance Law — Insurance Policies — Conditions in — As to additional Insurance — How complied with — Acts of the company approving the same — Estoppel.

A policy of fire insurance issued to S. provided that the insurance should cease, if additional insurance were obtained in another company, unless notification thereof was given, and the additional insurance allowed and approved at a regular meeting of the Board of Directors of

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the company issuing the policy. It further provided, that a compliance with the terms of the policy should not be considered waived unless the waiver was in writing and signed by the president or secretary. At the time the policy issued, there was no other insurance on the property, and S. so stated in his application, but he at that time told the director of the company having the matter in charge that he wished to procure further insurance. Subsequently he did so, and notified one of the directors, who told him that it was all right and he could have the matter attended to when it was convenient to come to the office. Some months later he went there at a regular meeting of the Board of Directors. Although he did not know the fact, the meeting had already adjourned, but one-half of the Board of Directors were still present.

S. gave his policy to the director with whom he had already had communication, who showed it to the president, who said he knew all about it, and instructed the director to write the necessary consent upon the policy. This was done by striking out the word "no" in the answer as to further insurance in the application, and inserting the amount of additional insurance and the name of the company issuing it. The policy was then shown to the president, who approved it, and was handed back to S. Shortly after the property was totally destroyed by fire. The company refused to pay the insurance on the alleged ground that S. had not complied with the terms of the policy as to additional insurance. S. then brought suit:

Held, that the company was estopped by the acts and declarations of its officers from denying its approval of the additional insurance, and that S. was entitled to recover his insurance.

Appeal of The Penn Mutual Fire Insurance Association of Lancaster County, Pa., defendant, from the judgment of the Common Pleas of Lancaster County, in an action of assumpsit brought by John H. Stauffer against said defendant company, to recover upon a policy of fire insurance.

Upon the trial before LIVINGSTON, P. J., the following facts appeared:—

The plaintiff, on August 27, 1887, applied for membership in The Penn Mutual Fire Insurance Association, and for insurance upon certain property, stating in his application that at the time there was no other insurance upon the property. On September 3, 1887, a policy was issued to him, insuring the property for twenty-eight hundred dollars. In the conditions of insurance as printed on the policy, it was stipulated that, "This association shall not be liable for any loss or damage caused by, etc., ... nor for loss if there is other prior or subsequent insurance, without the written consent of this association." The policy also contained the following provisions:

"Any misrepresentation or concealment, fraud or false swearing, shall cause a forfeiture of all claims on the association, and shall be a full bar to all remedies against this association under this policy. And said association shall in no case be deemed to have waived a full, literal and strict compliance with, and performance of each and every of the terms, provisions, conditions and stipulations in this policy contained and hereunto annexed, to be performed and observed by and on the part of the insured and every person claiming by, through or under them, unless such waiver be express and manifested in writing, under the signature of the president or secretary of said association.

"The insurance under this policy shall cease at and from the time the property hereby insured shall be levied on or taken into possession or custody under any proceedings in law or equity, or is assigned or transferred, or is insured in another company.

"This association may insure property already insured in another company. And a member of this association may place additional insurance in another company on property already insured in this association. Provided, that in either case there must be an application made to this association, which application shall contain, in addition to what is otherwise required, a full and correct statement of all the facts appertaining to such additional insurance in such other company, whether already made or intended to be made. And same must be allowed and approved at a regular meeting of the Board of Directors: otherwise this association shall not be held liable. And in case of loss, where there is an insurance in another company, this association shall be liable only for its proportional share of such loss insured by *this* association; same to be adjusted and paid as provided for by the conditions and by-laws in other cases."

Subsequently on May 8, 1888, the plaintiff obtained a further insurance of two thousand dollars in the Manheim Borough Insurance Company. It appeared that at the time the first policy was issued, the insured told the secretary of the company, I. G. Erb, who was also a director, that he intended to procure additional insurance, and that as soon as it was procured he notified Erb of the fact, and was told that it was "all right," and that he should meet the directors at their regular meeting and have it fixed.

Subsequently, on notice from Mr. Zortman, who had taken the place of Mr. Erb as director, he went to the office of the company at a time fixed for a meeting of the Board of Directors. The meeting of the board had already adjourned, and three only of the six directors were present, but of this he had no knowledge. He there produced his policy, and the president, Jacob Hershey, said that he knew all about it, and directed Mr. Zortman to fix it, which was done by altering the answer to the question in the original application, "Is there other insurance on this property?" from "None other,"

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to "Yes, there is in Manheim Borough Company, $2,000." The policy was then shown to the president, who approved it, and it was handed back to plaintiff.

Shortly after the property insured was burned down, and The Penn Mutual Fire Insurance Company refusing to pay the insurance money, the insured brought suit against them.

The defendant submitted, *inter alia*, the following points:—

1. It being the fact that after procuring insurance on his warehouse with the corporation defendant, the plaintiff subsequently procured additional insurance to the amount of two thousand dollars ($2,000) on the same premises with the Manheim Mutual Fire Insurance Company, and without the written consent of the corporation defendant, as required by the conditions of the policy on which suit is brought, the verdict must be for the defendant.

2. As the evidence shows that no application was made by the plaintiff to the corporation defendant for permission to procure additional insurance in the Manheim Mutual Fire Insurance Company on the premises insured by the corporation defendant, and as no such application was allowed and approved at a regular meeting of the Board of Directors of the corporation defendant, as required by its By-laws, the plaintiff cannot recover in this action, and the verdict must be for the defendant.

3. The plaintiff having procured additional insurance of two thousand dollars ($2,000) with the Manheim Mutual Fire Insurance Company upon the premises insured with the corporation defendant, and after the issuing of its policy, and without the written consent of the corporation defendant, as required by the conditions of insurance in the policy, and having made no application to the corporation defendant for permission to make such additional insurance, and such application not having been allowed and approved at a regular meeting of the Board of Directors of the corporation defendant, without which the By-laws provide that the corporation defendant shall not be held liable, and as the conditions of insurance in the policy provide that the corporation defendant shall in no case be deemed to have waived a full, literal and strict compliance with and performance of each and every of the terms, provisions, conditions and stipulations in the policy contained and thereto annexed to be performed and observed by and on the part of the insured and every person claiming by, through or under them, unless such waiver be express and manifested in writing under the signature of the president or secretary of said association, and as no waiver, in writing, of any of the terms, provisions, conditions and stipulations contained in or annexed to the policy in suit and signed by either the president or secretary of the corporation defendant was given in evidence or shown to exist, the plaintiff cannot recover, and the verdict must be for the defendant.

The Court answered these points separately, but in identical language, as follows:

"This would be true provided there was no waiver or estoppel by the action of the company through or by its proper officers, after the issuing of the Manheim policy and before the fire. If, however, the jury find from the whole evidence (which is somewhat contradicting upon these points) that Stauffer, the plaintiff, as he swears he did, told Mr. Zortman, a director o the company defendant, after the policy issued that he had additional insurance; that Zortman said it would be all right; that he (Stauffer should meet them at a directors' meeting; that they could not fix it at Lititz; that he afterwards met them at their office on a day of the regular meeting of the board, Mr. Zortman being present with the president and other members of the Board of Directors; that Mr. Zortman there said to him: 'You have come up to have that policy fixed;' that Stauffer said to him 'Yes,' and gave him the policy; that Zortman took it and went with it to Mr. Hershey, the president, in the front office, and told *him* what was to be done; that Hershey, the president, said that he (Zortman) should *fix* it, *insert the $2,000;* that he knew all about it; that Zortman then went and erased the word *no* on the line of answers to questions to be asked by applicants, and wrote in 'Yes, there is in Manheim Borough Company $2,000,' as it now appears there, then took it and showed it to Hershey after he had inserted it, and Mr. Hershey (the president), said, 'That is all right;' that Stauffer then took his policy and left; that after the fire he notified Zortman of it; that the president came and viewed the ruins and said it was a total wreck; that he said to Stauffer, 'Don't be worried, we'll pay you all we have insured, but you may have trouble with the Manheim Company, they are not so well fixed;' and that on another occasion told him that the company would pay him $2,000, but would not pay the whole amount. This conduct on the part of this association and its officers would amount to sufficient evidence of waiver by estoppel and entitle the plaintiff to recover the amount of the insurance with interest." (First, second and third assignments of error.)

4. There is no evidence of assent by the corporation defendant to the procuring of additional insurance by the plaintiff, as required by the policy in suit, and no evidence of any waiver on its part, as required by the policy. *Answer*. This point is refused. (Fourth assignment of error.)

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The Court charged the jury, *inter alia*, as follows:—

"If you find from the whole evidence (which is sometimes contradictory upon these points) that Mr. Stauffer, the plaintiff, as he swears he did, told Mr. Zortman, a director of the company, defendant, after the policy issued (Manheim), that he had additional insurance; that Mr. Zortman said it would be all right; that he (Stauffer) should meet them at a directors' meeting; that they could not fix it at Lititz; that he afterwards met them at their office on a regular day of meeting of the directors, Mr. Zortman being present with the president, Mr. Hershey, and other members of the Board of Directors of the association defendant; that Mr. Zortman there said to him *you* have come up to have that *policy fixed*; that Stauffer said to him *yes*, and gave him the policy; that Zortman took it and went with it to Mr. Hershey, the president, in the front office, and told *him* what was to be done; that Hershey, the president, then said that he, Zortman, should fix it, insert $2,000; that *he* knew all about it; that Zortman then went and erased the word *no* or *none* on the line of the answers to questions to be asked by applicants, and wrote in, Yes, there is in Manheim Borough Company $2,000, as it now appears.

"That he then took it and showed it to Hershey, the president, after he had so erased and inserted the $2,000, that Hershey said that is all right, that he then gave the policy to Mr. Stauffer, who then took his policy and left. That as Hershey, the president, says, 'We had it districted off, and this was in Zortman's district, and it was *his* business to *fix it*; that he told Stauffer to go to Zortman and let him fix it, and that Zortman did so, and that it so remained until the building was burned and up to this time, as you see it. That, after the fire, Stauffer notified Zortman, a director, in his district, of the fire. That shortly after the fire, the president of the association, Mr. Hershey, came and viewed the ruins and said it was a total wreck. That he then said to Stauffer, don't be worried, we'll pay you all we have insured, but you may have trouble with the Manheim Company, they are not so well fixed. And on another occasion after that and before suit brought told him the company would pay him $2,000, but would not pay him the whole amount.

"Such conduct and action on the part of this association defendant and its officers would amount to sufficient evidence of waiver—of waiver by estoppel, and the plaintiff, Stauffer, would be entitled to your verdict for the amount specified in the policy with interest.

"But if you find from the whole evidence—that Mr. Stauffer did not so notify Mr. Zortman of the additional insurance in the Manheim Company—did not go to a meeting of the Board of Directors on a regular meeting day by his direction; that Zortman by direction of Hershey, the president, did not make the erasure and insertion in the application on the policy as it appears there, and give it again to Stauffer who took it and left; that Hershey, the president, did not tell Stauffer, when he viewed the premises, shortly after the fire, and found it a total wreck—that he should not worry, we will pay you all we have insured, and that he afterwards and before suit was brought, did not tell him the company would pay him $2,000, but would not pay him the full amount. Then there would not be sufficient evidence of waiver or estoppel, and your verdict should be for the defendant."

Verdict for plaintiff, and judgment thereon, whereupon the defendant took this appeal, assigning for error the answers to its points, and the portion of the charge given above.

Eugene G. Smith and *George Nauman*, for appellant.

The conditions of the policy are binding on the insured, and the evidence shows that he has not complied with them.

Mitchell *v.* Lycoming Mut. Ins. Co., 51 Pa. 402.
Burd *v.* Penn Mut. Fire Ins. Co., 32 WEEKLY NOTES, 86.
Insurance Co. *v.* Stauffer, 33 Pa. 397.
Waynesboro Mut. Fire Ins. Co. *v.* Conover, 98 Id. 384.
Hook *v.* Mut. Ins. Co., 160 Id. 229.
Pottsville Mut. Fire Ins. Co. *v.* Minnequa Springs Imp. Co., 100 Id. 137.
Trask *v.* The State Fire and Marine Ins. Co., 29 Id. 198.

W. U. Hensel, (*J. Hay Brown* with him), for appellee.

The conditions of a fire insurance policy may be waived by its agents, and a waiver may be implied from the manner in which the company or its agents dealt with the policy holder subsequent to the issuance of the policy.

Flanders on Fire Insurance, 2d Ed. 523.
Wood on Fire Insurance, sections 245, 248, 451, 985, 949.
Parker *v.* Arctic Fire Insurance Co., 59 N. Y. 1.
May on Fire Insurance, 237.
Perry County Insurance Co. *v.* Stewart, 19 Pa. 48.
Girard Fire and Marine Ins. Co. *v.* Stephenson, 37 Id. 298.
Greenfield *v.* Mass. Mutual Life Ins. Co., 47 N. Y. 430.
Williams *v.* Hartford Ins. Co., 54 Cal. 442.
Farmers' Mutual Insurance Co. *v.* Taylor, 73 Pa. 342.
Crawford County Mutual Ins. Co. *v.* Cochran, 88 Id. 230.
Ins. Co. *v.* Todd, 83 Id. 272.
Inland Insurance and Deposit Co. *v.* Stauffer, 33 Id. 404.

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Imperial Fire Ins. Co. *v.* Dunham, 20 WEEKLY NOTES, 473.

When a company, upon being notified of other insurance, does not signify an objection, it is treated as assenting thereto.

Potter *v.* Ontario Ins. Co., 5 Hill (N. Y.), 147.
May on Insurance, section 372.
Lycoming Mut. Ins. Co. *v.* Stocklomn, 3 Grant, 207.
Farmers' Ins. Co. *v.* Taylor, 73 Pa. 342.
2 Wood on Fire Insurance, 2d Ed. 808.
Westlake *v.* St. Lawrence Ins. Co., 14 Barbour, 206.

A verbal or written assent need not be formal, and the usage as to the kind of assent the company requires to be given, in the absence of the insured's knowledge, is not material.

Goodall *v.* New England Mut. Fire Ins. Co., 25 N. H. 169.
Union Ins. Co. *v.* Murphy, 17 WEEKLY NOTES, 243.
Potter *v.* Ontario Mut. Ins. Co., 5 Hill (N. Y.), 147.

A policy is not rendered void by other insurance or over insurance, if subsequently the consent of the company is obtained, the policy is operative and enforceable.

Wood on Fire Insurance, sec. 397.
Obermeyer *v.* Globe, etc., Ins. Co., 43 Mo. 573.

But even if no consent of the company in the form prescribed by its By-laws had been given, there was evidence of waiver by estoppel on the part of the company of this condition of the contract.

Waynesboro Mut. Fire Ins. Co. *v.* Conover, 98 Pa. 388.
Lebanon Mut. Fire Ins. Co. *v.* Erb, 17 WEEKLY NOTES, 273.
Lycoming County Mutual Fire Ins. Co. *v.* Schollenberger, 44 Pa. 259.
Home Co. *v.* Davis, 98 Id. 280.
Ben Franklin Company *v.* Flynn, 98 Id. 627.
Dwelling House Insurance Co. *v.* Gould, 26 WEEKLY NOTES, 168.
Welsh *v.* London Assurance Corporation, 31 WEEKLY NOTES, 253.
Redstrake *v.* Cumberland Mut. Fire Ins. Co., 44 N. J. L. 294.
Mentz *v.* Lancaster Ins. Co., 79 Pa. 475.

October 1, 1894. FELL, J. The defendant is a mutual insurance company, and the policy upon which this action is founded contained the following provisions, applicable to the question involved:—

1. The company shall not be liable for loss if there is either prior or subsequent insurance without its written consent.

2. A compliance with the terms of the policy shall not be considered waived unless the waiver is in writing and signed by the president or secretary.

3. The insurance shall cease at the time the property is insured in another company.

4. A member in order to procure additional insurance without invalidating his policy shall make application to the company, and the same must be allowed and approved at a regular meeting of the Board of Directors.

The policy was issued to the plaintiff September 3, 1887, and on May 8, 1888, he procured additional insurance in another company.

There was testimony to show that at the time the policy was issued the insured told the secretary of the company, who was also a director, that he intended to procure additional insurance, and that as soon as it was procured he notified him of the fact, and went through the building with him, and was told by him that it was "all right," and that he should meet the directors at their regular meeting and have it fixed.

No time was then named, the direction being "any time you come up." Subsequently on notice from this director, Mr. Zortman, who had charge of the district in which the insured lived, he went to the office of the company at the time fixed for the meeting of the Board of Directors. When he reached the office the meeting of the board had adjourned, and three only of the six directors were present, but of this he had no knowledge. At the office of the company he handed the policy to Mr. Zortman, who took it to the president. The president said that he knew all about it, and directed Mr. Zortman to write the necessary consent on the policy. This was done by Zortman, who then showed the policy to the president, who approved it, and it was handed back to the plaintiff.

There was no formal action by the Board of Directors, but there was the written consent which the conditions of the policy required; and if there was any waiver of the condition it was expressed in writing and approved by the proper officer. The condition that the insurance should cease at the time additional insurance was taken must be read in connection with the provision for procuring additional insurance, and what was done fell short of a literal compliance with the conditions only in that there was no formal allowance and approval of the additional insurance by the Board of Directors as such.

The prohibition of additional insurance was of the substance of the contract, and notice of such insurance to a director and his assent and approval thereof would not save the policy, as a director has no authority to allow or approve additional insurance. Bard *v.* Penn Mutual Fire Ins. Co., 153 Pa. 257; Hook *v.* Mutual Ins. Co., 160 Id. 229. But the question here is not whether a director could waive a condition of the policy, but whether the company because

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of the acts and declarations of its officers is now estopped from denying its approval of the additional insurance. The plaintiff acting in good faith, and intending to comply with all the conditions of his policy, sought information of the executive officers of the company as to what he should do, and fully complied with their directions. He went to the office of the company at the time of a regular meeting of the directors, and was at once asked if he had come in relation to the additional insurance on his property, and was told that they knew all about it, and that it was all right. In his presence the president directed the indorsement of the company's approval to be made on the policy, and after it was done approved it, and returned the policy to him; and he left with the assurance that he had fully complied with the regulations of the company, and that the policy was valid.

He might well have assumed, if he had chosen to act upon his own judgment of what was necessary to be done, instead of relying upon the direction and assurance of the officers of the company defendant, that the Board of Directors had formally acted upon and granted his application. What was said and done by the officers of the company was equivalent to a declaration that all the conditions had been actually complied with, and estopped the defendant from controverting the fact.

In Mentz *v.* Lancaster Fire Ins. Co., 79 Pa. 475, the policy contained a condition that if additional insurance was procured it should be indorsed on the policy, and it was there held that the declaration of a general agent of the company to the insured that the indorsement of second insurance had been made on the policy estopped the company from objecting to the want of an indorsement, SHARSWOOD, J., saying: "Such a declaration made by a duly authorized agent or officer would clearly operate as an estoppel. It lulled the party to sleep by the assurance that the condition of the policy had been complied with, and that his indemnity was secure."

The judgment is affirmed.

S. H. T.

Jan. '94, 328. February 28, 1894.

Young v. Merkel.

Practice—Charge of the Court—Must not give undue prominence to one side, or throw discredit upon one side.

When the general trend of a judge's charge shows a manifest purpose to throw doubt and discredit upon testimony of one side and tends to convey to the jury the idea that, in the opinion of the Court, it is unlikely that the state of facts testified to by the witnesses for one side is true, the Supreme Court will reverse.

Appeal of Benjamin F. Merkel et al. from a judgment of the Common Pleas of Berks County. The facts are sufficiently stated in the opinion of the Supreme Court, *infra.*

The Court, ENDLICH, J., charged the jury, *inter alia*, as follows:

"[The question, gentlemen, is one of the preponderance of the evidence. On which side, in your opinion, is the weight of the evidence? What does the testimony of the witnesses prove? And what do the circumstances proven indicate? Is it likely, *considering the value of the property involved* in the litigation, of the long standing of the plaintiff as a practitioner at the bar, of the questions to be argued in this motion for a new trial and in resisting the application for a reopening of the matter, of the volume of the matters to be re-examined, of the peculiar facilities that the plaintiff possessed therefor; in view of these and all other circumstances as shown to you bearing on the point and that you may find in the evidence, is it likely that such a contract was made between these people? The memorandum on the back of the receipt of February 20, 1886, is not a contract, it was only admitted as corroborating the recollection and claim of the defendants as to what they claim to be the true state of facts.] Yet, as I told you, if the preponderance of the evidence, as you find it to be, leads you to believe in the existence of such a contract, then that is the end of this case.

"If, however, no contract has been proven limiting the fee to $20, then, inasmuch as the contract employing Mr. Young is unquestioned in this case, the liability to pay what is a reasonable compensation must follow, of course.

"[Now, gentlemen, what is a reasonable compensation in this case? In determining that you will consider what has been testified to here by gentlemen of the bar who have been called for that very purpose. You will remember Mr. Snyder testified that a compensation of $200 to $250 would be a reasonable one for the services which Mr. Young rendered to these defendants from February 20, 1886, down to the close of that litigation; Mr. Yundt testified that for the same services $250 would be a fair charge; and Mr. Montgomery testified that $250 for the same services would be a moderate charge. It is right and proper, and you are bound to consider that testimony, but in addition to that you must bring your own judgment to bear on this matter.]

"[You must remember the nature of this litigation, the nature of the questions involved, the nature of the services that Mr. Young thought necessary and proper to perform, what

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was the extent of the labor he was obliged to perform to be prepared for the argument of this case, and also remember what peculiar facilities and advantages Mr. Young had perhaps above any other member of the bar in coping with these questions, what knowledge he had acquired before, when in the employ of another person, that would enable him to see through this case, and understand and make clear that which might perhaps be cloudy to a person who had not acquired the knowledge he possessed. All those matters you must consider, and you must fix an amount that will fairly compensate him for his services, under all these circumstances, remembering that the litigation finally resulted in a victory for the defendants.]"

Verdict for plaintiff, for $235, and judgment thereon.

Defendant appealed, assigning for error, *inter alia*, the portions of the charge in brackets, as quoted above.

Herbert R. Green (*A. G. Green* with him), for appellants.

As a general rule the Judge at nisi prius should submit the facts without expressing his opinion on them.

Leibig *v.* Steiner, 94 Pa. 472.

Where the general tenor of the charge inadequately presents to the jury and manifestly misleads them as to the true points of inquiry to the prejudice of one of the parties, the Supreme Court will reverse.

Youngman *v.* Miller, 98 Pa. 196.

When the Judge prominently presents in his charge the theory and strong features of the prosecution, and ignores the theory of the defence, and the facts on which it is based, this constitutes cause for reversal on error.

Goersen *v.* Commonwealth, 99 Pa. 388.
Pennsylvania Canal Company *v.* Harris, 101 Id. 87 and 93.
Coxe *v.* Deringer, 82 Id. 258.

The general tenor of the cases is that the Judge in his charge to the jury should review all the facts impartially, and direct their attention to all the material points of the cause.

Ditmars *v.* Commonwealth, 11 Wr. 335.
Burke *v.* Maxwell's Adm'ors, 81 Pa. 139.

William J. Young (*E. B. Wiegand* with him), for appellee.

"A Judge may rightfully express his opinion respecting the evidence, and it may sometimes be his duty to do it, yet not so as to withdraw it from the consideration and decision of the jury." STRONG, J., in

Kilpatrick *v.* Commonwealth, 31 Pa. 198.

"A strong expression of opinion upon the facts, which, if taken in connection with the whole charge, does not amount to a binding instruction, is not ground for reversal."

Johnston *v.* Commonwealth, 85 Pa. 54

See also on this point,

Horton *v.* Coal Co., 2 Pennypacker, 25.

A Judge may express his opinion freely on the weight and value of evidence, and when he does so without misleading or controlling the jury, in the disposition of the facts, there is no ground for reversal:

Fredericks *v.* R. R. Co., 157 Pa. 103.

In charging the jury the Judge should give correctly the substance of the testimony, and caution the jury who have heard it, as to their right to determine exactly what fell from the lips of the witnesses; but the Court is not bound to repeat testimony *verbatim*. If the Judge makes a serious mistake in narrating the facts, counsel should call his attention to it immediately after the charge.

Kreps *v.* Carlisle, 157 Pa. 358.

October 1, 1894. McCOLLUM, J. This suit was brought to recover compensation for professional services rendered in an action of ejectment, in which Mendon F. Ludwig, et al., were plaintiffs, and George Regan was defendant. The plaintiff herein was employed by Regan as early as 1868, and it appears that in pursuance of his employment he directed, and was present at, the making of surveys of the land in dispute, and assisted his associate in the preparation and trial of the case which resulted in a verdict for the defendant on September 4, 1873. A rule for a new trial having been granted he prepared an argument against it, but for reasons which need not be stated here it was not discharged until April, 1889. As often as the rule was on the argument list, he went over and revised his previous preparation to resist it, so that it is reasonable to suppose that when the time came for arguing it he was well equipped for the performance of that duty. In 1883 or 1884, the defendants herein having previously purchased the land of Regan on terms which enabled them to retain a portion of the purchase money until he established his title, and being desirous of having the rule discharged, employed counsel to look after it, and on his suggestion they associated the present plaintiff with him in 1886. They thus became liable to the plaintiff for his services, after that date, in connection with the business for which he was employed. They say they had a contract with him by which they agreed to pay and he agreed to accept twenty dollars as full compensation for assisting their other counsel in getting the rule discharged. He says there was

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no agreement between him and them in regard to his compensation, and that he ought and is entitled to have from them what his services are worth. Two of the defendants, and the counsel with whom the plaintiff was associated in considering the services sued for, testified plainly and positively that there was such a contract, and the plaintiff testified as positively and plainly that there was not. There was no attempt by either party to impeach these witnesses, and their veracity is unquestioned save by the contradiction in their testimony, and this may be attributed to an honest difference in recollection.

A peculiar feature of the case is, that while the learned Court very properly held that the recovery, if any, must be limited to the value of the service rendered by the plaintiff after his employment by the defendants, the trial was so conducted that it resulted in a verdict in his favor for the exact sum he claimed, to wit, one-half of his estimate of the value of the service he rendered in the case after April, 1873. It is quite evident that this action was brought on the theory that as defendants bought the land of Regan they ought to pay one-half of the expense of defending his title to it. This thought pervades the whole of the plaintiff's testimony, and is frequently and plainly expressed therein. But it has neither a legal, nor an equitable basis. As we have seen, Regan was bound to maintain his title in order to get the purchase money. He employed the plaintiff and other counsel to defend it, and their services in the ejectment, from the institution of it to final judgment therein, were properly chargeable to him. That the plaintiff considered it to be his duty to Regan to continue in the case until it was finally determined, is evidenced by his preparation of an argument against a new trial, by his repeated revisions of it, and his unavailing efforts to get the rule discharged during thirteen years immediately preceding his employment by the defendants. It is further shown by his declaration or statement, in 1884, that the case was still in his hands as counsel for Regan. In short, it is beyond question that for his services in the ejectment prior to 1886, these defendants are not liable. What, then, were his services in the case after that time? Were they performed under a contract? If not, what was their value? These were questions to be answered by the jury upon a dispassionate consideration of all the testimony. To assist them in the performance of their duty the Court was required to instruct them in the law applicable to the case, and it was proper for it to call their attention to the evidence on each side, and to point out its relevancy to and its bearing on the issues. If, however, it attempted to review the evidence it was bound to do so impartially and adequately. The principal complaint of the appellants is that the charge was in the nature of an argument for the plaintiff, and was partial, inadequate, and misleading. Is this complaint well founded? In support of it they direct our attention to the charge as a whole, and particularly to the portions of it which constitute the third, fourth and fifth specifications of error. It is observable that throughout the charge particular stress was laid by the Court on the alleged peculiar fitness of the plaintiff, grounded upon the information he acquired in the service and at the expense of Regan, for the work he was engaged by the defendants to assist their counsel in performing, and that there was no allusion in it, to the fact that in rendering this assistance he represented Regan as well as the defendants. In that portion of the charge which forms the subject of complaint in the third specification there was a manifest purpose to throw doubt upon and discredit the defendant's testimony in relation to a contract; and to convey to the jury the impression that in the opinion of the Court it was quite unlikely that such a contract was made. In it, all the circumstances, remote and proximate, which the learned Court apparently supposed were inconsistent with the defendant's claim that there was a contract which fixed the compensation of the plaintiff for his services after his employment by them in 1886, were carefully grouped and used in execution of such purpose, but there was no mention of the circumstances in harmony with and corroborative of their claim, unless the slight reference to the memorandum on the back of the plaintiff's receipt is regarded as such. In that portion of the charge complained of in the fifth specification, there was a substantial repetition of the circumstances mentioned in the third, and the jury were told that in considering them as affecting compensation, they should remember that the litigation finally resulted in a victory for the defendants, but they were not reminded that it was a victory which was mainly due to the services rendered in the case prior to 1886, or that the principal benefits arising from it belonged to the estate of the defendants' vendor. But we need not pursue this subject further. The result of our examination of the case is that we are unanimously of opinion that the appellants have just cause to complain of the charge.

As the questions and answers complained of in the first and second specifications were not excepted to in the Court below, they will not be considered here. There is no error in the instruction which is the subject of the fourth specification, and we cannot sustain the seventh. The third, fifth and sixth specifications are sustained and the others are overruled.

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The plaintiff should have from the defendants fair and just compensation for his services in pursuance of their employment of him. In ascertaining the compensation, the jury should consider the nature and amount of the services, and all the circumstances which may legitimately affect it, but the plaintiff should not be permitted to recover from the defendants directly, or indirectly, for any services he rendered in the ejectment previous to 1886.

Judgment reversed, and venire facias de novo awarded. W. M. S., Jr.

Jan., '93, 398. January 15, 1894.

In re Vacation of Swanson Street from Washington Avenue to Prime Street.

Vacation of streets—Act of May 8, 1854—Power to vacate whole includes power to vacate part—Practice—Certiorari—Procedure under Act of 1854.

The power to do a greater act includes the power to do a lesser act, which is part of the greater.

Under the Act of May 8, 1854 (P. L. 645), which provides that the Court of Quarter Sessions of the proper county shall have authority to vacate any private or public highway, whether laid out by public or private owners, whenever by reason of forming town plots or otherwise they shall become useless to the public and those having lands bounding thereon, the Court has power, when a case is presented covering the conditions specified, to vacate the whole or any part of such public or private road.

The question of the qualification of the petitioners should be raised in the lower Court by specific exception and unless that is done the Supreme Court cannot pass upon that when the record comes up on a certiorari.

The admissions of counsel are no part of the record, and cannot be considered by the Supreme Court.

The Act of May 8, 1854, requires that the petitions shall set forth concerning the street "whether the same has been laid out by public or private owners."

Held. That this requirement was met by an allegation in the petition that the street "is opened and used as a public street."

A party who has withdrawn all exceptions filed in the lower Court has no standing to be heard in the Supreme Court.

Certiorari to the Quarter Sessions of Philadelphia County.

The record showed the following facts:—

On the 24th January, 1891, a petition of twelve persons, claiming to be freeholders of the vicinity, was presented to the Court of Quarter Sessions of Philadelphia County, averring that the portion of Swanson street extending from Washington avenue to Prime street, which was then open and used as a public street, had become useless to the public for a reason therein set forth, and praying that said portion of Swanson street should be vacated.

On the 24th January, 1891, a rule was granted returnable to the twenty-eighth day of February, 1891, to show cause why the said portion of Swanson street should not be closed up and vacated, in accordance with the Act of May 8, 1854 (P. L. 645).

Exceptions were filed by the City of Philadelphia, which were subsequently withdrawn, and by owners of property fronting on Swanson street.

The Court, on the fourth day of June, 1891, appointed six persons as a jury "to view and determine and to report to the Court upon the propriety of vacating and closing up Swanson street from Washington avenue to Prime street, in the City of Philadelphia."

A large amount of testimony was taken by said jurors, who reported:—

"After deliberation three of the undersigned, namely, Mr. Hunt, Mr. Steele and Mr. Montgomery, decided in favor of the propriety of vacating the street, and three others of the undersigned, namely, Mr. Gaskill, Mr. McCormick and Mr. Prosser, decided against the vacation. Being equally divided upon the question, they therefore pray to be discharged from its further consideration."

Subsequently the Court granted a rule to show cause why that portion of Swanson street now opened and lying between Washington avenue and Prime street, should not be vacated, and directed notice of the same to be advertised as required by the Act of May 8, 1854.

On January 9, 1893, the Court, ARNOLD, J., entered the following decree:

"Being of opinion that Swanson street from Washington avenue to Prime street has become useless to the public and those having land bounding thereon, it is adjudged and decreed that said Swanson street between the above avenue and street shall be vacated and closed."

An appeal was taken from the decree, and the following assignments of error filed:

"1. The learned Court erred in ordering the vacation of Swanson street between Washington avenue and Prime street.

"2. The learned Court erred in not refusing to order as prayed for in the petition to vacate Swanson street between Washington avenue and Prime street.

"3. The learned Court erred in not refusing to entertain and consider the petition to vacate Swanson street between Washington avenue and Prime street, because of lack of jurisdiction. The Court below had no jurisdiction to order a vacation of a part of an opened street.

"4. The Court below had no jurisdiction to

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entertain a petition filed by persons who were confessedly not freeholders of the vicinity.

"5. The petition for the vacation was defective in that it failed to show by what authority Swanson street had been opened.

"6. The Court had no right to entertain jurisdiction of the petition, in view of the fact that the reason assigned, namely, danger in the use of the street because of its use by a railroad company, was insufficient."

Richard C. McMurtrie and *John G. Johnson*, for appellants.

The Court had no jurisdiction to order the vacation of a portion of an opened street.

Act of May 8, 1854 (P. L. 645).

In all the Acts of Assembly which have conferred jurisdiction upon the Courts to vacate, the distinction has been made in the Acts themselves between the power to vacate the whole or a part of a street.

Act of June 13, 1836, § 18.
Act of May 3, 1855.

For a construction of these Acts see:

Road Case, 2 P. & W. 532.
Henry Street, 123 Pa. 353.
In re Vacation of Osage street, 90 Id 115.
Greenwich Township Road, 11 Id. 186.

Under the Act of 1854 jurisdiction only attaches upon a petition by "twelve freeholders of the vicinity," and it appears by admission of counsel, that petitioners did not hold title for themselves.

The said Act further requires that the petition shall set forth whether the street "was laid out by public or private owners," and this was not averred in this petition.

George E. Fili, *James Alcorn* and *Charles F Warwick*, representing the City of Philadelphia, filed an additional brief for appellants to the effect that the Court of Quarter Sessions of Philadelphia County had no jurisdiction to vacate a plotted street of said city without consent of Councils.

Citing:

§ 12, Act May 16, 1891 (P. L. 75 to 80.)

David W. Sellers, (*Henry K. Fox* with him), for appellees.

The Court has jurisdiction to vacate a part of the street.

Roads in Londonderry Township, 129 Pa. 244.
Henry Street, 123 Pa. 348.
In re Centre Street, 115 Pa. 252.

Assignments relating to the evidence will be ignored.

Spring Garden Street, 4 Rawle, 192.
Schuylkill Falls Road, 2 Bin. 250.
Church Street, 54 Pa. 353.
In re Kensington & Oxford Turnpike Co., 97 Id. 269.
Delaware Avenue, 67 Id. 309.

The petition avers that "Swanson street is opened and used as a public street." That is sufficient under the Act.

Vacation of an alley on Beatty's Plan, 104 Pa. 622.

October 1, 1894. GREEN, J. The proceedings in this case were instituted under the Act of May 8, 1854 (P. L. 645), for the purpose of vacating a part of Swanson street, Philadelphia, lying between Washington avenue and Prime street. The petition purports to be signed by the requisite number of freeholders in the vicinity, and the causes set forth as reasons for the order of vacation were sufficient in law for that purpose, if established. The Act of 1854 gives power to the Court of Quarter Sessions to entertain, hear and determine the matters in question, and authorizes the Court, if they so desire, to refer the ascertainment of the facts to six road viewers, to report for the information and final judgment of the Court.

Such viewers were appointed in this case and reported that they had met the parties and their counsel at various times, and had taken a large amount of testimony which they returned with their report, but that they were unable to agree as to the question of vacation, three of their number being in favor of it, and three against it. The learned Court below, being of opinion that Swanson street from Washington avenue to Prime street has become useless to the public and those having land bounding thereon, decreed that the part of the street named be vacated and closed.

It is contended for the appellants that the Court had no jurisdiction to order the vacation of part of a street, and the language of the Act is cited in support of the contention thus: "Whenever any private or public lane, alley, road or highway shall, by reason of forming town plots or otherwise, become useless to the public, etc., ... And upon hearing all parties interested, it shall be lawful for the Court to decree the vacation of any such lane, alley, street or highway upon such hearing," etc. Upon this language it is contended that the decree of vacation must be of the whole street, and cannot be upon a part of it. The argument is that in the general legislation of the Commonwealth authorizing the vacation of streets and roads, the power is expressly given to vacate "the whole or any part of any private or public road."

It is true that in the general road law of 1836, by the 18th section (Purd. Dig. 1501), this is the phraseology, and in the Act of May

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3, 1855, (Purd. Dig. 1501), the same language is used in giving power to the Courts of Quarter Sessions, "to change or vacate the whole or any part of any public or private road which may have been laid out by authority of law and opened in part."

But it does not follow from this that a power to vacate part of a road cannot be deduced from legislation which gives power to vacate the whole of it. In all ordinary circumstances the power to do a greater act includes the power to do the lesser act, which is a part of the greater. In the interpretation of the doctrine of powers this is well understood. It is not easy to see why it is not true of the power to vacate roads. If a Court is empowered to vacate the whole of a road, why may it not vacate a part of it? The statutory condition upon which the power is conferred is the same in both cases, to wit: "Whenever the same shall become useless to the public and those having lands bounding thereon." This condition may become true of a part, as well as of the whole, of a long public road, or a long street of a city. When it occurs in a city the vacation of the useless portion may be accomplished with little or no inconvenience to the property owners on the remaining portion of the principal street, because there are always crossing streets at short distances apart, through which free communication can be had with all the streets. The direct question at issue here does not seem to have been before us heretofore.

The Road Case, 2 P. & W. 532, cited for the appellants, does not raise the question. There the proceeding was to vacate part of a road which had never been opened, and to lay out another in its stead. We held it could not be done under the Act of 1815, which gave a power of vacation but no power to lay out a new one in place of the old one, nor under the Act of 1809 because it only gave a power to vacate old roads which had been completely opened. The case of Road in Greenwich Township, 11 Pa. 186, is not in point, because the conditions did not exist that are required by the 19th section of the Act of 1836, under which the proceeding was instituted, but in Madison and Harmony School House Road, 37 Pa. 417, where those conditions did exist, we held that a part only of the unopened road could be vacated, although the 19th section does not authorize expressly the vacation of the "whole or any part" of the road. Thus in this case as in the next one following the power to vacate a part where the power to vacate the whole existed, was assumed without discussion.

In the case of Henry Street, 123 Pa. 346, a portion of the street had been abandoned and built up so that a part of it only was left, extending from Taggert street to Brighton Road, a distance of about 150 feet. The proceeding was under the same Act of 1854, which is invoked in the present case, and several of the questions discussed in this case were considered and decided there. The part vacated by the decree of the Court below was the part between Taggert street and Brighton Road. It was claimed for the appellants that the Quarter Sessions had no jurisdiction, but the Court below and this Court held that it did have jurisdiction under this Act of 1854. It was also contended, as is contended here, that there was no concurrent action of the city, but we held that the city's jurisdiction was only under the Act of 1874, and there was no evidence that the city had accepted the provisions of that Act, and that it would be time enough to consider the question arising under that Act when it was properly presented. On the question of jurisdiction, and also of the applicability of the general road law of 1836, and certain other enumerated Acts, our brother CLARK, delivering the opinion, said:

"It is plain that none of these statutes has any application whatever to the case in hand, for the authority in none of them extends to the vacation of a street or highway in any incorporated city. This is a proceeding, however, under the Act of May 8, 1854, P. L. 645, which provides that the Court of Quarter Sessions of the proper county shall have authority to vacate any private or public highway, whether laid out by the public or private owners, whenever by reason of forming town plots or otherwise they shall become useless to the public and to those having lands bounding thereon." The method of procedure is specifically defined, and is, in most respects, different from the methods pursued under the Act of 1836.

It is contended that this Act of 1854 should be construed in *pari materia* with the Acts of 1836 and 1855, and that the restrictions contained in those Acts should be held to apply to it as part of the general system. But that the Act of 1854 was intended to apply to incorporated cities is manifest; not only is the Act general in form, embracing all cities within its terms, but it expressly provides that, 'in any city' the rule to show cause shall be published in one or more newspapers twice a week, and in other parts of the State once a week, etc. It is plain, we think, that the restrictions imposed by the Acts of 1836 and 1855, in this respect were not intended to apply in proceedings under the Act of 1854. It is equally plain also, from the specific and peculiar methods of procedure defined and established by the Act of 1854, that the proceedings are wholly independent of, and are, therefore, not to be regulated by the prac-

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tice under the Acts of 1836 or 1855. Whenever, therefore, a case is presented covering the the conditions specified in this Act, whether in an incorporated city or elsewhere, the Court of Quarter Sessions of the proper county must take cognizance of it."

The foregoing citation is sufficient to dispose of the question of jurisdiction and the character of the proceeding in the present case.

We do not see how we can consider the fourth specification of error. The question of the qualification of the petitioners should have been raised on the record in the Court below by a specific exception to that effect. The first exception filed is the only one that even approaches the subject, but it does not challenge the status of the petitioners as "freeholders of the vicinity." The petition asserts that they do fulfil that requirement, and the only way the matter is brought before us, is by an assignment of error to a question which was not ruled by the Court below, and was not before it, so far as we can discover. Moreover, we could not consider the question without trying the case on its merits, which we cannot do: Church Street, 54 Pa. 353; *In re* Kensington and Oxford Turnpike Co., 97 Pa. 269. The admissions of counsel are no part of the record, and we cannot consider them.

The fifth assignment is disposed of by what we said in Henry Street, *supra*, in reply to a similar objection. We held that it was enough that the petition set out that the street was a public road or highway. In this case the petition alleges that the street "is opened and used as a public street." We also ruled that this was sufficient in Vacation of an Alley on Beatty's Plan, 104 Pa. 622.

The sixth assignment is without merit. The city having withdrawn the only exceptions filed by her does not seem to have any standing to be heard.

Decree affirmed and appeal dismissed at the cost of the appellants.

W. M. S., Jr.

July, '94, No. 62. May 21, 1894.

Kelminski's License.

Application for license to sell liquors—Acts of May 13, 1887 and June 9, 1891—Discretion of the Quarter Sessions Court—How to be exercised.

Where an application for a license to sell liquors, either wholesale or retail, is made in due form and supported by the petition of citizens in good standing, and where no remonstrance is made to the applicant's receiving it, it is an arbitrary exercise of the discretionary power of the Quarter Sessions Court to refuse to grant the license for no reason other than that the Court has no personal knowledge of the facts alleged in the petition.

Appeal of Bartley Kelminski from the decree of the Quarter Sessions of Northumberland Co., refusing him a license to sell liquors. Bartley Kelminski presented his application for a license to sell liquors at retail in the Borough of Mt. Carmel, Northumberland County.

The application was supported by a petition of 85 electors of the township, alleging the necessity for the license and the fitness of the applicant. There were no remonstrances of any kind. On January 29, 1894, the Court, SAVIDGE, P. J., filed an opinion as follows:

"This application is in due form. The additional petition certifying to the necessity of the house and the fitness of the application is signed by 85 electors, most of whom are representative citizens of Mt. Carmel. From his appearance in Court we were favorably impressed with the applicant. No remonstrance has been filed and, so far as we know, there is no opposition to the grant. The proofs are altogether in favor of the applicant and if this was an application for a wholesale house, we would feel bound, in view of 'Johnson's License,' 156 Pa. 322, to grant it. It is, however, a retailer's application, and being without knowledge or the means of knowledge, other than that afforded by the petitions filed, we simply refuse the license, as per endorsement hereon. PER CURIAM. The application is refused."

This action of the Court was assigned as error.

Lewis Dewart, (*Voris Auten* with him), for appellant.

Under the provisions of the Act of June 9, 1891, it was held that an arbitrary refusal to grant a license was an undue exercise of the discretionary power of the Court.

Johnson's License, 156 Pa. 322.

This application is under the Act of May 13, 1887, the provisions of which governing the manner of making application are precisely similar in language to those of the Act of June 9, 1891, under which Johnson's License was applied for.

No counsel appeared contra.

October 1, 1894. McCOLLUM, J. An arbitrary refusal to grant a license to sell liquors at retail is on the same footing as a like refusal to grant a license to sell them at wholesale. The plainly expressed purpose of the legislation in relation to both is "to restrain and regulate the sale of vinous and spiritous malt or brewed liquors or any admixture thereof." While there

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are two classes of licenses provided for in this legislation the proceedings to obtain them are practically the same in each class, and so is the discretion which the Court of Quarter Sessions has in respect to the grant or refusal of them. In either case the application for the license must conform to the provisions of the statute under which it is made, and there must be a hearing upon it at a time fixed by a rule or standing order of the Court, when the applicant and all persons objecting to his application, may be heard by evidence, petition, remonstrance or counsel. It is the duty of the Court to receive and consider petitions in addition to that of the applicant, for, and against the application, and to refuse the license whenever in its opinion, having due regard to the number and character of the petitioners, the same is not neccessary for the accommodation of the public, or the applicant is not a fit person to have it. It is obvious, therefore, that in forming the opinion on which the grant or refusal of a license should rest the petitions for and against it cannot be entirely ignored. They must be fairly considered in connection with whatever may legitimately affect the exercise of the discretion with which the Court is clothed in respect to the application. The law evidently contemplates action by the Court in accordance with the knowledge it has of the character of the applicant and the needs of the locality in which he proposes to carry on business, under the license, but this action is not necessarily founded upon the knowledge exclusively derived from the evidence and petitions produced on the hearing. It may, and sometimes very properly does act of its own knowledge obtained from observation of the applicant and acquaintance with the district. If the Court, from such observation and acquaintance, knows that the applicant is not a fit person or that his house is not necessary for the accommodation of the public the license may be refused on such knowledge, although the petitioners present a *prima facie* case for it: Raudenbusch's Petition, 120 Pa. 328; Gross' License, 161 Pa. 344; and Mead's License, 161 Pa. 375. In the cases in which our license legislation has been considered there is a concurrence of opinion that the discretion which the Court of Quarter Sessions has in passing upon applications for license is judicial in its nature and should be exercised with due regard to the petitions and evidence in each case. An arbitrary refusal to so exercise it frustrates the legislative purpose and disregards the plain duty laid upon the Court by the law-makers. A decree founded on such refusal ought therefore to be set aside. Is the order complained of condemned by the law as we have stated it? The application for the license was in due form; it was supported by the petition of eighty-five representative citizens of the district certifying to the necessity of the house and the fitness of the applicant; there was no opposition to the grant of it and the proofs were altogether in favor of it. The Court was without knowledge or the means of knowledge other than that afforded by the petitions filed, and it said: "If this was an application for a wholesale house we would feel bound in view of Johnson's License, 156 Pa. 322, to grant it." It seems the Court thought its discretion in relation to the grant of a wholesale license was not the same as in an application for a retail license. In other words it was of the opinion that the latter might be arbitrarily refused while the former could not be. We think there is no warrant in the law for such a distinction as this. If it once existed it was removed by the Act of June 9, 1891, P. L. 257. It follows from these views that the decision of this Court in Johnson's License, *supra*, is applicable to the case at bar, and that upon the admitted facts the license should have been granted.

Order refusing a license reversed and procedendo awarded.

W. D. N.

Oct. '94, 291. October 5, 1894.

In re License to L. E. Branch and J. H. Powers.

License to sell liquors—Record—Bond—Appeal.

Neither testimony nor opinion of the Court can be considered upon a certiorari to the Quarter Sessions, as they form no part of the record.

The Quarter Sessions may allow an applicant for a liquor license to substitute a sufficient in lieu of a defective bond before granting.

Appeal of J. E. Bech, a citizen of Forrest County, from the judgment of the Quarter Sessions of said county upon an application by L. E. Branch and J. H. Powers, for a license to retail liquors at the "Keystone House," Mariensville.

The application was under the Act of May 13, 1887, and upon exception to the bond as filed being sustained by the Court, a majority of the Court gave leave to file a new bond and thereupon granted the license.

At the hearing of the petition there appeared to be some evidence of the provisions of the law having been violated during the year previous whilst the applicants were licensees.

Geo. F. Whitmer, for appellant.

W. W. Wilbur (*William Shurr* with him), for appellees.

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October 22, 1894. GREEN, J. In this case a majority of the Judges of the Court below granted the license in question, and their action must be considered as the action of the Court. The President Judge dissented from the decision of the associates, as was his undoubted right, but that circumstance does not affect the validity of their action nor its binding effect. There is nothing before us but the record and that is in strict conformity with the statutory requirements.

In Carlson's License, 127 Pa. 330, we held that "neither the testimony nor the opinion of the Court form any part of" the record, and also that upon certiorari we could only review what appears upon the face of the record. In Collarn's Petition, 134 Pa. 551, we held that we could not review proceedings in license cases upon the merits, and that all we could do was to see that the license Court has proceeded according to law. In Berg's Petition, 139 Pa. 354, we held that, "The appeal is a substitute for a certiorari and brings up nothing but the record. That shows the petition and the refusal of the Court below to grant the license. The reasons for such refusal are not material. They do not properly form any part of the record."

Following these precedents we can take no account of any averments which relate to the merits of this case. They are not before us and we cannot try them.

The record, however, does show that the bond originally filed was not accepted, but that another bond, filed on the day the license was granted, was accepted. It is contended by the appellant, that this action was erroneous because the law makes no provision for amendments to bonds, additional sureties or additional bonds. To that kind of an argument it is sufficient reply to say that the law makes no provision against the filing of a new bond where, for any reason, the one filed with the petition, was deemed and found insufficient. The record does not inform us as to the occasion of the insufficiency of the bond first filed. Presumably, and probably, the Judges may not have been satisfied as to the pecuniary sufficiency of the bail, and therefore required a bond with bondsmen who were more satisfactory in that regard. The contention that a Court may not require a sufficient bond in a proceeding, no matter of what kind, wherein bonds or recognizances are necessary to be filed, and those filed or offered are insufficient, is without reason. The law abounds with proceedings of many different kinds in which bonds or recognizances are required to be filed, and in all of them, as well after as before they have been filed or taken, exception to the sufficiency of the bail may be taken, the question of sufficiency may be heard upon testimony and decided, and if adjudged adversely the bail may be perfected by new bonds or recognizances. Such proceedings are of constant occurrence and the practice is perfectly familiar. We know of no reason why the same action cannot be had in bonds to be given in license cases. Technically the license law was strictly complied with in this case. The petition contained all the statutory facts required to appear therein, including the names of the sureties in the bond. The bond signed by the sureties named was duly filed and in all other respects the provisions of the law were carefully observed. When the bond was submitted for approval it was found insufficient for some reason, and leave was granted to file a new bond, which was done at once and the sureties approved, and then the license was granted. In all this we see no error.

The order of the Court below is affirmed and appeal dismissed at the cost of the appellant.

W. D. N.

Common Pleas.

C. P. No. 2. June, 1890, 403.

People's Passenger Railway v. The Union Passenger Railway and the Philadelphia Traction Company.

Street railways—Act of June 19, 1871—Right to use of streets in a city—Who may raise question of—Equity—Injunction—"Vigilantibus non dormientibus," etc.

It is fairly well settled that, ordinarily, one corporation has no standing to raise the question of the right of another corporation to use the streets of a city. The State alone may invoke the chancellor's aid where the powers granted by it are not properly exercised, or the city itself will have a standing in Court, when its rights have been invaded.

The complainant having consented by agreement with both the city and the park commission, that other passenger railways might be given permission to use the tracks across the bridge and within the park, and having secured its own use of them only by such agreement, cannot be said to be injured and to have had its rights "invaded," when the defendants have secured such permission.

A complainant asking a Court of equity for the exercise of extraordinary remedies, must show that his own conduct has been equitable, and that he has not slept on his right in such a way as to mislead his adversary.

Germantown Pass. Ry. Co. *v.* Citizen's Pass. Ry. Co., 151 Pa. 138, distinguished.

Sur application for special injunction.

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The facts are fully stated in the opinion of the Court.

H. Gordon McCouch, *J. Levering Jones*, *Richard C. Dale*, and *Mayer Sulzberger*, for complainant, relying on—

The Germantown Pass. Ry. Co. *v.* Citizens' Pass Ry. Co., 151 Pa. 138.

Thomas Leaming, *Rufus E. Shapley*, *E. A. Ballard*, *S. C. Perkins*, and *John G. Johnson*, for respondents.

October 17, 1894. PENNYPACKER, J. The facts which appear from the bill, answer and the affidavits filed, are as follows:—

The complainant, a passenger railway company incorporated by Act of Assembly of April 15, 1873, is the lessee of the Germantown Passenger Railway Company, with which latter company, prior to the lease, the Fairmount Park and Delaware River Passenger Railway Company had become merged. The Act of Assembly of March 26, 1859, incorporating the Richmond and Schuylkill Passenger Railway, afterward the Fairmount Park and Delaware River Passenger Railway Company, authorized it to construct a railway upon certain streets in the City of Philadelphia, and also to connect "with a double track westwardly along Girard avenue to the Girard avenue bridge, at the river Schuylkill. This company shall, at any future time, have the privilege of crossing the river Schuylkill by the Girard avenue bridge, and of extending the said road to Lancaster avenue." Acting presumably under the rights granted by this charter, the Germantown Passenger Railway Company, until 1868, had in operation a line of railway along Girard avenue to the eastern approach of an old bridge across the Schuylkill, but in that year the limits of Fairmount Park were extended, and this company took up its tracks within the limits of the Park and fixed its terminus on Girard avenue, about Thirty-first street. In 1874 the city built the present Girard avenue bridge over the Schuylkill. On April 6 of that year an ordinance of councils was passed, authorizing Clarke Reeves & Co, the contractors for the erection of the bridge, to lay a double track of seven-inch iron rails on the roadway of Girard avenue bridge, under the supervision of the chief engineer and surveyor of the city. Section 2 of that ordinance provided, that "the said bridge, when completed, shall be under the exclusive control of the City of Philadelphia, and the railway tracks thereon may be used and crossed by such passenger railway company or companies as shall receive the consent of the councils of the said city, by the passage of an ordinance to that effect." On July 8, 1875, an ordinance was passed by the city councils, authorizing the Germantown Passenger Railway Company to extend the tracks of said railway from their then terminus to connect with the double track railway upon Girard avenue bridge, the work to be done under the supervision and regulation of the chief commissioner of highways. Section 3 of this ordinance was as follows: "The said Germantown Passenger Railway Company, previous to running any car or cars upon or over said bridge, shall, in writing, agree to comply with section 2 of an ordinance, approved April 6, 1874: Provided, that the privilege hereby granted to the Germantown Passenger Railway Company shall not be construed to prohibit the City of Philadelphia from granting similar privileges to any other passenger railway company or companies: And provided further, that the privileges and requirements contained herein may be revoked by the passage of an ordinance to that effect." At this point the park commission interposed, and at its instance the city filed a bill in equity in Common Pleas No. 4, September T., 1874, asking the Court to restrain the said company from constructing and maintaining a railway upon Girard avenue, within the limits of the park, without the consent of the park commission.

The Act of April 14, 1868, contains the following provisions with reference to the power of the park commission:—

"Section 19. The said park commissioners shall have the power to govern, manage, lay out —the said Fairmount Park—and to construct all proper bridges, buildings, railways and other improvements therein.

"Section 20. That the said park commissioners shall have authority to license the laying down and the use for a term of years, from time to time, of such passenger railways as they may think will comport with the use and enjoyment of the said park by the public, upon such terms as said commissioners may agree, all emoluments from which shall be paid into the city treasury.

"Section 21. VIII. No street railroad car shall come within the lines of the park without the license of the park commission.

"Section 22. Provided that if said park commissioners should license the taking of ice in said park, or the entry of any street railroad car therein, or articles for sale, or musical entertainments, it may be with such compensation as they may think proper, to be paid into the city treasury."

The Court of Common Pleas No. 4, granted a preliminary injunction according to the prayer of the bill, which injunction was dissolved October 9, 1875, by the President Judge of that Court, upon the filing of an agreement,

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signed by the solicitor for the park commission and the solicitor for the Germantown Passenger Railway Company, to the effect that the injunction should be dissolved upon the terms prescribed by the park commission. These terms, as contained in the agreement, were:—

"Resolved, that the solicitor is hereby instructed to enter into an agreement for a discontinuance of the injunction against the Germantown Passenger Railway Company.

"Provided there shall be no waiver of any control this commission may have over Girard avenue, and any right to renew the motion for an injunction; and

"Provided further, that the said Germantown Passenger Railway Company shall agree that their tracks on Girard avenue, within the park, may be used by any passenger railways licensed or constructed by this commission to carry passengers from one portion of the park to the other." The Germantown Passenger Railway Company, upon the dissolution of the injunction, proceeded to lay its tracks to the Girard avenue bridge, and has been using these tracks and those across the bridge from that time down to the present.

The Union Passenger Railway Company, one of the defendants, and the lessor of the Philadelphia Traction Company, the other defendant, was originally incorporated by the Act of Assembly of April 8, 1864, P. L. 297, to construct a street railway upon Seventh and Ninth streets, in the City of Philadelphia, and its powers have been enlarged by numerous supplemental Acts, which it is unnecessary to specify. Under the provisions of these Acts, it had, prior to the year of 1885, a street railway in operation whose western terminus was at Twenty-ninth and Brown streets, and which extended thence north along Twenty-ninth street to Poplar street, and from there eastwardly, completing a circuit. At Twenty-ninth street and Poplar street it was separated from the grounds of the park by the tracks of the Philadelphia and Reading Railroad, which were there at grade.

By the Act of Nov. 22, 1873, P. L., 1874, p. 444, the Union Passenger Railway Company was empowered: Section 1. "To extend their routes and lay tracks on Ellsworth street, and on such other street or streets south of Christian street, west of Twentieth street, north of Columbia avenue, and east of Third street, as the Councils of the City of Philadelphia may from time to time permit or authorize to be used by said company, with single or double tracks.

"Section 2. That said company shall also have power—to connect said new routes with each other, and with their old tracks—to lay curves and to construct circuits, etc."

An ordinance of the councils of the city was passed Dec. 31, 1888, which ordained that "The Union Passenger Railway Company is hereby authorized to lay a double track railway on Poplar street, westwardly from its tracks on Twenty-ninth street, to Pennsylvania avenue, the plans to be approved by the board of highway supervisors. Sec. 2. That said company is hereby authorized to construct a bridge on the line of Poplar street, over Pennsylvania avenue, whenever the commissioners of Fairmount Park shall consent to a construction of a passenger railway entering the park at that point."

On June 1, 1889, the park commission adopted the following resolutions:

"1. That the Union Passenger Railway Company, upon constructing a bridge on the line of Poplar street, over Pennsylvania avenue, of sufficient width for a double-track railway to be placed thereon, with ample space for a carriage drive on each side, and a footway of twelve feet on each side, to be approved by the chief engineer, is hereby authorized to construct a double-track railway from said bridge northwardly along the northeast side of the park to Girard avenue, and there to connect (with) the tracks now laid thereon, etc. 3. That the Union Passenger Railway Company is hereby authorized to run its cars on the tracks now on Girard avenue to the station authorized to be built at the southeast corner of Thirty-seventh street and Girard avenue."

After the passage of this ordinance of councils and the resolution of the park commission, the president of the Union Passenger Railway Company, Aug. 1, 1889, wrote to the president of the People's Passenger Railway Company, saying, *inter alia*, "So soon as the company can erect the bridge over the Philadelphia and Reading, it will seek to make the connection with the tracks on Girard avenue, that cars may be run to the lot on the southeast corner of Thirty-seventh and Girard avenue, from which point a return will be made." After sending this letter, the Union Passenger Railway Company constructed the bridge, according to the plans of the park commission, over the railroad at Poplar street, and an avenue from this bridge through the park to Girard avenue, and laid its tracks upon this avenue at an expenditure of about $60,000. Its main purpose was to connect with the tracks upon Girard avenue, and in that way to be enabled to reach the station at Thirty-seventh street and Girard avenue, and the Zoological Garden at that point.

The councils, by ordinance of June 22, 1894, ordained that "The Union Passenger Railway Company is hereby authorized to connect with the tracks now laid on Girard avenue and the

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bridge from the point at which its existing track is constructed, and to run its cars over and along the same to the premises at the southeast corner of Thirty-seventh (street) and Girard avenue, as allowed by the commissioners of Fairmount Park, and to use electric motors as the propelling power of its cars, with the necessary standards and appliances needed to operate the same by overhead electric wires."

The complainant, by bill filed June 7, 1890, and by supplemental bill filed subsequently, asks that the defendants be restrained from extending their railway or running their cars over Girard avenue west of Pennsylvania avenue, from running their cars over Girard avenue bridge, from running their cars on Girard avenue west of the river Schuylkill, from cutting the complainant's tracks on Girard avenue, and from making use of the trolley wires erected by it, and applies for a preliminary injunction. Its contention is, that the defendants, under the Acts of Assembly which have been cited, have no power to construct a railway within the limits of the park west of Twenty-ninth street, or to make use of the tracks upon Girard avenue bridge for the purpose of crossing the river. It appears that there is no bridge across the Schuylkill, south of Girard avenue, for more than half a mile, and none north of that avenue for more than two miles. Girard avenue bridge is the chief means of access to the Zoological Garden, and for a large portion of the city east of the Schuylkill, to the west park and to West Philadelphia. It is urged, on the part of the defendants, that the people of the city are much interested in preventing any one railway company from having a monopoly of the use of the railway tracks upon Girard avenue bridge, and that it will be much to the benefit of the public that they should be permitted, in common with the complainant, to make use of the tracks there laid. Certainly those officials, who are charged with the duty of representing the interests of the public and the city with reference to the matter, entertain that view, because the park commission, by its resolutions of June 1, 1889, and the city councils, by the ordinances of December 31, 1888, and June 22, 1894, have given their consent to the extension of defendants' railway through that portion of the park, and to the use of the tracks in crossing Girard avenue bridge. Nevertheless, if the complainant has shown a clear right to the relief it seeks, these facts ought not to have weight with the Court to prevent it from issuing the injunction. The first point which arises in the consideration of the subject is, as to whether the complainant has a standing in a Court of equity to question the power of the defendants under their charters. It appears to be fairly well settled that, ordinarily, one corporation has no standing to raise the question of the right of another corporation to use the streets of a city, and that the intervention of the Court can only be invoked by the State, which is concerned to see that the powers granted by it are properly exercised, or the city whose rights are invaded. Thus, in Philadelphia and Gray's Ferry Pass. Ry. Co.'s Ap., 102 Pa. 123, where an application was made by a passenger railway company to restrain another company from the use of a street in Philadelphia, because of want of authority, Justice PAXSON, in reversing the Court below which granted the injunction said: "I am unable to see what standing the appellees have to raise this question. . . . The appellees are not in any sense the guardians of the rights of the city or the people, and may not interfere with the use of the street beyond the privileges conferred by their charter. Their right to be heard upon such a question is more than doubtful." The same doctrine is maintained in The Twelfth Street Market Co. *v.* Phila. & Reading Terminal Railroad Co., 142 Pa. 580, Junction Pass. Ry. *v.* Williamsport Pass. Ry., 154 Pa. 116, and recently in the case of the Thirteenth and Fifteenth Sts. Pass. Ry. Co. *v.* Southern Pass. Ry., 15 C. C. 145, decided in this Court. The complainant, however, relies upon the case of The Germantown Pass. Ry. Co. *v.* Citizens' Pass. Ry. Co., 151 Pa. 138. That case was decided under the provisions of the Act of June 19, 1871, P. L. 1360, which are that, "in all proceedings in Courts of law or equity of this Commonwealth, in which it is alleged that the private rights of individuals, or the rights or franchises of other corporations, are invaded by any corporation claiming to have a right or franchise to do the act from which such injury results," it shall be the duty of the Court to inquire whether the corporation does in fact possess the right, and, if it has not been conferred, to restrain, by injunction, such injurious acts. In that case, the bill of complainants averred that they were in the occupation of Germantown avenue under authority of their charter, and that the defendants, without any authority, were proceeding to lay tracks in that avenue, and that it would be "a serious inconvenience and hindrance to plaintiffs in the operation of their road, and a source of annoyance and injury to them." The Court held that these averments brought them within the terms of the Act, and gave them a standing to ask for an injunction. The ground of the decision was, that there was an allegation of a specific injury to the complainants, apart from the want of authority in the defendants, and of the fact that the rights of the complainants were "invaded." In the present case the admitted facts are, that

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the tracks upon Girard avenue bridge were laid by Clarke Reeves & Co., under the ordinance of April 6, 1874, which provided, that "the railway tracks thereon may be used and crossed by such passenger railway company or companies as shall receive the consent of the councils." Whatever may have been the rights of the complainant under its old charter, these tracks were laid under direction of the city, belonged to it, and were under its control.

There is a distinction to be drawn between the right to use the bridge and the right to use these tracks. The complainants secured the privilege of making use of these tracks from the city through the ordinance of July 8, 1875, which contained the provision, that before running any cars over the bridge, they should, in writing, agree to comply with section 2 of the ordinance of April 6, 1874, and the further provision, that "the privilege hereby granted to the Germantown Passenger Railway Company shall not be construed to prohibit the City of Philadelphia from granting similar privileges to any other passenger railway company or companies." The complainant also secured the dissolution of the injunction, obtained by the city on behalf of the park commission, by an agreement with that commission, in settlement and compromise of a somewhat doubtful question, to the effect, that "their tracks on Girard avenue, within the park, may be used by any passenger railways licensed or constructed by this commission to carry passengers from one portion of the park to the other." It is urged that these words of the latter agreement only apply to the railways authorized by and described in section 20 of the Act of April 14, 1868, fixing the powers of the park commission. Sections 21 and 22, however, show, perhaps not with that particularity which is desirable, that it was the intention of the Legislature to give power to the commission to license other passenger railways to enter the park beside those constructed under its direction under section 20, and the language of the agreement is sufficiently broad to cover such other railways. The complainant having, then, consented by agreement with both the city and the park commission, that other passenger railways might be given permission to use the tracks across the bridge and within the park, and having secured its own use of them only by such agreements, how can it be said that it is injured, and its rights "invaded," when the defendants, with the consent of the city and the commission, undertake to make use of these tracks? And if its rights are not invaded, and it is not injured by such use, how has it brought itself within the terms of the Act of June 19, 1871? We think that its standing in Court to raise the question of the power of the defendants is at least doubtful.

A complainant asking a Court of equity for the exercise of extraordinary remedies, must be able to show that his own conduct has been equitable, and that he has not slept upon his rights in such a way as to have misled his adversary. In the letter of the president of the Union Passenger Railway Company, written to the president of the People's Passenger Railway Company, Aug. 1, 1889, the purpose to erect a bridge across the railroad, and to make a connection with the tracks on Girard avenue, as a means of reaching Thirty-seventh street and Girard avenue, is clearly expressed. The complainant knew the object of this preliminary work, yet it permitted the work to be done, and a large outlay to be made without objection.

The contention of the defendants is that, under the Act of Nov. 22, 1873, they have ample power, with the consent of the city and the park commission, to extend their routes through the grounds of the park and over the Girard avenue bridge. We do not consider it necessary at this time to decide what construction ought to be put upon the words of this Act. For the reasons which have been given, as well as for others which have been only suggested, we think the complainant has not made out such a clear case that the Court would be justified in interfering in this early stage of the proceedings.

The special injunction is refused.

F. B. N.

C. P. No. 2. Dec. 1893, 587.

Calkins et al. v. Keely et al.

Affidavit of defence—Judgment for amount admitted to be due—Act of May 31, 1893.

The object of the Act of May 31, 1893, plainly is to permit the plaintiff to have a judgment for that "part of the claim" about which there is no contention; and the manner in which the portions are divided is immaterial.

"Part of the claim" may be one of two items, or, just as well, half of each of two items.

Rule for judgment for amount admitted to be due.

The facts are sufficiently stated in the opinion of the Court.

Francis S. Brown, for the rule.

F. A. Sobernheimer, contra.

April 12, 1894. PENNYPACKER, J. The suit is brought to recover for three bills for goods sold and delivered, amounting in the ag-

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gregate to twenty-eight hundred and ninety dollars and nine cents ($2,890.09). Credits were allowed amounting to twenty-two hundred and seventy-four dollars and thirty-two cents ($2,274.32). The plaintiffs claim to recover for the balance of six hundred and fifteen dollars and seventy-seven cents ($615.77).

The affidavit of defence filed sets up that there are overcharges in some of the items, and that the defendants are entitled to certain credits, and that "the defendants therefore only owe the sum of $336.31. The defendants are ready and willing to pay the said sum of three hundred and thirty-six dollars and thirty-one cents ($336.31), and now tender the same."

The sums admitted to have been paid more than cover the amounts of those items about which there is no dispute.

The Act of May 31, 1893, P. L. 185, provides: "That in all cases now pending or hereafter to be commenced in the several Courts of this Commonwealth, in which affidavits of defence have been or may be filed to part of the claim of plaintiff or plaintiffs, the plaintiff or plaintiffs may take judgment for the amount admitted to be due, and have execution for the collection of the same, and the cases shall be proceeded in for the recovery of the balance of the demand of the plaintiff or plaintiffs, if anything more should be justly due to such plaintiff or plaintiffs."

It is contended on the part of the defendants that the proper construction of the Act is, that it does not apply to the case of an admission of an amount due upon items all of which are more or less in dispute, and that it is intended only to meet the case where there is an admission that certain of the items are due. Looking at the language of the Act, and the objects to be accomplished by it, we see nothing which should lead the Court to draw such distinction. "Part of the claim" may be one of two items, or it may be just as well the half of each of two items. If it had been intended to limit the effect of the Act in this manner, it would have been easy to have used language which would have expressed that thought. The object plainly is to permit the plaintiff to have a judgment for that "part of the claim" about which there is no contention, and the manner in which the portions are divided would seem to be immaterial. We have been referred to the case of Myers *v.* Cochran, 51 Legal Intell. 22, as an authority to the contrary. We do not so understand that case. There an affidavit was filed as to the whole claim, without any admission of a sum due, and the Court held that therefore it was not within the Act, and that they would not undertake to determine to what extent the affidavit was invalid and give judgment for such sum, leaving the balances to be ascertained: Roberts *v.* Sharp, 51 Legal Intell. 22; Russell *v.* Archer, 76 Pa. 473.

For these reasons the rule will be made absolute for the amount admitted to be due, with leave to the plaintiffs to proceed for the recovery of the balance. F. B. N.

Orphans' Court.

April, 1894, 71.

Young's Estate.

Exemption of $300 under Act of April 14, 1851 —The word "children" in that Act—Unmarried daughters—When within the Act—Practice O. C. where petitioner for exemption has property belonging to the estate.

Unmarried daughters, without means of support, living with and dependent upon their father, are "children" within the letter and spirit of the Act of April 14, 1851, and therefore entitled to the exemption provided for in that Act.

The word "children" in the Act of April 14, 1851, does not necessarily mean minor children only.

If a petitioner for exemption have in his possession money or property belonging to the estate, the Court will award the exemption of $300 only upon condition of the restitution to the estate of such money or property held by petitioner.

Petition for exemption of $300.

The facts are stated in the opinion.

William H. Peace, for petitioners.

R. T. Corson and *G. G. Cookman*, contra.

October 27, 1894. FERGUSON, J. This was a claim for the exemption of $300, the petition alleging that the petitioners were the daughters of the decedent; that they were upwards of twenty-one years of age, and that they had always lived with their father, and were solely and wholly dependent upon him for support. The allowance of this claim was excepted to, because the petitioners were not minors, and because, as alleged, they had appropriated to their own use money and property of the estate to an amount exceeding $300.

It has been held by this Court that the word "children" in the Act of April 14, 1851, does not necessarily mean minor children only, but that an unmarried daughter, without means of support, living with and dependent upon her father, is within the letter and spirit of the Act: Halbe's Est., 48 Legal Intell. 86.

The exemption is therefore awarded to the petitioners, upon condition, however, that they first make restitution to the estate of any money or property belonging thereto in their possession. F. B. N.

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WEEKLY NOTES OF CASES.

VOL. XXXV.] *FRIDAY, DEC. 7, 1894.* [No. 13.

Supreme Court.

Jan., '94, 293. March 30, 1894.

Meigs v. Lewis.

Deed—Reservation in—Meaning of "over and above," and of "in like manner as the same is now done."

In construing a deed, it is proper and sometimes necessary to consider the circumstances under which it was made, for the purpose of ascertaining the intention of the parties, and the rule that the provisions of a deed are to be construed most strongly against the grantor is never available to defeat an intention so manifested.

A. who owned two pieces of land, conveyed one to B., the deed containing the following clause in the habendum: "Under and subject . . . . as respects the two feet three inches wide strip above mentioned to the right and privilege of the owners and occupiers of the premises adjoining on the east to build over and above the same in like manner as is now done." The premises on the east was the other of A.'s two tracts, and at the time of the deed to B. certain structures were over the strip beginning at the height of eleven feet from the ground:

Held, The manifest purpose of the parties in connection with the grant and the building right reserved was to secure to the grantee the use and benefit of the way as it then existed; that the words "in like manner as the same is now done," referred to the point and manner of the location of the structures above it, and hence so long as B. or his grantee of the eastern premises left a way of eleven feet in the clear, he or they could build over the strip and were not limited to buildings of the height of those which existed at the time of the conveyance to A.

Appeal of Harry A. Lewis, defendant, from the decree of the Common Pleas No. 2, of Philadelphia County, in a suit in equity wherein Samuel Emlen Meigs was plaintiff.

The facts in this case as found by the master (J. Edward Carpenter, Esq.,) were as follows: William H. French, being the owner of certain real estate situate on Locust street, Seventeenth street and Latimer street, in the City of Philadelphia, conveyed by deed dated April 29, 1863, and recorded in Deed Book A. C. H. No. 89, page 403, a portion of the said lot of ground situated on the south side of Locust street at the distance of eighteen feet westward from the west side of Seventeenth street, containing in front on Locust street, sixteen feet and extending of that width southward seventy-three feet seven and one-half inches, then narrowing by an off-set on the east side to the width of two feet three inches and continuing of that reduced width southward a further depth of sixteen feet four and one-half inches to Latimer street, to William L. Hildeburn. This deed contained the following clause in the habendum: "Under and subject nevertheless . . . . as respects the two feet three inches wide strip above mentioned to the right and privilege of the owners and occupiers of the premises adjoining on the east to build over and above the same in like manner as is now done."

Afterward by deed dated May 22, 1863, French conveyed to Charles H. Roser another portion of the original large lot fronting on Seventeenth street and extending in depth along the north side of Latimer street to the eastern line of the strip of land two feet three inches wide before conveyed to Hildeburn upon which it was bounded sixteen feet four and one-half inches: "Together with the right and privilege to Chas. H. Roser, his heirs and assigns, owners and occupiers of the premises of building over and above the alley in like manner as was then done."

By means of sundry conveyances the lot conveyed by French to Hildeburn came into the possession of the plaintiff and that conveyed to Roser into the possession of the defendant. The deed to the plaintiff is from James C. Biddle, trustee, dated January 5, 1891, and contained the clause, "Subject as respects the two feet three inches wide strip above mentioned to the right and privilege of the owners and occupiers of the premises adjoining on the east to build over and above the same in the like manner as is now done."

The defendant's deed is from George L. Harrison and wife, dated November 26, 1890, and grants the right to build over the alley "in like manner as is now done."

At the time of the conveyances to the plaintiff and defendant there was over the northern portion of the strip of ground two feet three inches wide belonging to the plaintiff, a frame structure with a brick wall crossing the northernmost end of the strip beginning at a distance of eleven feet from the ground and extending in height to a distance of thirty-two feet two inches from the ground. This frame structure was a portion of a room or rooms in the second floor of the house then existing on the defendant's property and occupied a space of eight feet four and one-half inches over the strip of ground from the northern end running south.

An ordinary floor or platform was built over the remaining or southerly portion of this strip extending from the southernmost end of the frame structure above mentioned to Latimer street, at the same height above the ground as the floor of the second story of the house. And this was the character and condition of the structure erected over the strip of ground as far

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back as the memory and knowledge of any of the witnesses could go, and there was no evidence before the master to show that at any time since the date of the deed from French to Hildeburn any other structure had ever existed over the strip of ground. In September, 1892, the plaintiff discovered that the defendant intended to build over the strip of ground to a greater height on the northernmost portion than the wall then existing, or which had previously existed, had been erected, and also to build over the southernmost portion of the strip to an equal height, where previously no wall had existed.

The plaintiff warned the defendant to desist from building over the strip in the manner indicated, but finding that the building was still progressing he filed a bill.

[For the opinion of the master see 33 WEEKLY NOTES, 484].

The master reported a decree that the defendant be restrained from maintaining any structure over the southern end of plaintiff's strip at a height above 12 feet 6 inches from the ground and over the northern part in excess of 32 feet 6 inches from the ground and that he be ordered to remove any existing structure above said height on said parts of the strip.

The defendant filed exceptions, which after argument were dismissed by the Court, and a decree was entered as recommended by the master.

The defendant took this appeal and assigned as error, *inter alia*, the entry by the Court of the decree enjoining the maintenance of the erections complained of, *supra*. (2d, 3rd and 4th assignments of error.)

Richard P. White, (*Joseph P. McCullen* with him), for appellant.

While it might well be argued that the plaintiff is not entitled to an injunction because his right is uncertain—

Kerr on Injunctions, p. 49.
Harkinson's App., 78 Pa. 196.

and his injury, if any, *de minimis*—

Livingstone *v.* Wolf, 136 Pa. 519.
Orne *v.* Fridenburg, 143 Id. 487.

It is argued that the meaning of the words "to build over and above the strip in like manner as is now done," taking them in their ordinary acceptation and according to the intention of the parties as denoted by the circumstances existing at the time of the execution of the deeds, makes it clear that complainant's bill should have been dismissed.

In Sheppard's Touchstone, at page 88, it is said: "This rule (that a deed be taken most strongly against a grantor) from its strictness and rigor is the last to be resorted to; and is never to be relied on but where all other rules of exposition fail."

And see

Richardson *v.* Clements, 89 Pa. 503.
Taylor *v.* Corporation of St. Helens, 6 Ch. D. 264.
Smith *v.* Packhurst, 3 Atk. 136 S. C. *sub nom.* Parkhurst *v.* Smith, Willes, 327.
Huss *v.* Stephens, 51 Pa. 282.
Chriswell *v.* Grumbling, 107 Id. 414.

In construing a deed the court must look into the circumstance under which it was made as evidencing the intention of the parties.

Cox *v.* Freedley, 33 Pa. 124.
Miner's App. 61 Id. 283.
Morrison *v.* Marquardt, 24 Iowa Rep., 64.
Washburn's Easements and Servitudes, (3rd Ed.) 49.

In the deed from French to Hildeburn there was an express reservation to the owners of the Lewis lot of a right to build over and above the strip. This right is given in the words quoted above.

When within a few weeks, within less than a month, after conveying the Meigs lot to Hildeburn, French conveys the Lewis lot to Roser, he makes it very clear as to what his meaning and his purpose was, for he no longer calls this offset a "strip" but speaks of it as an alley, and grants the right to Roser, "his heirs and assigns to build over and above the alley in like manner as is now done."

It may be admitted that French in his design to create an alley-right for the benefit of the plaintiff's property did not make use of the best conveying form or term, and his ignorance on this point, if we are to call it such, may be conceded; but surely we cannot assume that he was so utterly foolish as to have thus designed to have light and air furnished to the Locust street house over a two feet three inches wide strip by providing that on the Latimer street end of the strip furthest from Locust street there should be a building in the nature of a platform but twelve feet high, while between that platform and the house to which he desired to furnish light and air and nearest to that house, there should be a wall thirty-two feet high, and then again that this wall should be limited in its height only to the extent of two feet three inches, while the remainder of the wall could be built to any height whatever.

The meaning of the words and the intention of the grantor as gathered from his own interpretation in the subsequent deed to Roser for the Lewis lot (in which he speaks of the strip as an alley), and from all the surrounding facts and circumstances as they existed at the time of the original grant and reservation, indicate clearly that the purpose of the grantor was to have maintained an alley-way of a certain headway

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in the clear for the benefit of the plaintiff's property. This having been done, and the plaintiff not having been interfered with in his enjoyment of such an alley right, it would seem that the learned master was in error in invoking the rule of construction upon which he based his report—a rule under which he certainly did construe the language of the deed "most unfavorably to the grantor," for he overcame the grantor's intention, destroyed the meaning of his words, and turned a building privilege into a building restriction.

Henry Budd, (*William M. Meigs* with him), for appellee.

In interpreting the words "to build over and above the same (a certain strip of land) in like manner as is now done" it must be borne in mind that the common grantor by his first deed gave the fee in land composing the strip, and gave it by the very same words by which he gave the broader part of the lot; no distinction whatever is made. The plaintiff therefore is vested with the absolute fee simple of the strip, and, except so far as interfered with by the servitude created by the clause which is to be interpreted, his right over the strip is absolute. *Cujus est solum, ejus est usque ad coelum*, and it is clear that the plaintiff can—subject only to the exception imparted by the reservation—do as he please over and above this strip; it is his, and he can forbid anyone from interfering with it in any way, even though no injury whatsoever be done him—let alone a case where, as here, all possible future use of his rights over the strip is snatched away from him, and a wall is run up close to his back windows to shut off light and air in a crowded city.

Nor is this all, for the right is moreover claimed by the defendant—and must be claimed—to build over the strip as high as he may please at any future time, nineteen stories or whatever may be the limit of height hereafter to be attained. The statement of this proposition carries its own refutation, when it is compared with the facts which have been found by the master as to the prior condition of the buildings, and the words of the deed—"to build over and above the same in like manner as is now done."

The well-known maxim, that words are to be taken most strongly against him who uses them, *verba chartarum fortius accipiuntur contra proferentem*, applies.

White *v.* Smith, 33 Pa. 186.
Beeson *v.* Patterson, 36 Id. 24.

We are not set to work to guess at the meaning of a grantor without regard to his words, and required to practically assume that where he grants one lot and retains another he must be taken to have meant to grant as little as possible and retain as much as possible.

As to the contention that intent as derived from circumstances must govern, let us look at the authorities cited by the appellant.

In Huss *v.* Stephens, 51 Pa. 282, and Chriswell *v.* Grumbling, 107 Id. 414, the interpretation of the grantor's words was found in expressions used in the same paper as that which contained the words whose meaning it was sought to explain; in Cox *v.* Freedley, 33 Pa. 124, there was a practical application of the maxim, the Court holding that under a grant of land bounded by the side of a street the grantee took to the centre of it, if the grantor's title extended so far, and in Miner's Appeal, 61 Pa. 283, the maxim was expressly recognized. In our case it was found by the master and undisputed that the plaintiff's lot was the one first conveyed by the party who originally owned both lots, and created the reservation; and who, when he conveyed the plaintiff's lot to Hildeburn, subject to the reservation, still owned the lot now belonging to defendant.

The words to be interpreted refer to the restriction upon the plaintiff's rights contained in the grant of the fee to him; or, if you please, to the reservation by the grantor for the benefit of the lot he retains. If, then, the maxim applies, it is plain that the grantor can be held to have reserved no more than the words in their strict sense, taken against him, imply; but, if the maxim be not of authority, as was contended below by the defendant on the authority of Taylor *v.* Corp. of St. Helens, L. R. 6 C. D. 270; then, if the words be so doubtful that we cannot find out their meaning according to the ordinary and proper rules of construction, the reservation is void for uncertainty, and the restriction upon the plaintiff's use of his property falls to the ground.

As to the contention that the defendant is not doing the plaintiff much damage, and can therefore go on and do it, it is submitted that such is not the law. The plaintiff's right is an absolute one, and any violation of it is a plain wrong. The question is not how much injury is done, but has the defendant the right to build as he has done? He is trespassing on plaintiff's land. Can he show any warrant for so doing? It must not be forgotten here again that the defendant's successor, or even he himself, if he have the right to do what he has done, has the right hereafter to add another story and still another at his pleasure.

It cannot "make the slightest difference that the plaintiff's property is of insignificant value to him as compared with the advantages that would accrue to the defendant from its occupation."

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Walters *v.* McElroy, 151 Pa. 549.

It is well settled that the defendant in continuing to build after the bill was filed, did so at his own risk.

Clark *v.* Martin, 49 Pa. 289.
R. R. Co. *v.* Land Co., 54 Id. 28.
Walters *v.* McElroy, 151 Id. 549.
McCall *v.* Barrie, 14 WEEKLY NOTES, 419.

The trespass in this case is clearly one of such a permanent nature as equity will always restrain by injunction.

Masson's Appeal, 70 Pa. 30.
Walters *v.* McElroy, 151 Id. 549.
Proctor *v.* Campbell, 6 Pa. C. C., 531.
Bank *v.* Avery, 7 Id. 255.
Com. *v.* R. R. Co., 24 Pa. 159.
Vollmer's Appeal, 61 Id. 118.
Milne's Appeal, 81 Id. 54.

November 12, 1894. MCCOLLUM, J. This case turns on the construction of the reservation in the deed from French to Hildeburn. The appellee has succeeded to the rights of the grantee in that deed and the appellant to the rights of the grantor. In construing a deed it is proper and sometimes necessary to consider the circumstances under which it was made for the purpose of ascertaining the intention of the parties: Cox *v.* Freedley, 33 Pa. 124, and Miner's Appeal, 61 Pa. 283. In delivering the opinion of this Court in Lacy *v.* Green, 84 Pa. 514, WOODWARD, J., said: "Where the meaning of an agreement is doubtful its terms are to be considered in the light thrown on them by proved or admitted illustrative facts. The situation in which the parties stand, the necessities for which they would naturally provide, the conveniences they would probably seek to secure, and the circumstances and relations of the property in regard to which they have negotiated, are all elements in the interpretation of an ambiguous contract." That was a case which involved the construction of a reservation in a deed and the real question in it was whether the reservation was broad enough to allow the grantor to pile his lumber for the purpose of rafting it on a portion of the land he conveyed to the grantee. The Court below, being of opinion that the case was one in which the reservation should be construed most strongly against the grantor, held that it was not, but this Court reversed the judgment on the ground that the language of the reservation construed in the light of the surrounding circumstances showed it was the manifest intention of the parties that the grantor should have the privilege of piling his lumber on the grantee's land for the purpose stated. It is evident that in Lacy *v.* Green, *supra*, the Court below misapplied the rule on which it based its decision because the language of the reservation construed with regard to the facts and circumstances under which it was made showed a clear intention of the parties in accord with the grantor's claim, and the rule that the provisions of a deed are to be construed most strongly against the grantor is never available to defeat an intention so manifested.

In the case before us the grantor reserved the right "to build over and above" the narrow strip or alley "in like manner as the same is now done." It will be noticed that the reservation contemplated a building by the grantor "over and above" the alley and not a mere continuance by him of the structures then erected over it. But it is contended by the appellee that the words "in like manner as the same is now done," restrict the grantor and his assigns to the erection of buildings over it of the same height as those existing at the time of the reservation, whilst it is claimed by the appellant that the proper office of these words is to secure to the grantee an alley of the same width and height as the one then in use. The "proved or admitted illustrative facts" in the case are that when French conveyed to Hildeburn the narrow strip was built over its entire length and constituted a covered private way from the Locust street property to Latimer street. The building over the way from Latimer street a distance of eight feet was a mere platform, the top of which was twelve feet and six inches above the ground and the building over the balance of it was a dwelling nineteen feet and eight inches higher than the platform or thirty-two feet above the ground. According to the appellee's construction of the reservation the appellant cannot build above the platform to the height of the building, at the northern end of it, nor raise the latter above its present height, although it must be conceded that he may raise that portion of his building which abuts on the Locust street property for thirteen feet nine inches to any height he pleases. The absurd results of such a construction naturally suggest that it is unsound and not in harmony with the intention of the parties. It is a construction which materially detracts from the convenience and value of the appellant's property and adds nothing to the convenience or value of the appellee's. What possible use or benefit can the latter derive from a construction of the reservation which keeps open for all time the narrow space above the platform from Latimer street to the appellant's dwelling which extends to the northern end of the alley? But the learned master thought it was of no consequence in this issue whether the building which the appellant proposed to erect would benefit or injure the property of the appellee. This is true if his construction of the reservation is sound. The right of the appellant is such as the reservation

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gives him and it cannot be enlarged or abridged by showing that his action under color of it would or would not result in injury to the appellee's property. It must be remembered, however, that the reservation must be interpreted in the light of the apparent object or purpose of the parties, and of the conditions existing when it was made. If the master's view, that the reservation relates to the height as well as to the point and manner of the location of the building above the alley, prevails, the appellant must build, if at all, to the height of the old structures. He cannot build above or below that height without disregarding the terms of the reservation as construed in the Court below. We cannot find in the reservation in question any warrant for a construction which would accomplish the results to which we have referred. Moreover we think that the language of the reservation does not authorize such a construction when it is considered in the light of the facts and circumstances existing at the time of the sale and conveyance to Hildeburn. The manifest purpose of the parties in connection with the grant and the building right reserved was to secure to the grantee the use and benefit of the way as it then existed and the words "in like manner as the same is now done" refer to the point and manner of the location of the structures above it. In accordance with these views we sustain the second, third and fourth specifications of error. We do not consider it necessary in the view we have taken of the case to notice in detail the other specifications.

Decree reversed and bill dismissed at the cost of the appellee.

W. C. S.

Jan. '94, 257. March 23, 1894.

In re Assigned Estate of Charles Weinmann & Co.

Lea's Appeal.

Assignment for benefit of creditors—Landlord and tenant—Assignee—Rent accruing after assignment—When assignee not liable for same.

Under a deed of assignment for the benefit of creditors none but the then existing creditors of the assignee acquire an equitable interest in the assigned estate.

A landlord is not entitled to recover a dividend out of an assigned insolvent estate, upon a claim for rent accrued subsequent to the assignment and after the occupancy of the premises by the assignee had ceased.

The mere acceptance of the trust by an assignee for the benefit of creditors is not an acceptance of the lease so as to make him liable for subsequently accruing rent.

When a landlord seeks to enforce a claim based on an alleged election to hold the lease for the benefit and at the expense of the estate, it is incumbent upon him to prove by clear and satisfactory evidence an express agreement by the assignee to so hold it, or conduct on the part of the latter which necessarily implied that he had elected so to do.

The mere fact that the assignee held the bare possession of the premises for a brief period for the purpose of disposing of the merchandise of the assigned estate and paid rent for that period does not warrant the inference of an intent to accept the lease.

Appeal of Henry C. Lea from the decree of the Common Pleas No. 1, of Philadelphia County, dismissing his exceptions to the report of Charles N. Mann, Esq., auditor, in the matter of the assigned estate of Charles Weinmann & Co.

The auditor found, *inter alia*, the following facts:—

"The assignors, at the time of the making the assignment, were extensively engaged in the retail furniture business at Nos. 1022 and 1024 Market street, and at the time of the assignment a considerable amount of stock and outstanding accounts were on hand.

"The assignee, for the purpose of realizing as much as possible for the creditors, continued to carry on the business, as he found it, for a period of about two months, and then disposed of the stock still remaining on hand at public sale, and during the temporary continuance of the business as aforesaid the assignee made purchases from time to time of such articles as were necessary, in order to advantageously dispose of the stock on hand. . . . . The claim of Mr. Lea is for rent of premises Nos. 1022 and 1024 Market street, under leases with the assignors, aggregating $13,916.66.

"The lease of premises No. 1024 Market street was for the term of five years, commencing April 1, 1891, at an annual rental of $9,000, payable monthly, and the lease of No. 1022 Market street was for four years and seven months, commencing September 1, 1891, at an annual rental of $5,000, payable monthly in advance. The assignee, as hereinbefore stated, carried on the business of the assignors for the purpose of the trust for a short period of the time, and during his occupancy of the premises he paid the rent, and no claim is made until the occupation of the assignee of the premises in question had ceased.

"During the month of January the assignee ceased to occupy premises No. 1022 Market street, but still continued to occupy premises No. 1024 and paid the rent therefor.

"The claim as made is for premises No. 1022 Market street from January 1, 1892, up to February 1, 1893, and for No. 1024 Market street from February 1, 1892, to February 1, 1893."

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The auditor declined to allow this claim to share in the distribution of the funds of the assigned estate.

To this report counsel for Lea filed the following exceptions:—

"1. Because the learned auditor reports that the assignee paid the rent of the premises Nos. 1022 and 1024 Market street, respectively, during his occupancy, and no claim is made until the occupation of the assignee of the premises in question had ceased.

"2. Because the learned auditor reports that during the month of January, 1892, the assignee ceased to occupy premises No. 1022 Market street.

"3. Because he does not distinctly report that the occupation of the assignee of said demised premises ceased only in the sense that he did not physically use them; that he offered to surrender them to the landlord, this exceptant, and that a surrender was refused, and that possession was never delivered to any other person or persons during the time for which the present claim is made, except by the subletting of a portion of one of the two premises to one Mitchell, by agreement that it should be without prejudice to any rights or claims; and that the lease and term were not otherwise assigned to or vested in any one except said assignee during said period.

"4. Because, in reporting that other leases were executed by this exceptant for same premises from February 1, 1893, he does not also report that the new tenants were produced and offered to exceptant by Mr. Hecht, a real estate agent having his office with the counsel for the assignee; and that said new leases were executed with the assent and concurrence of the assignee.

"5. Because he does not distinctly report, in terms, that no rent has been paid for the premises in question, or either of them, for the period for which this claim is made, except the sum of $500 paid by one Mitchell, a sub-tenant, under an agreement in evidence, by which agreement said payment was received through an intermediate agent without prejudice to the rights or claims of either party.

"6. Because the learned auditor, during the examination of the assignee as a witness, excluded a question asked by this exceptant's counsel, as follows: 'What effort did you make in any other quarter to get rid of the stores?' The purpose of the proposed testimony being to show continued acts of ownership by the assignee.

"7. Because the learned auditor does not report as requested by this exceptant's counsel in his second point, as follows: '2. Some time after entering into possession thereof he offered to the landlord, this claimant, to surrender the same, but the surrender was not accepted.'

"8. Because the learned auditor does not report as requested by this exceptant's counsel in his third point, as follows:—

"'3. The lease and term and possession of the demised premises were not transferred to any other person until the final adjustment recently, except by the lease made to one Mitchell, which was made without prejudice,' etc.

"9. Because the learned auditor does not report as requested by this exceptant's counsel in his fifth point as follows:—

"'5. The assignee having accepted possession of the demised premises for the assigned estate in his charge, that estate and its assets became thereby liable for the accruing rent, either for its payment in full, or, at the least, for the payment thereof proportionately with other creditors."

"10. Because the learned auditor does not report as requested by this exceptant's counsel in his sixth point, as follows:—

"'6. Apart from the question of acceptance of possession, the assigned estate is liable for the accruing rent until the final surrender, by virtue of the covenants of the assignors; such liability being either for the rent in full, or, at the least, for the proportion thereof with other creditors.'

"11. Because the learned auditor does not report as requested by this exceptant's counsel in his seventh point, as follows:—

"'7. If it be decided that there can be no claim for rent, by the name of rent, a claim may be allowed for damages accruing to the landlord by having the property left idle and unproductive, and the claim thus made should now be allowed.'

"12. Because the learned auditor awards nothing to this exceptant on his said claim."

The Court, BREGY, J., after argument, entered the following decree:—

"December 18, 1893. Exceptions dismissed and report confirmed."

Whereupon this appeal was taken, and the dismissal of the exceptions assigned as error.

J. Howard Gendell, for appellant.

The assigned estate is liable because the acceptance of the trust was an acceptance of the lease and demised premises. The original tenant is not relieved by his assignment, and his assignee is liable by reason of his privity of estate.

Woodfall's Landlord & Tenant, pp. 79, 306.
Kunkle *v.* Wynick, 1 Dal. 305.
Ghegan *v.* Young, 23 Pa. 18.
Frank *v.* Maguire, 42 Id. 77.
Smith's Landlord & Tenant, *302.

If the assignee of a lease elects to accept the interest of the assignor and to enter under it he becomes bound.

Dorrance *v.* Jones, 27 Ala. 630.
Horwitz *v.* Davis, 16 Md. 313.

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Boyce *et al.* *v.* Bakewell *et al.*, 37 Mo. 492.
Ecker *v.* Chicago, B. & Q. R. R. Co., 8 Id. 223.
Morton *v.* Pinckney, 8 Bosw. (N. Y.), 135.
Young *v.* Peyser, 3 Id. 208.
Astor *v.* Lent, 6 Id. 612.

Taking possession of the premises for the purpose of selling the goods assigned, and actually selling them thereon, amounts in law to such an acceptance, and binds the assignee accordingly.

Dorrance *v.* Jones, 27 Ala. 630, citing—
Welch *v.* Myers, 4 Camp. 368.
Clark *v.* Hume, R. & M. 207.
Powers *v.* Carpenter, 15 N. Y. Weekly Dig. 155.
Weil *v.* McDonald, 21 Id. 440.
Price's Appeal, 116 Pa. 410.
Newkumet *v.* Davidson, 13 WEEKLY NOTES, 10.
White *v.* Thomas, 75 Mo. 454.

The landlord is a creditor within the terms of the assignment.

There was an express covenant to pay from time to time. The obligation was absolute at the time of the assignment.

It has been repeatedly held that obligations not due at the time of the assignment, but maturing afterwards, are payable from the estate.

Mellon's Appeal, 32 Pa. 121.
Patten's Appeal, 45 Id. 151.

Emanuel Furth (*Jacob Singer* with him), for appellee.

A claim for rent to accrue in the future, by virtue of a present demise, has never been regarded in Pennsylvania as a debt in the ordinary acceptance of the term.

Bosler *v.* Kuhn, 8 W. & S. 186.
Assigned Estate of Snyder *et al.*, 8 Phila. 303.
Sweatman's Appeal, 150 Pa. 372.

The burden of proof that the assignee elected to retain the lease as a part of the assigned estate is upon the appellant.

Pratt *v.* Levan, 1 Miles, 358.

October 22, 1894. McCOLLUM, J. The principal question raised by this appeal is whether on the distribution of an estate assigned by a debtor for the benefit of his creditors, rent accruing after the assignment is on the footing of debts existing at the time of it. It is well settled in Pennsylvania that by the assignment the creditors become equitable owners of the property embraced in it to the extent of the assignor's indebtedness to them. Their rights are fixed as of the date of the assignment and their ownership of the property is in the proportion that their respective debts bear to the whole indebtedness: Miller's Appeal, 35 Pa. 481; Brough's Estate, 71 Id. 460; Dean's Appeal, 98 Id. 101, and Jordan's Appeal, 107 Id. 75. That rent not accrued or demandable at the time of the assignment is not a debt which is entitled to participate in the distribution of the trust estate appears to be equally well settled: Bosler *v.* Kuhn, 8 W. & S. 186, and Sweatman's Appeal, 150 Pa. 369. In the case last cited the learned Court below held that rent accruing subsequent to the assignment was not payable out of the trust estate, and this Court referring to the decision, said of it: "If the appellant's claim was for rent to fall due in the future the action of the Court below could not be successfully attacked." *In re* Assigned Estate of Snyder and Cadwallader, 8 Phila. 303, it was plainly ruled that rent which accrued after the assignment was not a debt for which the assigned estate was liable. It is true that was a Common Pleas decision acquiesced in by the litigants and their counsel, and it is principally valuable as showing the judicial and professional thought on the subject at that time. No decision of this Court at variance with these principles has been cited, and our research in this line has not resulted in the discovery of one. In fact they are not in conflict with the citations made by the learned counsel for the appellant from the text books and reports. The most of these citations are claimed by him as affording support to the proposition that the assignee elected to accept the lease and thereby bound the estate for the rents accruing during the term. It being clear under the cases we have referred to that without an acceptance of the lease by the assignee the assigned estate was not liable for subsequently accruing rents, it remains to inquire and consider whether the estate became bound for such rent by any act or agreement of the assignee in respect to the demised premises. It should be borne in mind in this connection that any action by the assignee which rendered the estate liable for rent to fall due in the future would introduce the lessor as an equitable owner of the assigned property and thus place him in a position in respect to it which he did not acquire by virtue of the deed of trust. We have already seen that under and by force of this deed none but the then existing creditors of the assignor acquired an equitable ownership of or interest in the assigned estate, and that the lessor as to subsequently accruing rent was not such a creditor. If it be conceded that the assignee by virtue of his appointment had the power to accomplish such a result, it will be admitted, we think, that the burden of showing that he did so was on the lessor who claimed rights which the deed did not confer upon him. In other words, as the lessor was seeking to enforce a claim based on an alleged election by the assignee to hold the lease for the benefit and at the expense of the estate it was incumbent on him to prove by clear and satisfactory evidence an express agreement by the assignee to so hold it, or conduct on the part of the latter from

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which there was a plain and necessary implication that he had elected to do so. It is not pretended that there was an express agreement by the assignee in this case to accept the lease as an asset of the estate and thereby bind the latter for the subsequently accruing rent. Aside from the bare possession of the leased premises, a comparatively brief time for the purpose of disposing of the stock of merchandise which constituted a large share of the assigned estate and was in the leased stores at the time of the assignment, there was absolutely nothing to indicate an acceptance of the lease by the assignee. For the time he occupied the premises for this purpose he paid the rent and the payment so made was in the nature of expenses incurred in the administration of the trust, and he was entitled to credit for it as such in his account. The nature and purpose of this possession were known to the lessor, and it negatived rather than warranted an inference of an intention to charge the estate with the rent which he now seeks to recover from the fund appropriated by the assignment to the claims of the then existing creditors of the assignor. It certainly was not sufficient to support the appellant's present contention.

The specifications of error are overruled.

Decree affirmed and appeal dismissed at the cost of the appellant. W. M. S. Jr.

July, '93, 48. January 30, 1894.

Woods to Use, etc., v. Irwin, Executrix.

Trustees and their counsel cannot speculate in claims against the trust estate.

A person charged with the duty of administering an estate cannot speculate either directly or indirectly in claims against the same, and if he buys them for less than their face value he can recover no more than the amount actually paid.

The same rule applies to the counsel for the estate.

Appeal of Hannah Woods, to the use of J. W. Irwin and Milton Stewart, trustee, from the decree of the Common Pleas of Montgomery County, vacating a judgment confessed in their favor by N. A. Irwin, executrix of the estate of Ninian Irwin, upon petition of creditors of said estate.

The facts are sufficiently stated in the opinion of the Supreme Court, *infra*.

The Court of Common Pleas, WEAND, J., delivering the opinion, entered the following decree:—

"And now April 13, 1893, it is ordered and decreed that the judgment, Woods to use, *v.* Irwin, executrix, etc., entered in judgment docket, L. 1, P. 127, Nov. 26, 1886, is declared null and void for all amount over and above a dividend amounting to $1000 with interest from Feb. 9, 1881, to be realized thereon and is not to be enforced or considered binding against the estate of William Irwin, deceased, after the dividend on said judgment shall pay plaintiff the said sum of $1000 with interest as aforesaid."

The plaintiff appealed, assigning for error, *inter alia*, this decree.

Montgomery Evans, for appellant.

The principle of prohibiting one in a trust relation from buying claims against the trust estate does not apply where no advantage is gained by reason of the trust relation.

Chorpenning's Appeal, 32 Pa. 315.
Hammond's Appeal, 123 Id. 503.

The purchase by the nephews was perfectly legal and after the purchase they could do as they pleased with the claim.

The declaration of the nephews at the time of purchase was simply of an intended gift and was revocable.

Lyon *v.* Marclay, 1 Watts, 271.
Thornton on Gifts, sec. 114.
Houser *v.* Singiser, 1 Leg. Ch., 145.
Sessions *v.* Moseley, 4 Cush., 87.
Smith *v.* Ferguson, 90 Ind., 229.
Kennedy *v.* Ware, 1 Pa. 445.
Campbell's Est., 7 Id. 100.
Zimmerman *v.* Streeper, 75 Id. 147.
Scott *v.* Lauman, 104 Id. 593.
Bond *v.* Bunting, 78 Id. 210.
Walsh's Appeal, 122 Id. 177.

Charles Hunsicker and *George W. Rogers* (*Henry Freedley* with them), for appellees.

The doctrine that a trustee cannot gain profit by purchasing a claim against an estate, that the instant he acquires it, it is paid and satisfied for all excess over what is actually paid in the purchase, is so old, and so well settled, that it seems supererogation to cite authorities to sustain it, and we cite them only for the convenience of the Court.

Ex parte Bennett, 10 Ves. 389, 400.
Kerch *v.* Sandford, Wh. & Tud. Ldg. Cases, Eq., vol. 1, p. 94.
Hill *v.* Frazier, 22 Pa. 324.
Saeger *v.* Wilson, 4 W. & S. 504.
Everhart *v.* Searle, 71 Pa. 261.
Heager's Appeal, 15 S. & R. 65.
Fisher's Appeal, 34 Pa. 31.
Keller *v.* Lieb, 1 P. & W. 223.
Weaver *v.* Wible, 25 Pa. 270
In re Cake's Est., 27 Atlant. Rep. 773.

But the doctrine is not limited, as the appellants contend. It extends to every case where the trustee buys for himself, for his own benefit, with his own money or the money of another, and affects it with the same trust in the hands even of a stranger if the stranger employ the fiduciary as his agent in the purchase.

Ex parte Bennett, 10 Ves. 381.
Lazarus *v.* Bryson, 3 Binn. 63.

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Wescott *v.* Tyson, 38 Pa. 389.
In re Cake's Est., *supra.*

October 1, 1894. McCollum, J. At the instance of the attorney of the estate the Woods claim against it was purchased by the nephews of the executrix for the sum of one thousand dollars, and in an action upon the claim in their names as trustees, she, acting under his advice, confessed a judgment against the estate for $15,525 and costs. The claim was purchased Feb. 9, 1881, and the judgment was entered November 26, 1886. The negotiations for the purchase were conducted by the attorney who recommended it; the assignment of the claim was delivered to him by the sellers, who received his check in payment of the sum for which they sold it, and he immediately made a memorandum on the back of the assignment showing how it was acquired and under what instructions he held it. These instructions were to collect the claim, account to the purchasers for the money they invested in it, with interest thereon, and to pay the balance to the executrix. When the creditors of the estate attacked the judgment entered on the claim and succeeded in the lower Court in setting it aside he advised the surviving plaintiff and trustee therein to appeal to this Court, but the latter declined to do so until indemnity was furnished against all costs and expenses for such appeal. It seems from this that he was anxious to maintain the judgment against the estate. A singular fact in connection with the transaction is that he carefully concealed it from the executrix for whose benefit it was made. For ten years or more the trust feature of it was known only to him and the purchasers of the claim. The silence of the parties to the transaction in reference to the trust created by it is suggestive of a consciousness, or at least, an apprehension on their part that the law would not enforce the trust against the creditors of the estate. We think the evidence in the case fairly establishes the existence of the facts recited, and that it fully justifies the conclusion that the nephews of the executrix were persuaded by the attorney of the estate to purchase the Woods claim "with the understanding, intention and instructions" that he should collect it and pay to her whatever was realized upon it above the cost of acquiring it. Such is the conclusion reached by the learned Judge of the Court below upon a careful consideration of all the testimony, and we see no reason to doubt the correctness of it. The controlling question arising from and founded upon it is whether the trust in favor of the executrix is enforceable against the creditors of the insolvent estate. The issue is in fact, though not in form, between them. The purchasers of the claim are not now demanding, and they have never demanded, anything from the estate on account of it beyond the amount they paid for it together with interest thereon. The transaction evidenced by the assignment from one of them to Geo. W. Irwin was made to gratify the desire of the attorney of the estate to sustain the judgment, and it does not affect in any degree the rights of the real litigants, nor was it intended to do so. The law does not countenance speculation in claims against an estate by a person charged with the duty of administering it. He is not allowed to purchase such claims for his own profit. If he buys them for less than their face value he can only recover from the estate the amount he paid for them. If, in this case, the executrix had bought the Woods claim with her own money for one thousand dollars, that would be all she could recover from the estate on account of it. The same rule applies to her attorney, who was her legal adviser in the administration of the estate and who did most of the work pertaining to it. If she had induced her nephews to buy the claim, as they did, for her benefit, would she have been entitled to the profits, if any, derived from the purchase? If so she would have acquired by it an interest in the claim adverse to the estate she represented, and accomplished by indirection what she could not do directly and what the law does not tolerate. The creation of the trust in her favor was due to the efforts of her counsel and the parties to the transaction did not inform her that she was the beneficiary in it. But we think these facts do not give additional force to her contention or place her on better ground in this litigation than she would have occupied if she had done for herself what her counsel did for her. To this point the language of the learned Judge of the Court below is so pertinent that we quote it. He said: "It must not be forgotten that this whole business was managed by the counsel for Mrs. Irwin and the estate. It was his duty to protect the estate as much as it was the duty of the executrix, and his knowledge was her knowledge. As he could acquire no interest for himself antagonistic to the estate, neither could he do so for his client the executrix. She could not entrust him with the whole management of the estate and thus allow him to secure for herself an advantage which she was not permitted to do herself." Without further elaboration of the subject we conclude that there is no error in the rulings, instructions, or decree complained of. The latter is in conformity with well established principles recognized in the text books and enforced in the cases cited in the opinion of the Court below and in the briefs of the appellees.

The specifications of error are overruled.

Judgment affirmed and appeal dismissed at the cost of the appellant. W. M. S., Jr.

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Jan., '94, 299. February 16, 1894.

Mintzer's Appeal.

Guardian—Revocation of appointment—Costs, by whom paid.

The Orphans' Court of Philadelphia County appointed A. the guardian of the person, and B. the guardian of the estate, of a minor. Subsequently C. was appointed guardian of said minor by the Orphans' Court of Delaware County. C. presented a petition to the Orphans' Court of Philadelphia County, asserting the jurisdiction of the Court appointing him, and denying that of the Philadelphia Court, which after full hearing decided in favor of its jurisdiction; this decision was not appealed from. A. and B. then presented a petition to the Delaware County Orphans' Court to revoke the appointment of C. The Court made the decree prayed but on terms that A. and B. pay to C. the costs of the proceedings before it and those incurred in the proceeding in the Philadelphia Court, or indemnify C. against the same.

Held, that the circumstances did not justify the imposition of costs upon the successful contestees, or warrant the unsuccessful contestant in claiming to be indemnified against the payment thereof, and that the Court had therefore no right to append terms to its decree revoking C.'s appointment.

Appeal of Edward L. Mintzer, Sr., guardian of the person, and Francis H. Thole, guardian of the estate, of Walter A. Mintzer, a minor, from the definitive decree of the Orphans' Court of Delaware County, entered November 9, 1893, vacating the appointment of Horace P. Green, to be guardian of the person and estate of said minor, upon payment of costs, etc., by the appellants.

The facts of this case are fully stated in the opinion of the Supreme Court, *infra*.

William W. Ker and *Garrett E. Smedley*, for appellants.

The appellee, Horace P. Green, when he accepted the appointment made by the Orphans' Court of Delaware County, well knew that the Orphans' Court of Philadelphia County had assumed jurisdiction and had appointed guardians for the person and estate of the minor. He was not an innocent person, who assumed the position without knowledge of the fact that his appointment would be questioned or that his right to hold the position was disputed. By filing his petition in the Orphans' Court of Philadelphia County, he submitted himself to the jurisdiction of that Court, and the judgment of that Court was conclusive upon him and upon the Orphans' Court of Delaware County. When the appellants filed their petition in the Orphans' Court of Delaware County, for the revocation of the appointment of Horace P. Green, it was based upon the judgment and decree of the Orphans' Court of Philadelphia County, a Court of competent jurisdiction, and the appellee was estopped from disputing its legality in the subsequent proceeding in the Orphans' Court of Delaware County, and the Orphans' Court of Delaware County was bound to accept and regard it. The petition of the appellants was that the Orphans' Court of Delaware County would revoke the appointment of Horace P. Green. They did not ask for an account, or for the filing or adjudication of an account, and it is respectfully submitted that the account set forth in the answer of Horace P. Green was no material answer to their petition, and should not have been accepted as part of the answer. The Orphans' Court of Delaware County had no control over the costs in the Court of Philadelphia County, and the decree, if carried into effect, compels the appellants to become personally responsible for the costs. These are placed upon the appellants and not upon the estate.

V. Gilpin Robinson and *A. Lewis Smith*, for appellees.

The question of costs in all proceedings in the Orphans' Court as well as in all equitable proceedings is one entirely discretionary with the Court.

Stokely's Estate, 19 Pa. 476.
Gyger's Appeal, 62 Pa. 73.

The appellants do not dispute the right of the Court below to dispose of the question of costs in the present proceeding, but claim that it had no control over the costs incurred in Philadelphia. By a careful reading of the decree it will be observed that the Court below does not attempt to pass upon the question as to who shall pay or be liable for the costs incurred in Philadelphia, but simply decrees that the appointment of Horace P. Green shall not stand revoked until they are paid by the petitioners, or the appellee is indemnified against them. It was apparent to the Court below, as it must be apparent to this Court, that the position of the appellants, contending that these costs should be paid by the appellee personally, was grossly unjust and inequitable, and that he should be protected from their payment as far as possible by the decree of the Court. It is not an usurpation of the right of the Orphans' Court of Philadelphia to pass upon the question, but is simply a declaration by the Orphans' Court of Delaware County that it will not revoke the appointment made by it, until its appointee is at least indemnified against this impending liability. One acting in a fiduciary capacity by the appointment of the Court and being authorized to act, all expenses incurred by him in the discharge of the trust thus imposed are properly allowable to him. The decree of the Court below is in substance that Mr. Green, who by its appointment accepted this trust, is to be paid and allowed out of the funds received by him as guardian, his

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ordinary expenses. He occupies the same position that a guardian would who applied to be discharged and for the appointment of some one else. All acts done by him up to the time of his discharge, in good faith, are approved by the Court, and he is to be allowed the proper and reasonable expenses incident thereto.

October 1, 1894. STERRETT, C. J. In March, 1893, the Orphans' Court of Philadelphia appointed one of the appellants, Edward L. Mintzer, Sr., guardian of the person, and Francis H. Thole, the other appellant, guardian of the estate, of Walter A. Mintzer, a minor, under the age of fourteen years. As directed by the Court, said guardian of the estate gave bond with security in the sum of sixty thousand dollars. A few days thereafter, the appellee, Horace P. Green, was appointed guardian of the person and estate of same minor by the Orphans' Court of Delaware County, and thereupon presented his petition to the Orphans' Court of Philadelphia, denying the authority of said Court to make the first mentioned appointments. Testimony was taken, and the matter was so proceeded in that the jurisdiction of the Orphans' Court of Philadelphia in the premises was fully sustained. Appellants then petitioned the Orphans' Court of Delaware County to revoke the appointment of appellee, as guardian, etc. That application resulted in the following decree of November 9, 1893: "that the appointment of the respondent, Horace P. Green, be revoked upon the petitioners paying the costs of this proceeding and of the proceedings in the Orphans' Court of Philadelphia for the revocation of the appointment of the petitioners, or indemnifying him against the same, and that thereupon his account appended to the answer be confirmed, and he be authorized to pay and transfer to the petitioner, Francis H. Thole, the balance in his hands."

While appellants have assigned error to the entire decree, they do not complain of the first clause thereof, revoking appellee's appointment. Their objections are restricted to the terms and conditions annexed to said revocation, viz: the payment of all costs, including the costs of appellee's fruitless litigation in the Orphans' Court of Philadelphia, or his indemnification against the payment of the latter, and the confirmation of the account which he voluntarily appended to his answer in this proceeding, and in which he claims credit for $150 counsel fees, $100 to his surety as guardian, etc.

There appears to be nothing in the facts or circumstances of the case, as disclosed by the record, to justify either of said terms and conditions. The appellants were entitled to an unqualified revocation of appellee's appointment. Before the latter undertook to act he was fully aware that the Orphans' Court of Philadelphia, upon the petition of the minor's paternal grandfather, had assumed jurisdiction and appointed guardians of his person and estate respectively. With full knowledge of these facts, he asserted jurisdiction of the Court that appointed him and denied the jurisdiction of the Orphans' Court of Philadelphia. By presenting his petition to that Court, he submitted himself to its jurisdiction; and for the purpose of this case the decree of that Court, unappealed from, must be regarded as conclusive of the question of jurisdiction.

We are not aware of any rule that in such circumstances would justify the imposition of costs upon successful contestees, or warrant the unsuccessful contestant in claiming to be indemnified against the payment thereof. As to the costs incurred in the Orphans' Court of Philadelphia, the jurisdiction of that Court is primarily exclusive. We are therefore of opinion that all the terms and conditions annexed to the decree revoking appellee's appointment were unauthorized.

So much of the decree as revoked and annuls the appointment of appellee, as guardian of the person and estate of said minor, is affirmed, and the residue of said decree is reversed and set aside, with costs to be paid by the appellee.

W. C. S.

Jan., '94, 195. March 21, 1894.

Lovegrove v. Christman.

Practice—Pleading—Rule of Court of Common Pleas of Philadelphia XXXI. secs. 126 c., 131.

The facts that through the delay on the part of the plaintiff in the fulfillment of his part of a contract, the defendant suffered loss and that plaintiff promised to make good such loss cannot be given in evidence in an action on the contract, under the plea of set-off, non-assumpsit or payment unless notice has been given, as required by rule of Court, of the intention to introduce such facts as a defence.

The introduction of equitable and other defences not admissible at common law, under the pleas of set-off, payment and non-assumpsit, is provided for in Philadelphia by rule of Court XXXI. secs. 126 c., 131, requiring ten days notice of intention to introduce such defences.

Appeal of J. W. Christman, defendant, from the judgment of the Common Pleas No. 1, of Philadelphia County, in an action of assumpsit brought by Thomas G. Lovegrove, trading as Lovegrove & Co.

This was an action brought to recover the price of a boiler furnished by plaintiff to defend-

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ant. The pleas were non-assumpsit, payment and set-off. There was no notice of special matter. On the trial the plaintiff proved the following correspondence constituting the contract between the parties:

PHILADELPHIA, August 21, 1890.

J. W. Christman, Esq.,
No. 2325 N. Broad Street, Philadelphia, Pa.

DEAR SIR:—

We propose to furnish and deliver at 2924 Park Avenue one sixty (60) horizontal return tubular boiler of the following dimensions . . . . for the sum of Seven hundred and seventy-six dollars and thirty cents ($776.30); stack to be painted. The boiler is to be complete with all fixtures that are required; no injector included, but all castings that are required to set boiler; no top covering bars. We will allow you for your boiler, engine, stack and all fixtures that are now with it, Two hundred and seventy-five dollars ($275.00); to remove same at our expense on or before August 25th. Boiler to be shipped from shop in fifteen (15) days from this date. Fire front to be shipped August 25th. Drawings to be furnished to set boiler.

Yours very truly,
LOVEGROVE & Co.

Lovegrove & Co.,

GENTLEMEN:—I accept your proposition to build boiler of this date; same to be shipped in fifteen days and delivered not later than seventeen days, for which I agree to pay $776.30 as per your offer, at thirty days, or if note is given, interest at 6 per cent.

Yours, etc.,
J. W. CHRISTMAN.

He also gave evidence of the delivery of the boiler on September 29. The defendant testified that early in August, 1890, one Barber, agreed to rent from the defendant the property 2924 Park avenue, which was a planing mill, and also a property in the rear thereof which was used as a storage mill and fronted on Broad street, if defendant would furnish a boiler within fifteen days; that in consequence thereof he went to the plaintiff and made the contract proved by him, telling plaintiff that if he could get a boiler delivered on his premises within seventeen days he could rent his property for five years, and that time was important, as without the boiler he could not rent the premises; that in consequence of this contract the defendant entered into a lease with Barber for the two properties which were to be used as one; that in consequence of the delay in furnishing the boiler Barber threw up the lease of the storage mill, whereby the defendant lost three months rent before he could get another tenant and also one month's rent of the Park avenue property; that on the non-arrival of the boiler at the agreed time, Barber notified defendant that he would hold him for loss of rent and damages; that defendant went to plaintiff and told him he would not take the boiler and asked him to rescind the contract, whereupon plaintiff persuaded defendant not to rescind and defendant told plaintiff if he would have the boiler there within two weeks from that time, and would agree to pay all damages, such as loss of rent, etc., he would consent to take the boiler; that plaintiff then expressly agreed to pay defendant what he should lose as rent, and that on those conditions defendant agreed to take the boiler; that the boiler did not come for about three weeks after that; that plaintiff knew what Barber claimed and what defendant was going to lose at that time.

On motion the Court struck out all the above testimony except that relating to the Park avenue building on the ground that no notice had been given.

(First assignment of error).

Counsel for defendant propounded the following questions to the defendant while on the stand:

Q. At the time you made this contract for the purchase of the boiler, was or was there not anything said about the leasing of the property fronting on Broad street, which adjoins the Park avenue property?

Q. What, if anything, was said at the time this contract was made in reference to the leasing and usage of the property on Broad street in connection with the property on Park avenue?

Q. Was or was not the leasing of the property on Broad street to Mr. Barber induced by the fact that Mr. Lovegrove had agreed to furnish the boiler at the time specified in the contract, so that Mr. Barber could use the two properties together?

All of which were objected to and were ruled out.

(Second, third and fourth asssignments of error).

Verdict for plaintiff $571.83 and judgment thereon.

The defendant took this appeal, and filed the assignments of error indicated above.

A. E. Stockwell and *M. Hampton Todd*, for appellant.

Under the plea of non-assumpsit, the defendant was entitled to show what damages he had suffered from loss of rent of the property fronting on Broad street; for under the plea of non-assumpsit, the defendant puts the plaintiff upon proving his whole case, and entitles himself to give in evidence anything which shows that, at the time the action was commenced, the plaintiff *ex æquo et bono* ought not to recover.

Gaw *v.* Wolcott, 10 Pa. 43.
Scott *v.* Coal Co., 89 Id. 231.
Fisher *v.* Ball, 93 Id. 390.
Blessing *v.* Miller, 102 Id. 45.

The defendant had a right to rescind the contract, because the boiler was not delivered at the

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time agreed upon. Plaintiff urged him not to do this, and agreed, if he would still take the boiler, that he, plaintiff, would indemnify the defendant for whatever he should lose in the way of rent. And because of this agreement the defendant then agreed to take the boiler at the later day. Surely the renting of the property entered into the consideration of the contract for the boiler.

The testimony was admissible under the plea of payment, on plaintiff's express agreement to indemnify the defendant from the loss of rent, arising from his failure to deliver the boiler within the time agreed upon; in short, by his express agreement he has made it payment in this case, even if the defence were not admissible under the plea of non-assumpsit.

Bryson *v.* Ker, 4 S. & R., 308.
Covely *v.* Fox, 11 Pa. 171.
Waterman on Recoupment, secs. 458, 543.

Frank R. Shattuck, (*Alex. P. Colesberry* with him), for appellee.

The defence was purely equitable and there was no record notice of it, it therefore was not admissible under the plea of non-assumpsit without notice.

Taylor *v.* Coryell, 12 S. & R., 251.
Erwin *v.* Leibert, 5 W. & S. 105.

It was not admissible under the plea of payment, for without notice the door is closed upon every merely equitable consideration which falls short of technical payment.

Steiner *v.* Erie Dime Savings Bank, 98 Pa. 591.

The case is governed by rule of Court (of Philadelphia County) XXXI., §§ 126 c., 131.

October 22, 1894. McCollum, J. The single question presented by this appeal is whether the learned Court below erred in rejecting the defendant's evidence, and offers of evidence, that in consequence of the plaintiff's failure to deliver the boiler at the time stipulated in the contract he lost three months' rent of his building on Broad street. The ground on which the evidence was rejected was that it was inadmissible under the pleadings. The learned Judge thought and so held that in order to introduce an item of this character by way of set-off, recoupment or equitable defence, the plaintiff should have reasonable notice by plea or otherwise, of the defendant's intention to present it on the trial as a complete or partial answer to the action. The rule of Court in Philadelphia County applicable to this question, is as follows: "Any defence legal or equitable that might heretofore have been specially pleaded or given in evidence under equitable pleas, shall be admissible under the plea of the general issue, upon notice given at least ten days before the day set for trial. Such notice of special matters of defence shall contain a specific averment of facts sufficient to constitute a good legal or equitable defence. Copies of such notice shall be filed of record and also served on the plaintiff or his attorney at least ten days before the day set for trial. In default of such notice the defence shall be confined to matters strictly admissible under the plea filed." As the defendant conceded that his claim for rent was not admissible as a set-off we need not quote the portion of the rule which relates particularly to that subject. His contention is that it should have been allowed under the plea of non-assumpsit and payment. It is well settled that under the plea of payment alone the proof to support it must be confined to matters which were admissible at common law and which constitute technical payment. If equitable payment is alleged notice of the matters constituting it must be given. The defendant's rejected evidence was therefore clearly inadmissible under his plea of payment. Was it admissible under the plea of non-assumpsit? It related to a lease of the Broad street building to Barber after the contract in question was entered into, to the loss of that lease, the contents of it and to Barber's abandonment of it. Its purpose was to charge the plaintiff with the loss the defendant alleged he sustained by such abandonment, and to attribute the same to the plaintiff's alleged failure to deliver the boiler for use in another building belonging to the defendant on another street. That a defence of this nature falls within the rule we have quoted, we have no doubt. We think it was not admissible at common law under a plea of non-assumpsit, nor do we think it was so connected with the contract in suit as to warrant its admission under that plea, in the Courts of our State, without timely and adequate notice of it. It embraced a transaction between the defendant and a third person, to which the plaintiff was not a party and which he had no reason to anticipate as an element in the defence to his claim. Surely it would be inequitable to allow a defence of this nature to prevail without opportunity afforded the plaintiff to meet it. We think the learned Court did not err in rejecting defendant's evidence, and offers of evidence, embraced in the second specification of error.

Judgment affirmed.

H. B.

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Oct., '94, 17. October 9, 1894.

Wick China Co. v. Brown.

Equity— Practice—Injunction—Dissolving of when unwarranted—Unsworn answer.

Where the material averments of fact contained in the bill are sustained by the injunction affidavits and the answer is not sworn to, it is error to dissolve a preliminary injunction.

Appeal of Wick China Company, plaintiff, from the decree of the Common Pleas of Armstrong County, dissolving an injunction against W. K. Brown and others, defendants. The bill averred that the plaintiff was a corporation engaged in the manufacture of white granite ware, its works being located about one mile above Kittanning and employing generally about two hundred persons; that the defendants were members of a brotherhood known as Local Union No. 3; that plaintiff on August 9, 1893, ordered the clay department of its works to be closed, whereupon the kiln hands and other employés who were members of the Local Union No. 3, refused to work themselves or to permit others to work for the plaintiff; that since August 9, 1893, the defendant had conspired and contrived to prevent the plaintiff from employing workmen who were willing to work for plaintiff and had tried to drive away such workmen and injure the company's business; that they had endeavored to accomplish their purpose by threats, menaces and intimidation, and by gathering in crowds about the plaintiff's place of business, at the boarding places of the workmen and by following them to and from their work, stopping them on the highways, interfering with them in their work and holding them up to the contempt of the bystanders, that by such unlawful acts the plaintiff was deprived of the services of many who were willing to work for it, and had suffered great loss; the bill prayed that defendants be enjoined from interference with the plaintiff and its workmen and from following the latter to and from their work and from all threats, menace. intimidation, etc. The Court, RAYBURN, P. J., granted a preliminary injunction. The defendants filed an answer which was not sworn to and moved to dissolve the injunction. The injunction affidavits sustained the averments of the bill, the defendants' affidavits denied them. The Court dissolved the injunction, the plaintiff appealed.

Orr Buffington (*J. H. Painter* with him), for appellant.

The lower Court has vouchsafed no reason for dissolving the injunction. The defendants filed an answer but failed to be qualified. Their affidavits are not responsive. The plaintiff's affidavits are full and complete. We have come into this Court to ask that the same relief granted in the case of Murdock, Kerr & Co. *v.* Walker, 152 Pa. 596, be extended to us.

No counsel appeared contra.

October 22, 1894. STERRETT, C. J. The learned Court was clearly right in granting the preliminary injunction, but we find nothing in the record to justify the decree dissolving the same. The answer, signed by twenty-one of the twenty-seven defendants, does not appear to have been sworn to by any of them. Whether this was intentional or a mere oversight we are unable to say. In justice to the defendants, however, it is proper to add that in affidavits, made by nearly all of them, they deny certain threats and acts of violence charged in the bill. But, without commenting on the merits of the case, at this stage of the proceeding, it is sufficient to say that the material averments of fact contained in the bill, sustained as they are by the injunction affidavits, require the restoration and continuance of the preliminary injunction; and, if said averments are hereafter established by the proofs, the injunction should be made perpetual.

The decree of September 19, 1893, dissolving the preliminary injunction, theretofore granted, is reversed and set aside, with costs of this appeal to be paid by the defendants; and it is now adjudged and decreed that said preliminary injunction be reinstated and continued, and it is ordered that the record be remitted for further proceedings *secundum regula.*

W. C. S.

Jan., '94, 65. May 1, 1894.

Brotherton et al. v. Reynolds.

Findings of fact by master—Effect of—Misrepresentation—Fraud—Rescission of contract.

The finding of a master on questions of fact, approved by the Court below, will not be set aside in the Supreme Court except for clear error; mere conflict of testimony is not sufficient.

Stocker *v.* Hutter, 134 Pa. 19, followed.

Where the means of knowledge respecting matters alleged to have been falsely represented are equally open to purchaser and vendor, the former is charged with knowledge of all that by the use of such means he could have ascertained; but this rule is not applicable when a knowledge of the matter referred to was very difficult to obtain, and it appears that the vendor expressly planned to mislead the purchaser.

Appeal of T. J. Reynolds, defendant, from the decree of the Common Pleas of Warren

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County, in a suit in equity brought by Brotherton Bros. and F. E. Dewey.

The facts as found by the master, W. V. N. Yates, Esq., and confirmed by the Court, HENDERSON, P. J., and the decree of the Court, are fully set out in the opinion of the Supreme Court, *infra*.

W. M. Lindsey and *Charles W. Stone* (*J. O. Parmlee* with them), for appellant.

Having repeatedly gone upon the land, and had opportunity of inspecting the timber, the purchasers cannot set up the vendor's misrepresentations of the quantity and quality of the timber as a means of avoiding their contract.

Mahaffy *v.* Ferguson, 156 Pa. 156.
Smith *v.* Richards, 13 Peters, 42.
Slaughter *v.* Gerson, 13 Wallace, 383.
Farnsworth *v.* Duffner, 142 U. S., 47.
Shisler *v.* Baxter, 109 Pa. 443.
Wait on Fraudulent Conveyances, 504.

W. W. Wilbur, (*Wm. Schnur* with him), for appellees.

The Supreme Court will not reverse a master's findings of fact if they are based on evidence sufficient to submit to a jury.

Warner *v.* Hare, 154 Pa. 548.
Kimball's App., 155 Id. 112.
Potter's Appeal, 158 Id. 292.
Stocker *v.* Hutter, 134 Id. 23.
Weaver's App., 12 Atl. Rep. 312.

Where a sale is consummated by means of fraud, the vendee upon discovering the fraud, has a right to affirm or disaffirm the purchase.

Mahaffy *v.* Ferguson, 156 Pa. 156.

October 1, 1894. DEAN, J. The bill in this case averred that defendant, by false and fraudulent representations and devices, had induced the plaintiffs to contract with him for certain standing timber, and prayed for a rescission of the contract, an accounting for money paid, and a computation of damages. The defendant denied any false or fraudulent representation, and averred the contract was in all respects reasonble and fair, and made by plaintiffs with a full knowledge of all the material facts.

Reynolds, a resident of Rochester, New York, was the owner of 982 acres of timber land in Glade Township, Warren County, Pennsylvania; on this he had erected a saw-mill and other improvements, and was carrying on the manufacture of lumber.

While so engaged, on December 13, 1889, he entered into a written agreement with plaintiffs to lease to them the saw-mill and the other improvements on the land for the term of four years, with the standing timber thereon, they to saw the timber into lumber within that time, and deliver it to defendant on the cars at Warren for shipment to such consignees as he should direct; also, to manufacture and deliver the railroad ties thereon. A complete schedule of prices to be paid by defendant to plaintiffs for each of twenty-one kinds and quality of lumber on delivery was made part of the agreement. The payments for such lumber were to be credited by defendant to plaintiffs the 15th of each month for all deliveries made the previous month, until the sum of $30,000 had been thus paid Reynolds as the consideration of the contract; with the stipulation, however, that Reynolds was to pay to plaintiffs in cash each month $6 per thousand on lumber, and 18 cents for each tie, leaving consequently only the excess above these amounts, as shown by the schedule prices, as actual payments on the whole price; further stipulating, that when the whole $30,000 was thus received by Reynolds, the timber yet unmanufactured, with the saw-mill and appurtenances, were to become absolutely the property of plaintiffs.

As part payment of the $30,000 they delivered to Reynolds a smaller saw-mill they owned on another tract, at the price of $1,600, some sawed lumber valued at $1,400, and a promissory note for $3,000, secured by mortgage on property in Erie County. At the same time, Reynolds sold and delivered to plaintiffs in addition, a large amount of other personal property upon the premises, not included in the transfer of the timber. The price agreed upon for this was $4,000, $2,000 of which they paid in cash, and the balance in a note at six months.

The plaintiffs then took possession of the property, and commenced to manufacture and deliver lumber as agreed upon, and so continued until February 14, 1890. They had then manufactured about 100,000 feet of lumber, and delivered about half of it on the cars, at $8 per thousand, the cost of manufacturing being $6 per thousand. They had also in the woods about 200,000 feet of logs, cut ready for hauling to the mill, and the cost of these was $2 per thousand; the plaintiffs had also, in purchases of additional tools and equipment, and expenditures about their operations, paid out about $2,250. The parties on that day made a new agreement, whereby plaintiffs surrendered to Reynolds all the property contracted for in the first agreement, and all that had been added by them; Reynolds agreeing to manufacture and sell timber and ties from the land until the net proceeds paid the note of $2,000 and the $30,000, the consideration money of the first agreement; a reasonable compensation to Reynolds for his services and risk, not to exceed $5,000 per year; further, he to account for all lumber received and manufactured up to that date; when all these payments were made out of the net pro-

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ceeds of timber manufactured, Reynolds was to re-transfer all the property to plaintiffs, with the right to two years further time to remove any timber yet standing. Accordingly, Reynolds again resumed possession.

The plaintiffs alleged they had entered into both contracts, relying upon the representations of Reynolds as to the quantity and quality of the timber, and that these representations were grossly false, and known to be so by Reynolds at the time. That he had represented there was upon the land nine millions of feet, when in fact there were not three millions; also, that it was of the best quality, while in fact it was very inferior; that he had pointed out to them timber as on this tract which was not on it.

The master, from the evidence, has found as a fact that Reynolds had said to plaintiffs before the first contract was made there were nine millions of feet on the land; he finds, further, that there were not three millions, and that Reynolds knew it; that Reynolds represented the timber as of good quality, yet it was very poor, and Reynolds knew this. That he made other false representations to plaintiffs, to induce them to enter into the contracts, and that both contracts were made by plaintiffs in reliance upon these representations.

Throughout, in his findings of facts and conclusions of law, the master's report is against defendant; and he suggests that the Court decree that Reynolds deliver up both contracts for cancellation, as also the notes, mortgages and securities in his possession, delivered to him by plaintiffs, in pursuance of the contracts, and that all bargains and agreements on the subject be rescinded. Further, that an account be taken of the money expended by plaintiffs, and paid by them to defendant, and of damages sustained by them, and that defendant be ordered to pay over to them such sum as should be found due.

On exceptions filed by defendant to the report, they were overruled by the Court, the report confirmed, and the decree suggested by the master adopted. From that decree defendant appeals.

All of the nineteen assignments of error, either expressly or inferentially, deny the correctness of the master's findings of fact. Unless that denial in some degree be sustained the averments of error must fail. While we frequently draw from facts, other inferences than those the master and the Court below think warranted, and often come to a different conclusion as to the law applicable to the facts, it is a very rare case that the findings of fact by the master, approved by the Court below, are so manifestly wrong that we feel called upon to set them aside. Very often the testimony presented to us on paper books seems not to warrant the findings; but we know full well there probably was much at the hearing to induce belief or disbelief, which does not and cannot find its way to the printer.

The manner of a witness, his intelligence, acuteness of perception, and opportunities for observation, all are matters which influence the master, but cannot be fully transferred to the report. Besides, there is more or less abbreviation, lack of emphasis, and error in the most accurate transcripts of testimony. So, notwithstanding the urgent appeal of counsel for appellant, we must adhere to the rules so often announced before, and so recently in Stocker *v.* Hutter, 134 Pa. 23: "The findings of a master on questions of fact, approved by the Court below, will not be set aside in the Supreme Court, except for clear error, even where the testimony is conflicting, and the merits may appear contrary to the master's conclusion."

We must then assume as facts that there was gross misrepresentation of the quantity; that there was not one-third of the nine millions represented on the land; there was also misrepresentation as to quality; instead of being very good, it was very poor; and that Reynolds knowingly misstated the facts in each particular. But it is argued that, from the undisputed facts, the inference is that the plaintiffs had every opportunity before bargaining to examine the timber, and in fact did examine it, and the rule is invoked as laid down in Farnsworth *v.* Duffner, 142 U. S. 47, and similar cases, where the suit was for a rescission of the contract on the ground of fraudulent representations: "In respect to such an action, where the means of knowledge respecting the matters falsely represented are equally open to purchaser and vendor the former is charged with knowledge of all that by the use of such means he could have ascertained."

We do not question the soundness of this rule, but it is not applicable to these facts.

The subject of this contract was the timber standing on about 1,000 acres of land, cut up by ravines and broken by elevations. The most accurate estimate of quantity would have been to run the outside lines, and then traverse the whole tract by sections, inspecting and counting the trees. Neither party desired to adopt such an expensive and time-consuming method as this.

Another, the crudest sort of an estimate, is to look at different parts of the tract, notice the relative merits of each, estimate roughly how much was well timbered, and how much indifferent, then estimate how many thousand feet stood on one acre of each, and multiply that by the number of acres of the same kind; or another method is that pursued by some of the

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witnesses here; a party of three or four blaze a strip eight or ten rods wide from one side clear across the tract, and estimate by slowly walking over the strip the quantity; then blaze another strip, and so back and forth until the whole tract has been gone over. This method, some of the witnesses state, required the time of four men about twenty-four days.

The master has found, as a fact, that these plaintiffs made no estimate of any kind; they looked at the timber, spent only a few hours in doing so, and then they were conducted by defendant's agents and employés. One of them, Henry S. Deal, testified that he went upon the land twice with Brotherton, and says:

"He (Reynolds) told me to show them the best part of the timber, and not to take them over that part that had been cut, and I done as directed by Mr. Reynolds." Smiley, one of the parties interested with Brotherton, says that Deal said to him what he showed them was a general average of the timber.

The master finds that Reynolds stated to plaintiffs he had had the timber estimated, and there were nine millions; further, that he knew this was not true. If this be correct, then by a trick carried out through Deal, his agent, he sought to confirm plaintiffs in trusting in his false statement; tried to lead them to believe that with their own eyes they were witnesses to the truth of it. This is not what the law means by knowledge equally accessible to both parties; by parties dealing at arm's length on their own judgment. The knowledge of the quantity was difficult to be had; to obtain it required many days of careful, laborious examination. Reynolds, in substance, said, "Heretofore, I got this information; I have had an estimate made." Then to guard against discovery by them of the truth, he successfully planned to mislead them.

Whether these were the facts was open to question before the master, where defendant was fully heard; the master, on sufficient evidence, has found the fact against him, and that is an end of discussion here. No further knowledge was acquired by plaintifis after they took the possession, which they kept for two months and then surrendered. Most of the old employés of Reynolds remained; plaintiffs themselves, being busy closing out their operations at another mill, were seldom on the ground, and had but little further opportunity for observation.

The master has found that, trusting in this misrepresentation as to quantity, persistently kept up by trick and artifice, the plaintiffs were induced to contract. They could have made an estimate, but why should they do so, when Reynolds had one made which he assured them was correct? Especially why, when Deal had shown them a part of the timber which was good, and represented that was an average of the whole? To hold, on these findings of the master, the means of knowledge were equally open to both parties, would be equivalent to holding that systematic and continued deception was a means of knowledge.

This is not the case of buyers relying upon an imperfect investigation of their own, as in Mahaffey *v.* Ferguson, 156 Pa. 156, cited by appellant, but the case of a buyer relying upon a false estimate of the vendor, and his confidence increased by a further falsehood still more persuasive.

The argument of the learned counsel for appellant, however forcible, all through is to the effect that the master and the Court below ought not to have found the material facts against them; but they have wholly failed to show there was no evidence tending to establish the facts, and that, if established, the inferences drawn were not warranted. We find nothing sufficient to justify us in reversing the decree on any one of the assignments: therefore it is affirmed, and the appeal is dismissed at costs of appellants.

W. M. S., Jr.

July, '93, 133. April 30, 1894.

Elizabeth Sager, Orren C. Allen and Ezra T. Hazeltine, Trustees of the Estate of George A. Cobham, Deceased, v. George Mead.

Register of wills — Letters of administration — Orphans' Court—Sales for payment of decedents' debts—Fraud.

The children and heirs at law of C. agreed to withdraw his will from probate, no letters testamentary having been granted, and assented to the appointment of an administrator of the estate who sold the real estate on an order of the Orphans' Court for payment of debts, etc. After the sale the will was admitted to probate, and the trustees under the will brought ejectment against a purchaser at the Orphans' Court sale:

Held, that if done in fraud of rights of another not a party to the agreement, the Orphans' Court sale was void as to him, and that evidence tending to establish fraud should have been admitted.

Appeal of Elizabeth Sager, Orren C. Allen and Ezra T. Hazeltine, trustees of the estate of George A. Cobham, deceased, from the judgment of the Common Pleas of Warren County, entered on a verdict in an action of ejectment, wherein appellants were plaintiffs, and George Mead, defendant.

The facts of the case are sufficiently set out in the opinion of the Court.

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D. I. Ball, (*Allen & Sons* with him), for appellants.

The power of the register of wills to grant letters of administration is dependent on the death intestate of the owner of property.

II. Blackstone Com., 494.
McPherson *v.* Cunliff, 11 S. & R. 430.
Tolliver on Executors, 51.
Devlin *v.* Commonwealth, 101 Pa. 276.

If the letters of administration were void, then the administrator had no standing in the Orphans' Court.

Halsey *v.* Tate, 52 Pa. 311.
Keene's Appeal, 60 Id. 504.

The agreement to withdraw the will from probate, have letters of administration granted and property sold by him through Orphans' Court process being in fraud of the remaindermen, was void.

Gilbert *v.* Hoffman, 2 Watts, 66.
Dean *v.* Connelly, 6 Pa. 239.
Jackson *v.* Summerville, 13 Id. 359.
Bunn, Raiguel & Co. *v.* Ahl, 29 Id. 387.

M. F. Elliott, (with him *H. McSweeney*, *W. D. Hinckley* and *W. E. Rice*), for appellee.

The acts of the administrator performed before the will was admitted to probate are valid.

Patton's Appeal, 31 Pa. 465.
Cook's Estate, 1 Phila. 342.
Biglow *v.* Biglow, 4 Ohio, 138.
Schluter *v.* Saving Bank, 117 N. Y. App. 125.

The granting of letters of administration is a judicial act, and while they remain in force cannot be contradicted.

McPherson *v.* Cunliff, 11 S. & R. 422.
Devlin *v.* Commonwealth, 101 Pa. 273.

October 1, 1894. STERRETT, C. J. This action of ejectment for the land described in the writ had its inception in circumstances which appear to be quite out of the ordinary course.

On October 6, 1870, George A. Cobham died testate, seized, *inter alia*, of the land in controversy, leaving to survive him three daughters: Georgena C. Cobham, Elizabeth (intermarried with John Sager), and Alice (afterwards intermarried with George Mead, the defendant, and since dead,) and a stepson, Henry Cobham, who was also a nephew of the deceased. As appears by his will, the testator devised said lands to Henry Cobham, Georgena C. Cobham, John Cobham and Rasselas Brown, upon the various trusts, for life, etc., specified in said will, and appointed them executors. The office of trustees having become vacant by the death of said Georgena C. and John Cobham, and in consequence of the other two trustees having ceased to act, in August, 1891, said vacancies were filled by the appointment of plaintiffs.

Pursuant to a citation issued and served on Georgena C. Cobham, Elizabeth Sager, John Sager, Alice Mead and George Mead, said will was presented for probate. Thereupon a caveat was filed by said John Sager, Elizabeth Sager and Alice Mead, and the matter was so proceeded in, at the instance of the said caveators, that an issue was directed "to try the validity of said writing, and the matters of fact that may be objected thereto." That issue was afterwards discontinued by Mr. S. P. Johnson, attorney for the parties thereto, and all the papers withdrawn from the record. Said will was not probated until April 10, 1875. In the meantime Georgena C. Cobham, Elizabeth Sager, John Sager, Alice Mead, George Mead and Henry Cobham, ignoring said will, waived their right to administer; and upon their request, letters of administration on the estate of said George A. Cobham were granted to Rufus B. Smith, who was afterwards removed, and letters of administration *de bonis non* were issued to W. M. Lindsey. On June 18, 1871, the six persons above named entered into an agreement:

1. That the application for probate of the will aforesaid should be withdrawn.

2. That W. M. Lindsey shall take out letters of administration on the estate of said deceased and sell the real estate for the payment of debts.

3. That George N. Parmlee shall purchase the property at said sale, and hold the same for redemption by and distribution to and among the parties to said agreement, according to their original rights and equities in the same, and as if the said George A. Cobham had died intestate.

4. That the distribution of said property should be made in the manner specified in said agreement, etc., etc. Pursuant to an order of sale made December 13, 1871, all the real estate of said decedent was sold by said Lindsey, as administrator *de bonis non*, etc., and bid in by said Parmlee; and afterwards, in accordance with the terms of said agreement, the property was divided, and deeds made by said Parmlee to the respective parties.

Recognizing George A. Cobham as the common source of title, plaintiffs, as substituted trustees, etc., claimed under his will probated, as above stated, April 10, 1875, and defendant relied on the Orphans' Court sale. Plaintiffs' contention was that said sale was void, and of no effect:

1. Because the register had no authority to grant letters of administration when the will was known to be in existence.

2. Because the petition presented by said ad-

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ministrator to the Orphans' Court was insufficient to give said Court jurisdiction to order the sale; and

3. Because the agreement of June 18, 1871, between the tenants for life for withdrawal of the will from probate, etc., together with their proceedings thereunder, was a fraud upon those entitled in remainder; and defendant being a party thereto, and fully cognizant of the fraudulent purpose, cannot successfully claim thereunder.

The question, as to the jurisdiction of the register, etc., is involved in the first nine specifications of error. The tenth relates to the alleged insufficiency of the administrator's petition for the order of sale; and the remaining six relate to the offers to prove the alleged fraudulent and collusive agreement to which defendant was a party, entered into and carried out for the purpose of ignoring the will and defeating its provisions, by means of the Orphans' Court sale, in the interest and for the benefit of the tenants for life, and to the prejudice of those interested in remainder and now represented by the substituted trustees' plaintiffs.

If it be conceded that such was the purpose of the parties to said agreement, etc., it can scarcely be doubted that the proceedings were fraudulent and void as to those whose interests were intended to be thus injuriously affected, without being made parties to the proceeding or having an opportunity to be heard. It is not seriously contended that this would not be so, but it is insisted that the decree of the Orphans' Court, under which the sale was effected, cannot be impeached and avoided in a collateral proceeding. As a general rule, the principle invoked is correct, but we think it has no application to the case under consideration; for the reason that those whose rights and interests were injuriously affected by the decree, into the procurement of which the alleged actual fraud entered, were neither parties to the proceeding nor have they ever had a day in Court. Such cases are not within the rule. As to the interests thus defrauded the decree is, as it were, *non coram judice*, and void. It is not pretended that those entitled in remainder under the will in question were parties to the agreement ignoring that instrument, and effecting a sale of the lands in question, as though the testator had died intestate.

The principle contended for by the plaintiffs, and which we think applies to the facts in this case, is recognized in several cases, among which are: Jackson *v.* Summerville, 13 Pa. 359; McCaskey *v.* Graff, 23 Id. 321; Seylar *v.* Carson, 69 Id. 81; Otterson *v.* Middleton, 102 Id. 78; Gilbert *v.* Hoffman, 2 Watts, 66; Dean *v.* Connelly, 6 Pa. 239. In the case first cited it appeared that in an action of partition, based upon a deed which had been obtained by fraud, the land was adjudged to the defendant; and it was held that "though a judgment of a Court of competent jurisdiction cannot be overturned in a collateral proceeding upon an allegation of mistake or error, yet when actual fraud had been used by a party in procuring a deed, and the deed is used as a means of obtaining a judgment in partition of the land, part of which was conveyed by the deed, the decree in partition is void, to the extent of the fraud, as to party defrauded, though it may be valid with respect to other interests not involved in the fraud." This is upon the principle that actual fraud vitiates all contracts and proceedings into which it enters, and renders them null and void as to the party or parties defrauded. Delivering the opinion of the Court in that case, Mr. Justice COULTER said:

"That decree was rendered upon the faith of the fact that the Summervilles were legally and honestly represented by Jackson. But if the deed were fraudulent and void, the title never passed out of the Summervilles, but still resides in their legal representatives. Whilst, therefore, the decree is good as against the interest honestly represented before the Court, it is void as against the interests not represented at all; that is not represented in the eye of the law. As to that interest the decree of the Court was, as it were, *non coram judice*. Where the parties have been heard, or due notice has been given, the judgment or decree of the Court upon the point in issue cannot be overturned in a collateral proceeding upon an allegation of mistake or error. That is the law. But where fraud has been used by the party, and enters into the procurement of the decree, the law holds up the mirror of truth, and it fades away."

It follows from what has been said that the proposed evidence at least tended to prove the allegations of the plaintiffs, and should have been submitted to the jury with guarded instructions as to its legal effect.

As to the specifications relating to the jurisdiction of the register to appoint an administrator, etc., it is sufficient to say that, generally speaking, that officer has jurisdiction to appoint an administrator to act until a will is presented and proved. In this case, however, it is only necessary to consider the appointment of the administrator, in so far as it may appear to have been part of the alleged general scheme of the parties to the agreement aforesaid to ignore the will and defeat its provisions to the prejudice of the rights of those entitled in remainder.

While the petition of the administrator *de bonis non*, for the order of sale is not strictly formal and beyond the reach of adverse criticism,

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we cannot say that—standing alone and disconnected with other facts, including those embraced in the rejected offers—it was insufficient to give the Court jurisdiction.

On the whole, with the proposed evidence before the jury, we think such a case would be presented as should be submitted to them under proper instructions.

Judgment reversed, and a venire facias de novo awarded.

W. D. N.

Oct., '94, 121. October 3, 1894.

Commonwealth ex rel. Parris v. Balmer and others, School Directors of Brookville.

School law—Soldiers' children—Soldiers' children's homes—Act April 18, 1893, P. L. 23.

Inmates of an institution, chartered for the care and education of poor children, do not by their residence in the said institution acquire such a residence in the district within whose bounds such institution is situated as will entitle them to be educated without charge in the common schools of said district.

This rule applies to a home for soldiers' children, having a charter in which no provision is made for the education of the inmates, but which has received State appropriations for the said purpose.

The Act of April 18, 1893, P. L. 23, does not entitle a child resident in a soldiers' children's home to free admission to the schools of the district containing the home; the Act was intended to secure common school privileges to the children of soldiers who were obliged to seek employment and homes outside the district of their parents' residence, but it does not include the children of any class for whose education in the charitable institution of which they are inmates, the State has made adequate provision.

Appeal of A. F. Balmer, C. C. Benscotter and others, directors of the school district of the Borough of Brookville, defendants, from the decree of the Common Pleas of Jefferson County, granting a mandamus at the suit of the Commonwealth *ex rel.* Warren Parris, by his next friend, commanding said directors to admit the relator to the common school of the district.

The petition in this case, which was after answers, amended by striking out the names of all the relators except Warren Parris, set forth—

First. That the defendants were the school directors of the said school district of the Borough of Brookville.

Second. That the Pennsylvania Memorial Home was a corporation duly organized under the laws of the State of Pennsylvania, and that A. F. Thompson is the president.

Third. That Warren Parris was the child of a person who was a soldier in the service of the United States in the late war of the rebellion; that he was, for a long time prior to the time of the refusals hereinafter mentioned, and continued to be, a resident of the school district of the Borough of Brookville, in Jefferson County, Pennsylvania, dwelling in the building known as the Pennsylvania Memorial Home, at Brookville, within the aforesaid district; that his age was about fifteen years, and that he was entitled upon application, to admission and instruction the same as resident children, in the proper common school of such district in accordance with the provisions of the Act of General Assembly, approved April 18, 1893, P. L. 23, entitled, an Act relative to the admission and instruction of children of soldiers, etc.

Fourth. That said A. F. Thompson, as president of said home, made application to said board of directors of the school district for Parris' admission to, and for his instruction in the common school of such district by a writing as follows:

BROOKVILLE, PA., Aug. 16, 1893.

To the School Board of the Borough of Brookville, Pa.:

GENTLEMEN:—I hereby most respectfully make application to you for the admission into your public schools for instruction, etc., of—

Matilda Furl, aged 15 years, . . .
Warren Parris, aged 15 years, . . .
Clara Shugart, aged 13 years,
Esther Wood, aged 14 years.

All of whom are children of persons who were soldiers in the service of the United States in the war of the rebellion, and are now and have been for some time last past inmates of the Pennsylvania Memorial Home, at Brookville, Pa.

Under the provisions of the Act of the General Assembly of the Commonwealth of Pennsylvania, approved the 18th day of April, A. D., 1893, a copy of which is herewith enclosed.

Yours respectfully,
A. F. THOMPSON,
President of the Board of Directors.

Attest:
ABBIE LYNCH, Secretary.

Which application was refused, the school board stating in its reply that it would not admit the children under the provisions of the Act referred to by Mr. Thompson, but would receive them if there was paid to the treasurer of the board the sum of $15 per annum for each child.

Fifth. That the said Warren Parris, personally made application for admission to and instruction the same as resident children in the proper common school of the said school district of the Borough of Brookville, on the 18th day of September, 1893, but by order of the aforesaid board of directors of said district, he was refused such admission and instruction and was excluded from the proper common schools of such district.

Upon these facts a mandamus was prayed,

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directing the school board to admit Warren Parris to the common school of the district.

An alternative writ was granted to which the defendants made return as follows:

"*First.* There is no sufficient or legal party applying as relator for a writ of mandamus in this case.

"*Second.* There is no evidence that the persons named in the petition of the relator, as inmates of the Pennsylvania Memorial Home, are the children of persons who were soldiers of the United States, in the late war of the rebellion.

"Conclusive proof by legal evidence in every individual case should be furnished, together with a formal application as contemplated by the Act of April 18, 1893.

"*Third.* The Act of April 18, 1893, under the provisions of which the relator's petition in this case is attempted to be drawn, is unconstitutional and void, being in violation of the Constitution of the State of Pennsylvania, as set forth in Articles and Sections of the Constitution as follows:

"Article III., Section 3; Article IX., Section 1; Article X., Section 1; Article I., Section 10; Article III., Section 7.

"*Fourth.* The Act of June 2, 1893, P. L., page 264, makes ample provision for the education of the children of said Pennsylvania Memorial Home, and provides for the expense thereof, and such an extraordinary remedy as is here sought is not necessary, in that an adequate legal remedy exists for the supposed wrong alleged.

"*Fifth.* The refusal of the school board of the Borough of Brookville, to educate, free of charge, the inmates of the Pennsylvania Memorial Home, as set forth in the petition, is not a wrong to said alleged claimants, in that the Act of June 2, 1893, makes specific provisions for the education of the children of said home, and provides for the expenses thereof.

"*Sixth.* The Act of April 18, 1893, and Act of June 2, 1893, must be taken and construed together, and in so doing, the Act of April 18, 1893, does not apply to said home.

"*Seventh.* That a good school is now established in said home, under Act of June 2, 1893, rendering these extraordinary proceedings unnecessary, the education of the inmates, children, being now already sufficiently provided for."

The Commonwealth demurred to the return. The Court, CLARK, P. J., sustained the demurrer and awarded a peremptory mandamus as prayed.

The defendants took this appeal and assigned as error, *inter alia*, the overruling of the various objections set up in their return and the awarding of the peremptory mandamus.

W. F. Stewart and *W. P. Jenks*, for appellants.

Neither the Act of 18th April, 1893, nor the common school law of Pennsylvania, as heretofore declared and administered, have any application to this case. The Legislature has provided a special system for the education of all such children as the relator, a system which equally burdens all the tax-payers of the Commonwealth. The system has regulations of its own. Its provisions are executed by its own agents; has its own school houses; its own teachers; its own revenues; is as distinctly marked and kept separate from the common school system as though no common school system existed. From 1867 until the present time, children such as the relator have been accounted wards of the State, and as such have been separated from the other children.

Act of 1867, P. L. 21.

By this Act and others following it provisions in detail are made for homes, care of, maintenance, education and welfare of these children, as separated from the other children of the Commonwealth; and persons authorized and required to see that the bounty of the State is fully secured to them; not at the expense of the other children of the State, but as that which is intended to be especially their own.

The Act of June 2, 1893, P. L. 264, is one of the last in the series. It appropriates to the Brookville Home $1,500 for the education of its inmates. The children of soldiers who fought in the war of the rebellion, have provided for them a distinct school system.

The relator therefore has a home of his own, a school of his own, money of his own to purchase books and pay his teachers. He is not satisfied with these, he wants what others have and pay for and cannot give without injuring themselves, and these he wants without paying for or offering to pay for. The Court below issued a mandamus to compel the respondents to yield to these unreasonable requests, and orders the respondents to pay the costs. Surely this cannot be law.

The Act of 1893 is unconstitutional, if its effect is what is claimed for it by the relator.

The Constitution, Article X., Section 1, limits the operations of the public schools to "the children of this Commonwealth." The Act violates the Constitution by opening the public schools of Brookville to all the children of Union soldiers who may be imported there to be educated, from every State in the Union, or nation in the world, and it is not either the intention or spirit of any constitutional law to permit people to be imported into any district for the purpose of getting either free maintenance or free education.

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The subject of the Act is not clearly expressed in its title.

The Act violates Art. IX., Sec. 1, of the Constitution. The expense of educating the children sent from the home to the schools must be raised by taxation. A tax is not valid where imposed for a purpose in which the people taxed have no interest.

Sharpless *v.* Mayor, 21 Pa. 147.

The people of Brookville have no interest in educating children sent temporarily into the district.

The Act violates Art. III., Sec. 7, as it is special and class legislation under guise of a general law. Its subject, the public education of children, is proper for general legislation, but the statute deals only with a limited number of children of a certain class, who, in the absence of legislation have no claim upon the public different from others. There would be no object for this Act except where soldiers' children are massed in a home such as that at Brookville.

See Weinman *v.* Pass. Ry. Co., 118 Pa. 192.

George A. Jenks and *Charles Corbet*, for appellee.

The right to admission and instruction in the common schools is by law made the right of every individual child resident in the Commonwealth between the ages of six and twenty-one years.

Act May 8, 1854, P. L. 621.

This right is subject to no conditions except that the child shall be between the ages of six and twenty-one years, reside in the school district, and shall make application for admission and instruction.

When all the conditions fixed by the law have been complied with on the part of the child his right to admission and education is absolute. That right cannot be denied him because of the failure of his parent, guardian, or any one else to perform his or their duty, over which the child has no control.

The child cannot be met at the door of the school-house and turned away because his father or guardian has not paid his school tax or made a proper contract relating to any matter which is or might be a proper subject of contract.

The Act of April 18, 1893, P. L. 23, provides that children of any soldier in the late war of the rebellion, temporarily or otherwise in any school district shall be entitled to common school privileges, notwithstanding such child shall have come into the district for the purpose of attending the school and its parents or guardian reside in another school district. This Act does not restrict the right of the child under the general law, it simply declares that every child in the State shall have the right to go to school wherever he may reside.

The Act of June 2, 1893, P. L. 264, does not affect the rights of a child under the two preceding Acts. It provides an additional fund to apply to the education of the child, but the administration of that fund is not placed in the hands of the child, nor is he in any way responsible for its administration. His right to attend school is neither conditioned upon the rightful or wrongful administration of that fund; neither is his right to be held in abeyance till the rightful administration of the fund shall have been decided. His time for education is fixed by law within a period of fifteen years. All of that time when the schools are open he has a right to go; one, two or three years cannot rightfully be cut out of his time by disagreement between others to which he is not a party.

November 12, 1894. McCollum, J. In Commonwealth *ex rel.* John Fry *v.* The Board of Directors of the School District of Upper Swatara Township, decided at this term, we held that the inmates of an institution chartered for the care, support and education of poor and needy children, and maintained by State appropriations, voluntary contributions, etc., did not by their presence in it for the purpose of education and maintenance, become entitled to free admission to the schools of the district in which it was located. In other words we held that the non-residents of the district did not acquire a residence therein for common school purposes by becoming inmates of the institution, for care, support and education. It is not necessary in this case to restate the grounds of that decision, or the reasons given for it. The facts in the two cases are not exactly alike, but it is believed that the principle on which the one referred to was determined is applicable to and governs this. The object of the Children's Industrial Association of Harrisburg was the care, support and education of poor and needy children, and there was no residence or class limitation in its charter. The Pennsylvania Memorial Home was chartered for the purpose, *inter alia*, of "providing comfortable homes and maintenance for the children of deceased and permanently disabled Union soldiers," but its charter was silent as to the education of them. The home was located in the Borough of Brookville and the State made large appropriations for buildings and other equipment required for the performance of its charter work. Since its location there the State has made an adequate appropriation for the education of its inmates. There is now and was when the petition for the mandamus was filed a good school established in the home in which all its inmates who require school

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privileges are educated at the expense of the State. In thus providing for the education of the inmates of the home the State recognizes and avoids the injustice that would be done to the district in which it is located if they were admitted to its public schools and educated there at its expense and in abridgment of the rights of its own children to education therein. The learned counsel for the relator apparently concede that the underlying principle of our common school system is that the children of the Commonwealth shall exercise and enjoy the rights it confers in the districts in which they respectively reside, and that the duty of each district is to provide for the education of the children belonging to it. But they contend first that the relator has a residence in the Brookville district by virtue of his admission to and presence in the home, and second, that he is entitled under the Act of 18th April, 1893, P. L. 23, to free admission to the public schools of the district because he is a child "of a soldier of the late war of the rebellion." Their first contention is sufficiently answered by our decision in Fry's case. It is claimed that the Act on which their second contention is based is class legislation and therefore unconstitutional. The question thus raised need not be decided or considered now, because in our view of the Act it is not applicable to the case presented by the petition and answer. It provides that the child of a Union soldier who shall be temporarily or otherwise in any school district of the Commonwealth shall have the same right to instruction in the proper school of such district as the resident children have, although he may have come into the district for the purpose of attending such school, and the residence of his parents, guardian, or other person entitled to the custody of him may be in another district. It was obviously intended to secure common school privileges to the children of soldiers who were obliged to seek employment and homes in families outside of the district of their parents' residence, but we discover no manifestation of a purpose in it to include the children of any class for whose education in the charitable institution of which they are inmates, the State has made adequate provision.

The learned Court below thought that School District *v.* Pollard, 55 N. H., 503, afforded some support to the relator's contention in this case, but we do not think so. In that case it was decided that the minor children of paupers supported at a county poor farm had the right to attend the public school in the district in which such county farm was located, on the ground that they were inhabitants of the district within the meaning of the statute regulating admission to the public schools. The county farm was taxed for school purposes in that district and it is manifest from the opinions of the Judges that if the State or county had specially provided for the education of the children upon it their application for free admission to the public school would have been denied. Besides the decision in Pollard's case was made with reference to the educational system of New Hampshire, and to what extent that conforms to the common school system of Pennsylvania does not appear from the report of it. It is not therefore an authority for the proposition that non-resident children for whose education the State has otherwise provided are entitled to free admission to the public schools of a district by reason of their presence in a charitable institution located within it. It is suggested, however, that the children may acquire the right to such admission by the misconduct or neglect of the managers of such institution. We do not think so. With the same propriety and reason it might be said the misconduct or neglect of the school directors of one district entitles the children residing in it to free admission to the schools of an adjoining district.

We think upon due consideration of the facts of this case and the legislation pertinent to it, that it is governed by the principle on which Fry's case was decided.

The order awarding a peremptory mandamus is reversed and the petition therefor is dismissed at the costs of the relator.

H. B.

Common Pleas.

C. P. No. 3. Oct. 26, 1894.

Boyce v. Super et al.

Practice—Rule to inspect books in the possession of the defendants—A portion of the book entries in plaintiff's handwriting.

Rule to permit plaintiff to inspect a sales book of the defendants in which a portion of the entries of a certain sale were in the plaintiff's handwriting, and to inspect the ledger of the defendants which showed the entry of the said sale.

The affidavit in support of the rule averred that the plaintiff had brought suit to recover his commission on a sale of merchandise made by him for defendants to Jordan, Marsh & Co., of Boston, under a verbal agreement with defendants that he should have a commission of one per cent. on the amount of the said sale, which amount was unknown to plaintiff and of

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which defendants had refused to inform him and had denied him access to the books named in the rule. The plaintiff further averred that said books contained the amount of the sale, were in the possession of the defendants and exclusively in their power and control; that plaintiff had a common interest with the defendants in them, and that part of one of the books was in plaintiff's handwriting.

Owen B. Jenkins, for the rule.

The common law doctrine of a century ago that no man need arm his adversary against himself has been modified by statute and decisions.

Act of Feb. 27, 1798, 1 Pur. Dig. 723.

Under the above Act a party will be allowed inspection of books at a convenient period before trial after the pleadings are made up:

Arrott *v.* Pratt, 2 Wh. 566.

Upon a rule to take depositions:

Boston to Use *v.* Streeper, 2 Miles, 41.

Before declaration filed to assist plaintiff to declare:

Murphy *v.* Morris, 2 Miles, 60.

Inspection may be granted not only where it is asked with a view to establish the original case of the applicant, but also where the object is to obtain material evidence to answer the opponent's case.

Am. & Eng. Enc. of Law, Vol. II, p. 245, and cases there cited.

Frank P. Prichard showed cause.

The plaintiff should be forced to abide by the figures set out in his statement. Jordan, Marsh & Co., who bought the goods, know the amount of the sale and plaintiff should consult them.

The Court, GORDON, J. Rule absolute.

Orphans' Court.

October, 1893, 470.

Bradley's Estate.

Life tenant—Real estate—Improvements on, not in the nature of repairs—Work done by municipal order—Book entry of—Name of owner set out incorrectly.

An improvement upon the real estate of a life-tenant not in the nature of repairs is chargeable upon the estate of the testator.

Work done to property pursuant to municipal order is not chargeable to a life-tenant who acts merely as a compulsory agent to save the property from a lien.

Where the book entries of a claimant describe the property for which work is done and material furnished pursuant to such order, it is of no consequence whether or not the name of the owner be correctly set out.

Sur exceptions to adjudication.

The facts as they appeared at the audit were as follows:—

The decedent died in 1890, testate, and leaving a widow and issue by her and by a former wife. By his will he left, *inter alia*, his residence to his widow for life. During the life tenancy the bureau of highways served her with an order to connect the property with the neighboring sewer. She accordingly did so. The life estate terminated by her death in 1893. The contractor presented a claim at the audit for work done and material furnished. The remaindermen sought to have the charge made upon the widow's estate, instead of upon that of the present decedent. But the auditing Judge considered that the work done was "in the nature of betterment" and not for the widow's convenience. He allowed the claim.

The remaindermen made this the sole exception.

H. J. Scott, Jr., for exceptants.

George H. Chambley, contra.

March 31, 1894. ASHMAN, J. In this dispute between the life-tenant and the remaindermen, the former being the widow, and the latter the children of the testator, the real question is whether the estate of the testator was properly chargeable with the amount of the claim. The order to do the work emanated from the bureau of highways, and it was given by the widow to the contractor, who admitted that he read it. The whole transaction shows that the widow acted in the matter, not in her own behalf, but as the compulsory agent of the bureau; and it is very certain that if the order of the department had not been obeyed, the drain would have been laid at the expense of the city, and the property would have been encumbered with a lien. The improvement was not in the nature of repairs, because the premises had never been connected with the sewer; and it was, therefore, a permanent addition to the structure. In addition to this, the entry on the books of the claimant, described this property as the one on which the work had been done, and for which the materials had been furnished; and it is therefore of no consequence as to the parties now sought to be charged, whether it set out the name of the owner correctly or not: (See Barbier *v.* Smith, 38 Pa. 296.) The reason is that if the contract should be held to have been primarily with the life-tenant, the estate of the widow, after the payment of the claim, would be entitled to sue and recover, in the name of the claimant, against the parties in remainder.

The exceptions are dismissed. F. B. N.

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WEEKLY NOTES OF CASES.

VOL. XXXV.] *FRIDAY, DEC. 14, 1894.* [No. 14.

Supreme Court.

Jan. '94, 205. April 18, 1894.

Henrietta Irvin et al. v. Sarah Patchen et al.

Trespass—Act March 29, 1824—Parole Conveyance of land—Reservation—Right to cut timber—Possession—Evidence—Proof of Signature.

A direction, "This land I want disposed of as follows: the valuation of it when sold is to go to my brother," etc., in a will is insufficient to work a conversion.

As against a trespasser, title to "wild" lands carries with it possession.

Where the proof of an agreement in writing depends pon one of the parties tot he instrument whoi s somewhat amiliar with the handwriting of the two subscribing witnesses, who are both dead, there is sufficient proof to justify the admission of the paper.

Assessors' books and tax receipts are not sufficient in themselves to prove title, but are admissible as evidence of claim.

In a parol conveyance of land, K. reserved a right to cut certain species of timber therefrom. This land was subsequently transferred by articles of agreement to sundry persons, subject to the said reservation. The last one in the title received a deed in fee simple from K.'s grantor in whom the paper title still remained. K. subsequently transferred his right to cut the timber to P.

In an action of trespass by the representatives of the grantee in the deed against the representatives of P.:

Held, that if the timber they cut was that which was standing at the time the reservation was made no trespass was committed.

Appeal of Sarah Patchen, L. H. Haney, Kingsley Smith, William Fulton, E. Fulton and John Berringer, defendants, from the judgment of the Common Pleas of Clearfield County, in an action of trespass wherein Henrietta Irvin, Harriet E. Strouse and William Strouse in right of said Harriet E., Daniel W. Irvin, and William Paul Irvin, by his next friend, Henrietta Irvin, were plaintiffs.

This was an action of trespass in which plaintiff declared for treble damage for cutting and carrying away timber under the Act of 29th of March, 1824. The plaintiffs all claimed under the will of Mamie A. Irvin. The clause in her will relating to this property was as follows:—

"I own a piece of land in borough of Burnside, as a deed in my possession will show, from Aaron W. Patchen and wife, containing about forty-three (43) acres, bought on the 9th day of November, 1883. This piece of land I want disposed of as follows: The valuation of it when sold is to go to my brother Orin G. Irvin, and my cousins, Harriet Elizabeth Irvin (now Strouse), Daniel Wilson Irvin and William Paul Irvin, to share and share alike, and it is my sincere wish and desire that this piece of land be not sold until William Paul Irvin becomes fourteen years of age, and not then unless three-fourths of the heirs, together with the executors are agreed." A further provision was that in case of the death of Orin G. without issue, his share should go to the cousins named, and in case of the death of any cousin, her share to go to the surviving parent or parents of such cousin.

This will was executed on the 29th of June, 1887. By codicil made August 24, 1887, she appointed Dr. G. F. Prowell and Sadie Weaver her executors. Henrietta Irvin acquired her title by deeds from Orin G. Irvin of his interest to William A. Coddington of November 18, 1889, and by Coddington to her of July 17, 1890. Both these deeds recite the Aaron Patchen deed to the testatrix in substantially the same language. The recital in Orin G. Irvin's deed being in these words: "Being the same land and premises conveyed to my sister Mary A. Irvin by Aaron W. Patchen and wife by deed dated November 9, 1883, which deed sets forth a full description of said property."

Mamie A. Irvin and Orin G. Irvin were the only children of William C. Irvin, who died intestate on the third of March, 1870. He claimed under Robert Smith, who claimed under Jehu Gressly, who claimed under William J. Kime, who in 1864 or 1865 bought by parole about 100 acres of timber land of Aaron W. Patchen for 300 dollars, which price he subsequently paid. This land he sold by written agreement to Jehu Gressly in the fall of 1865, reserving to himself all the oak, pine and hemlock timber. Gressly, by written agreement of 9th of January, 1867, sold the northwest half of his purchase (being the land on which the timber in dispute stood) to Robert Smith (with a reservation of the timber as in the sale to him) for $63, which was paid. This agreement sometime about the 10th of August, 1868, was assigned to William C. Irvin, father of the testatrix. She acquired the interest of her brother Orin G., by a sheriff sale to her made on September 26, 1883, or a judgment in favor of D. W. Moore, her guardian, entered 26th June, 1882. About the time Gressly sold the northwest end of his purchase to Robert Smith he sold the other end to one John Woodward. On that end a small piece had been cleared, but the part sold Smith and now

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claimed by plaintiffs had never been cleared or cultivated or been in the actual possession of any one up to the time of the trial.

In 1867 and 1868 William J. Kime cut, under his reservation, such timber as was then suitable for square timber, but did not cut any saw timber or for any other purpose. In Kime's testimony for plaintiffs he stated on cross-examination: that his cutting was principally on the Woodward end; that while he cut some pine and oak all over the 100 acres, that he cut but little hemlock on any part of the other end and none where the present cutting has been done. Blake Baird, the only other witness connected with this first cutting, in his testimony for plaintiffs, was unable to state that any hemlock at all was then cut on the end in dispute.

Of the 109,130 feet claimed for in plaintiffs' statement sent out with the jury (and adopted by the jury, as shown by the record), all was hemlock but 9,785 feet. From the time this cutting was done by Kime and under his direction, no timber had been cut or removed until the cutting in dispute. It was claimed on part of plaintiffs that all the timber had been cut and removed by Kime, and that the timber claimed for here had become merchantable timber since. Besides the witnesses referred to, plaintiffs offered witnesses as to the sizes of the timber lately cut, and of the probable growth during the intervening years.

William J. Kime, by agreement of December 17, 1883, sold to Horace Patchen "all the oak, pine and hemlock timber" on this land with this clause as to removal of the timber: "The said Horace Patchen is to have fifteen years from the date of a deed of conveyance made by A. W. Patchen to Mary A. Irvin for the above mentioned piece of land, to cut and remove the above mentioned timber free of charge." None of the prior agreements had any limit for the removal of timber. Horace Patchen died intestate on December 23, 1885. Sarah Patchen is his widow and administratrix, and under her direction the cutting here claimed for was done in 1891 and 1892. By deed bearing date November 9, 1883, witnessed by and acknowledged before D. W. Moore, who was guardian for Mary A. Irvin, A. W. Patchen and wife conveyed to her this piece of land "hereby reserving all the oak, pine and hemlock timber on the above described tract of land, having previously sold the said timber to William J. Kime with the period of fifteen years to cut and remove the same free of charge." This is the deed recited in the will of Mary A. Irvin and deed of her brother as showing her title to the land. The arrangement Kime had with Patchen was that deed was to be made to Gressly, his vendee, and Gressly's arrangement was that deed was to be made to his vendee. Robert Smith, his vendee, spoke to Irvin about the deed being so made as "to pass over him" to Irvin. But no deed was in fact made until this deed of November 9, 1883, to Irvin's daughter, the testatrix. The plaintiffs were permitted under objection and exception to make out their case without offering the deed from Patchen thus recited, and without any proof of title except that based on the parole purchase of Kime from Aaron Patchen, and the jury were in effect instructed that plaintiffs were not affected by this deed nor by its limitations. Plaintiffs were also permitted, under objection, to prove assessment and payment of taxes on the land without proof of any separate assessment or payment upon the timber, or any agreement by which the timber owner was to pay any part of the taxes. Testimony for defendants showing express recognition and acknowledgment of their title, by testatrix and plaintiffs, to the timber in dispute, was rejected. These rulings, together with portions of the charge and answers to points, are the subject of the principal assignments of error.

Verdict for plaintiff and judgment thereon, the Court refusing to treble the amount of the damages. Thereupon defendants took this appeal.

Thomas H. Murray (*F. G. Harris* with him), for appellants.

The parol contract for the sale of the land vested no title in testatrix.

Hart *v.* Carroll, 85 Pa. 508.

Possession is a necessary condition of the party who brings *trespass quare clausum fregit.*

Wickham *v.* Freeman, 12 Johns. 183.
Leland *v.* Tousey, 6 Hill, 331.
Rifener *v.* Bowman, 53 Pa. 313.

But even if testatrix had title her will only gives plaintiffs right to the *proceeds* of the land. Power to sell in executors gives no right to the land to the beneficiaries.

Miller *v.* Meetch, 8 Pa. 425.

The agreement between Gressly and Smith was not legally proved.

1 Gr. Ev., sec. 569.
Abbot *v.* Plumbe, 1 Doug. 216.
Rex *v.* Harringworth, 4 M. & S. 353.

"It is a settled rule that where a paper is executed in the presence of a subscribing witness, and attested by him, his evidence of its execution is the best, and the party is bound to resort to it, unless in some special cases."

Himes *v.* Barnitz, 8 W. 45.

S. V. Wilson (*James H. Kelley* with him), for appellees.

October 1, 1894. GREEN, J. We think it

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very clear that the will of Mary A. Irvin did not work a conversion of the land therein described as situate in the Borough of Burnside, and containing about forty-three acres. The clause of the will which devises this land is as follows: "I own a piece of land in Borough of Burnside, as a deed in my possession will show, from Aaron W. Patchen and wife, containing about forty-three (43) acres bought on the 9th day of November, 1883. This piece of land I want disposed of as follows: the valuation of it when sold is to go to my brother Orin G. Irvin, and my cousins, Harriet Elizabeth Irvin, Daniel Wilson Irvin, and William Paul Irvin to share and share alike; and it is my sincere wish and desire that this piece of land be not sold until William Paul Irvin becomes fourteen years of age, and not then unless three-fourths of the heirs, together with the executors are agreed. . . . In case of the death of any of the cousins, their share or shares of the piece of ground in Burnside Borough is to go to whichever one of their parents that may be living, and if both be living they are to share it equally."

In the case of Hunt's and Lehman's Appeals, 105 Pa. 128, it was said by Mr. Justice PAXSON, delivering the opinion, "It ought to be settled by this time that, in order to work a conversion there must be either, 1st, a positive direction to sell, or 2d, an absolute necessity to sell in order to execute the will; or 3d, such a blending of real and personal by the testator in his will, as to clearly show that he intended to create a fund out of both real and personal estate, and to bequeath the said fund as money."

In Perot's Appeal, 102 Pa. 235, the words of the will were, "I further authorize and empower my said executors to make sale in their discretion of any real estate for the purposes of this trust and to make deeds to the purchaser or purchasers thereof without any liability on the part of the purchasers to see to the application of the purchase money." We said, "This is a mere discretionary authority and under the authorities does not work a conversion: Peterson's Appeal, 7 Norris, 397; Jones *v.* Caldwell, 1 Outerbridge, 42."

In Stoner *v.* Zimmerman, 21 Pa. 394, the words of the will were, "I direct that my executors either sell all my real estate (which I hereby fully empower them to do, and convey in fee simple), and divide the amount arising therefrom between my wife, etc., or to have it proportioned and valued by three judicious and disinterested men, so as to accommodate as many of my children as it will allow of, if it be their wish at that time to have it done so." We said of these words, KNOX, J., "To convert land into money, the direction to sell must be absolute and unconditional. In this case, the sale by the terms of the will depended upon the choice of the widow and children of the testator. In the absence therefore of a positive direction to sell the estate retained its original character as land, and so passed under the will."

In Anewalt's Appeal, 42 Pa. 414, we said, THOMPSON, J., "The following taken from the books may be received in the aggregate as a full statement of every requirement under the doctrine, 'To establish a conversion the will must direct it absolutely or *out and out*, irrespective of all contingencies.'

" 'The direction to convert must be positive and explicit, and the will, if it be by will, or the deed, if it be by contract, must *decisively fix upon the land the quality of money*.' 'It must be an imperative direction to sell;' " citing a number of authorities. Proceeding, Justice THOMPSON further said, "The sale directed here depended upon several contingencies; in such case the rule is that no conversion results from the law, and does not take place until it is actually made."

Recurring now to the language of the will we are considering, it is to be observed that there is no direction to sell given to any person. The only mode in which a direction to sell can be deduced from the words of the devise is by implication. The only source of the implication is the words, "The valuation of it when sold is to go to my brother," etc. Sold when? Sold by whom? Sold in what circumstances and upon what occasion? A sale might be made by the devisees jointly, consistently with this language, but there were no words conferring upon them such a power. There is absolutely nothing upon which to found any implication that the executors were to sell or might sell. The only connection in which they are even alluded to is in a prohibition of any sale, "until after William Paul Irvin becomes fourteen years of age, and not then unless three-fourths of the heirs, together with the executors are agreed." The only function possessed by the executors is a right to agree to a sale conjointly with three-fourths of the heirs. But if that proportion of the heirs do not agree, the executors have no function at all. They could not sell if they desired to, because the will, instead of permitting them to sell of their own motion, positively prohibits them from selling without the consent of three-fourths of the heirs, and does not authorize *them* to sell even in that event. In addition to the absence of any order to sell, the will particularly directs that there shall be no sale until at least three contingencies have happened, all of which are of uncertain character. 1. William Paul Irvin must have attained fourteen years of age. 2. Three-fourths of the heirs must have agreed to the sale, and 3, the execu-

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tors must also agree. Who the persons are who are *heirs* is altogether indeterminate. There are four persons who are devisees of this land. Whether the testatrix considered that these were her heirs because they were her devisees of this land we cannot tell. It might be so or it might not. They were a brother and three cousins. She names in her will as legatees an uncle Matthew Irvin, an aunt Susan Eason, and she refers to parents of her cousins who are devisees, and gives them the interests of the cousins in the "piece of ground in Burnside Burough," in the event of the death of the devisees or any of them. In this last clause of the will the shares of the cousins are described as "shares of the piece of ground," and the devise over to the parents of the cousins is a devise of the land itself and not of shares of valuation money. As the possible sale was not to occur except with the consent of three-fourths of the heirs and also of the executors, it follows that if these consents or either of them are withheld there could be no sale, and therefore the very existence of the power depends upon a contingent and an uncertain event. In point of fact the land never was sold up to the bringing of this suit, and the suit was brought by the devisees because it was still land and they alone had an interest. We are bound to assume therefore that the contingencies mentioned in the will never transpired, that the prerequisite consents never were given, and hence no conversion under the will was possible. The cases above cited can not be reconciled with any possible theory of conversion.

As to the proposition that the plaintiffs had not actual possession of the land and therefore could not maintain trespass for cutting the timber, it is sufficient to say that, under all the authorities, if they were the owners of the title, the land being unimproved and unoccupied in any way, the title carried with it the possession, and such possession was sufficient to maintain the action. In Miller *v.* Zufall, 113 Pa. 317, we said, "It is well settled law that the owner of wild and uncultivated land is to be deemed in possession so as to maintain trespass until an adverse possession is clearly made out. Mather *v.* Trinity Church, 3 S. & R. 513; Ward *v.* Taylor, 1 Pa. 238; Baker *v.* King, 18 Id. 138." Speaking of the plaintiff's right in that case we said, "He had an indubitable right of possession, and in contemplation of law was in the actual possession. This gave him a right to maintain trespass for injury done thereon. It lies not in the mouth of a trespasser to defend by reason of the plaintiff owning only an equitable estate; McCurdy *v.* Potts *et al.*, 2 Dallas, 98. His equitable title was sufficient to maintain the action against a wrong-doer. . . . . A warrant for unimproved land gives to the owner of it a constructive possession of the land, which will enable him to maintain trespass for digging ore thereon against one who has not an actual adverse possession of the land: Baker *v.* King, 18 Pa. 135."

We are of opinion that so far as the construction of the will of Mary A. Irvin, and the question of possession in the plaintiffs as affecting their right to maintain the present action are concerned, there was nothing in the way to prevent a recovery, if on the other questions arising their right of action could be sustained. In reference to these matters the facts are of a somewhat complicated character, but after a patient and careful reading of the charge of the learned Court below, we are satisfied the case was correctly tried. Much of the controversy arose over the deed of November 9, 1883, from A. W. Patchen to Mary A. Irvin. It is certainly true that when that deed was made Patchen had nothing to convey except the naked legal title. Notwithstanding the rather numerous sales of the land or the timber, made in the interval between 1864, when A. W. Patchen acquired his title, and November 9, 1883, when he executed the deed to Mary A. Irvin, there never had been any actual conveyance of the legal title. Of course he held it in trust for the lawful owner as was said in the charge. When he made a parol sale of the land to W. J. Kime, in 1864 or 1865, no writing of any kind passed between him and the grantee, who testified explicitly to that effect on the trial. Nevertheless he says he paid most of the purchase money to Patchen and cut timber, pine, oak and hemlock on the land and then sold to Gressly by a written article of agreement which was lost and not given in evidence. Gressly sold to Smith by article of agreement dated January 9, 1867, which was put in evidence on the trial. Kime testified that when he sold to Gressly he reserved all the pine, oak and hemlock on the tract, and when Gressly sold to Smith he reserved the "pine, white oak and hemlock," and this appears on the face of the article. This agreement therefore operated only on the land and not on the timber, the title to which, or so much as had not been cut off, was still in Kime. Up to this time no one had questioned the validity of the verbal sale by Patchen to Kime, on the contrary the transactions of the parties fully recognized it, and proceeded upon the presumption of its validity. On the back of the article between Gressly and Smith there was the following writing, "I sold the within named piece of land to W. C. Irvin in August, about the 10th, 1868, for a consideration of $75 cash and transferred this article to W. C. Irvin. ROBERT SMITH, Sr."

This was the origin of the title of W. C. Ir-

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vin. No deed had been made by A. W. Patchen up to this time, August, 1868, to any one. Smith being examined as a witness on the trial, testified that he sold the land to W. C. Irwin in August, 1868, and also that when the deed came to be made he would be willing it should pass over him and be made directly to Irvin. He testified, "I said that if when the deed came through Kime and Gressly that I had no objection for it to pass me, as it would save me the trouble of making it to Irvin. By signing the article in full I gave him full possession of what I owned. I bought it in full and paid for it and I received payment for it." Gressly testified that when he bought from Kime he bought for $100, which he paid, only the land and not the timber, that he sold the part in question to Robert Smith, and that he agreed that as Kime had not made the deed to him he might make it to the person he, Gressly, sold it to.

We think it entirely clear therefore, that the parol sale from Patchen to Kime was recognized and observed all the way through from Patchen to W. C. Irvin, that the reservations of the timber were made, not to assert any new right but merely to enforce the original reservation made by Kime, and because the subsequent purchasers of the land considered they had no title to the timber. This was said by the learned Court below in the charge and answers to points with entire correctness as we think. It results then, that when Smith sold to W. C. Irvin, Kime remained the owner of the timber if it was not cut off, or of so much timber as was merchantable at the time of the reservation, and was not cut off. This raised two questions of fact which were carefully left to the jury, whether it had all been cut off, and if not, whether any, and how much, that was merchantable at the time of the reservation, which was in 1866, 1867 or 1868, was still left. If there was any of the latter which was cut by the present defendants, the jury were instructed it was rightfully cut, and there could be no recovery for it in the present action. A considerable amount of testimony was given on this subject, and it was all left correctly and with careful instructions to the jury. Now W. C. Irvin died in March, 1870, having acquired his title in August, 1868. He left two children, Mary A. Irvin and her brother Orin G. Irvin, and to these two the land descended under the intestate law. Mary A. Irvin subsequently acquired her brother's title by a purchase at sheriff's sale. No conveyances of the land were made between August, 1868, and November 9, 1883, and at the latter date A. W. Patchen made the deed to Mary A. Irvin. The deed contained the reservation of the timber in the following words: "The said party of the first part hereby reserving all the oak, pine and hemlock timber on the above described tract of land, having previously sold the said timber to William J. Kime, with the period of fifteen years to cut and remove the same free of charges." As a matter of course this was not a reservation in favor of Patchen as he had sold everything, land and timber, to Kime in 1864 or 1865, and he did not assume to reserve anything to himself. The reservation was for the benefit of Kime or his grantees if he had any, but as he never sold the timber to any one prior to November 9, 1883, he was the sole beneficiary. But if he had removed all the timber that was merchantable at the time of the reservation made by him, there was nothing upon which the reservation in the deed from Patchen to Mary A. Irvin could operate, and it was of no effect as against her. If there was any of that kind of timber still left it belonged to the defendants under the subsequent deed made by Kime to Horace Patchen in December, 1883, and to this effect the Court below instructed the jury correctly as we think.

These views dispose of all the assignments of error except those which relate to admission and rejection of testimony. As to the first we think that when one of the parties to the instrument testified to the fact of execution by himself and the other party, and that both the subscribing witnesses were dead, and that he had some acquaintance with the hand-writing of one of the witnesses from having seen him sign for him, and that he had seen some of the hand-writing of the other witness, who wrote the paper in question which the witness signed, it is sufficient to justify the admission of the paper. He testified to the fact of his own signature, and that he was present when John Fulton, one of the subscribing witnesses, signed it, and that the other witness wrote the body of the paper. The reception of the instrument in evidence was largely in the discretion of the trial Judge which we see no occasion to question. Wilson *v.* Vanleer, 127 Pa. 371.

Several assignments relate to the admission of certain assessment books and tax receipts. Of course such testimony cannot prove title but they are some evidence of claim, and are more or less efficient as a basis of inference, according as the opposing evidence of a similar character is weaker or stronger and the other facts in the case are more or less consistent with the claim made.

In Hockenbury *v.* Snyder, 2 W. & S. 240, speaking of a claim under the statute of limitations, we said, "The assessment is resorted to not as giving him a right but to show the extent of his claim and possession. . . . . I apprehend then that, where paying taxes for a tract, or the whole tract, is spoken of, it has reference to the

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extent of the claim, and is referred to as evidence of that extent."

The present litigation is chiefly a contest about timber, or land with timber on it. Some of the assessments are for land only, others are for timber land. How far they would affect the question of the plaintiffs' claim for timber or timber land would be for the jury. Three of the tax receipts for 1885–6 and '7 were receipts to Mamie Irvin and were objected to, because the payment of the money was not proved by the person who paid it, or the one who received it, but the Court held that not being evidence of title but only evidence of the bona fides of the claim to the property in dispute the papers were sufficiently shown to be for taxes levied and assessed upon the land. We think there was no error in this. The other payments were proved by the person who made them. That person was Henrietta Irvin, one of the plaintiffs, whose competency was objected to on account of the death of Horace Patchen under whom the defendants claimed. He died December 23, 1885, and these payments were all made after that time. The Court below was of opinion that under the Act of 1891, P. L. 287, she was competent as she was not testifying to anything that occurred between her and Horace Patchen but in the presence or hearing of other living or competent persons. In this we think there was no error. The Act authorizes the admission of testimony of one of the parties to facts transpiring before the death of the deceased party or person if the relevant matter occurred between the witness and some other living and competent person.

We do not see how the testimony as to the extent of the timber cutting, and the growth of timber after the right reserved was exhausted, could have been withheld from the jury. There was sufficient evidence of the facts to submit to the jury, and upon the plaintiffs' theory of their right to recover the testimony was competent.

We think the learned Judge of the Court below was entirely right in charging the jury that A. W. Patchen had nothing to convey but the bare legal title when he made the deed of November 9, 1883, that he could not bind W. J. Kime by any reservation he chose to put in the deed, that Kime's right to take off the standing timber was limited to the merchantable timber on the land at the time he sold to Gressly, and that any timber which grew into value on the land after 1868 was the timber of the plaintiffs.

The fact that Henrietta Irvin saw the defendants hauling timber from this land past her door without objection, would not divest her title if she had it, and it was therefore immaterial. So too the fact that Mary A. Irvin told Dr. Prowell that Patchen's estate owned the oak, pine and hemlock timber, could not divest her title if she had one, nor could it create a title in Patchen's estate. As for the recognition of the deed of November 9, 1883, that was abundantly done in her will, but, as we have already said, Patchen could not convey anything but the legal title, and he could give nothing to Mary A. Irvin by reservation, or in any other way, more than the naked legal title. Therefore there was nothing upon which the proposed declaration could operate. It was Kime's reservation and the effect of it that was in controversy, and that was not and could not be affected by these rejected declarations. We think the answer to the defendants' fourth point was entirely correct. Mary A. Irvin could certainly not be estopped from claiming the timber by any manner of recognition of the Patchen deed if she was otherwise entitled to it. She had a right to have the deed for the conveyance of the legal title, and it was not in Patchen's power to take away her title to the timber if it arose extrinsically to the deed.

We see no error in the answer to the defendants' fifth point. The defendants' right could not be greater than a right to cut such timber as belonged to them, and that the answer gave them. Certainly they would be liable if they cut timber not within their reservation, and that was the whole substance of the Court's ruling, and it is fully sustained by our decision in Shaffer *v.* Broadhead, 126 Pa. 260.

Judgment affirmed. W. D. N.

Jan. '94, 8. January 19, 1894.

John Markle, Joseph Markle, Ella Markle and Rebecca Patton v. City of Philadelphia.

Constitution, Art. XVI—Streets—Widening and change of grade of—Damages.

In an issue to determine the amount of damages suffered by a property owner by the grading of a street, the fact that the newly established height had previously been assigned by the municipal authorities for a street intersecting the first, at the edge of the property in question, and that a proceeding to open the intersecting street at that height was previously begun, is not an admissible guide to the jury.

In estimating damages under such an issue, the obligation of the municipal authorities—or the absence of such obligation under special circumstances of a street—to furnish ordinary highway improvements, is not a consideration for the jury.

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Appeal of the City of Philadelphia, defendant, from the judgment of the Common Pleas No. 2 of Philadelphia, wherein John Markle, Joseph Markle and Ella Markle and Rebecca Patton were plaintiffs. This was an appeal from the report of a road jury assessing damages for the change of grade of Roxborough avenue, in the Twenty-first ward. By agreement the issue was made to embrace the injury, if any, occasioned by the widening of the road, physically effected at the same time with the grading. No testimony was offered of damage by the widening.

Plaintiff's property was operated as a farm some few years since, and Roxborough avenue had been only a narrow country road, not constructed to any plan grade, and but slightly leveled in its course over undulating ground. In its previous state the grades, which were at some points as steep as fifteen feet in the hundred, produced a hollow at one part of its course upon plaintiff's property, and the accumulations of water there could pass away only by flowing over abutting private property.

Manayunk avenue, a street intersecting Roxborough avenue at right angles within the plaintiff's property, had been ordered open years before, according to the same confirmed plan by which the grading of Roxborough avenue, complained of, had been done.

Under primitive natural conditions a water course had traversed plaintiff's property from the northeast, crossing the line of Roxborough avenue at the hollow above referred to, and so on, across the property of one Campbell to the southwest over the hill to the Schuylkill river. It was claimed that this had been stopped up by the grading of Roxborough avenue.

The Court, PENNYPACKER, J., was requested by defendant to charge as follows:—

1. The question for the jury is what, if any, difference is there between the value of Mr. Markle's property as it was before the grading of Roxborough avenue, and its value as affected by such improvements upon that street. Any former confirmed plan of the locality, which was never carried into effect as to Mr. Markle's property on Roxborough avenue, is remote from the question involved in this case, and should not be considered by the jury.

2. In cities a property owner has no right to the maintenance of drainage flow, whether ancient or not, from his own property over a public highway into or through other private property. Any reduction of value of plaintiff's property occasioned by the obstruction of the water course passing over Roxborough avenue to the property of Mr. Campbell cannot be considered by the jury in arriving at their verdict. The use of such a water course to drain Roxborough avenue at Mr. Markle's property cannot be considered in this case.

3. The city authorities are under no obligation to lay highway improvements in a street before it is made to conform to the grade established upon the confirmed plan. In estimating the value of Mr. Markle's property prior to the filling in of Roxborough avenue, the jury must consider that street as not entitled to receive of the city authorities cartway paving, water pipe or sewer, until the grading for which plaintiff claims should be done.

4. The city authorities are under no obligation to lay highway improvements in a street before it is made to conform to the grade established upon the confirmed plan. In estimating the value of Mr. Markle's property prior to the filling in of Roxborough avenue, the jury must consider that street as not entitled to receive of the city authorities cartway paving, water pipe or sewer, until the grading for which plaintiff claims should be done.

The first point was affirmed, and refusal to affirm the remaining three was assigned for error.

The jury found for plaintiffs $5,000 damages, and judgment was entered accordingly. Defendant appealed.

E. Spencer Miller, assistant city solicitor, (*Charles F. Warwick*, city solicitor, with him), for appellants.

The city should not pay doubly to a given property owner for the elevation of the street grades at an intersection on his property.

Pusey *v.* Allegheny, 98 Pa. 522.

The city is not bound to furnish municipal improvements to a country road before the surface has been leveled.

Can a property owner in an urban locality include as part of his claim against the city for a change of grade, alleged damages suffered through stoppage of an intermittent ancient drainage channel, at the point where it enters upon his neighbor's lands?

Bentz *v.* Armstrong, 8 W. & S. 40.
Broomall *v.* Chester, 1 WEEKLY NOTES, 228.

Isaac D. Yocum, for appellees.

October 1, 1894. MCCOLLUM, J. Under the pleadings and the agreement of the parties the jury were charged with the duty of ascertaining from the evidence submitted to them the depreciation, if any, in the market value of the plaintiff's property caused by the widening and change of grade of Roxborough avenue. In the performance of this duty it was proper for them to take into consideration the condition of the property immediately before the work of widening and changing the grade of the street

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was commenced and the condition of it immediately after the work was completed. It was competent for the parties to present evidence descriptive of its condition at either time, and evidence explanatory of the effect upon it of the work done. But the condition referred to must be an actual condition discoverable by observation of the property, not a prospective or possible one depending for a physical existence upon the future action of the municipality. Hence a street laid out, but not opened, cannot be taken into consideration in assessing the damages caused by the opening or change of grade of another street upon the same property: Negley Avenue, 146 Pa. 456. If Manayunk avenue was opened and graded before Roxborough avenue was widened, and the grade of it physically changed, the plaintiff could not in a proceeding for the assessment of the damages sustained by the opening and grading of the former have acquired or lost anything by the contemplated or prospective change of the grade of the latter. It logically follows that proceedings for the assessment of damages caused by the opening and grading of Manayunk avenue are not admissible to affect a claim for damages caused by the widening and physical change of grade of Roxborough avenue. It is proper to state in this connection that there was no offer to prove on the trial of the present case that the damages claimed in it were recovered, or the plaintiff's right to them adjudicated in any former proceeding. It is not necessary at this time to discuss the rights of the plaintiff or the duties of the city in respect to paving, sewerage, etc. These are matters which are not pertinent to the issue in the case, and the learned Judge properly declined to instruct the jury in relation to them as requested in the city's fourth point. If such improvements are hereafter made it is probable the plaintiff's property will be assessed with its proportion of the benefits arising from them.

There was no error in the refusal to affirm the city's third point. It assumed the existence of facts which were not proven, and that alone is a sufficient justification of the denial of it.

There was no evidence in the case to which the second point was applicable, and for that reason the refusal to affirm it was proper.

We need not specifically refer to the remaining specifications. We have examined and considered all of them, including those filed on the 20th of January, in pursuance of the permission granted on the argument at bar. Our conclusion is that there is nothing in the rulings or instructions complained of which calls for a reversal of the judgment.

The specifications are overruled, and the judgment is affirmed.

W. D. N.

July, '94, 112. October 10, 1894.

Delaware County and Philadelphia Electric Railway Co. v. City of Philadelphia et al.

Practice—Assignments of error—Jurisdiction—Officers of municipality—When subject to jurisdiction of another county.

The Supreme Court will not consider an assignment of error when the record shows nothing to support it and no exception relating to the same.

The one-half of a bridge built over Cobb's creek, the middle of which is the county line between the City of Philadelphia and Delaware County, is subject to the jurisdiction of the Courts of Delaware County, and the officers of the City of Philadelphia and their agents can be prevented by injunction issuing from that county, from tearing up rails laid on that portion of the bridge within the limits of said county.

The fact that one-half of the costs of erecting the bridge was defrayed by the City of Philadelphia, does not affect the jurisdiction of Delaware County over that portion of the bridge actually within the limits of said county.

The officers of the City of Philadelphia and their agents who are made defendants in such a bill are individuals and subject to the jurisdiction of Delaware County to prevent the commission, within that county, of any acts of trespass. The rule that a municipality can only be sued in the Courts of the county where it is situated has no app ca such a state of facts.

Appeal of the City of Philadelphia, Edwin S. Stuart, mayor, James H. Windrim, director of public works, and John B. Reilly, from the decree of the Common Pleas of Delaware County, continuing until further notice, a preliminary injunction previously granted to restrain them from tearing up and removing the ties, rails and wires of the electric railway track, laid by the Delaware County and Philadelphia Electric Railway Company, upon so much of the bridge over Cobb's Creek as was within the County of Delaware.

The facts are sufficiently stated in the opinion of the Supreme Court, *infra*.

The appeal was taken from the decree of the Court of Common Pleas and error assigned, (1 and 2) the assumption of jurisdiction of Delaware County against the City of Philadelphia and its officials, (3) in refusing to hear oral testimony, and, (4 to 8) the granting and continuing of the injunction.

James Alcorn, assistant city solicitor, (*Charles F. Warwick*, city solicitor, with him), for appellants.

A municipality can only be sued in the Courts of the county where it is situated.

Lehigh Co. *v.* Kleckner, 5 W. & S., 181.
Oil City *v.* McAboy, 74 Pa. 249
Potts *v.* City of Pittsburgh, 14 WEEKLY NOTES, 38.

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Heckscher *v.* City of Philadelphia, 20 WEEKLY NOTES, 52.

Under the amendments to the equity rules, the Court should have heard the oral testimony.

The plaintiff did not have proper authority to use the bridge.

Venango County Comm'rs *v.* Oil City S. R. Co., 3 Dist. Rep., 546.
Act April 21, 1855, sec. 10.

J. B. Hannum, for appellees.

The plaintiffs had secured proper authority.

§ 9, Art. XVII., Constitution.
§ 15, Act May 14, 1889.
Gillett *v.* C. & M. Railway Co., 2 Dist. Rep., 450.

The bridge is a part of the public highway.

Rapho Township *v.* Moore, 68 Pa. 404.
Township of Newlin *v.* Davis, 77 Id. 317.

The agents of the City of Philadelphia should be restrained from interfering with the tracks of the plaintiff in Delaware County.

Millvale Boro. *v.* Evergreen Ry. Co., 131 Pa. 23.

October 22, 1894. GREEN, J. This is an appeal from an order of the Court below continuing until further notice, a preliminary injunction previously granted to restrain the defendants from tearing up, and removing the ties, rails and wires of the plaintiff's electric railway track laid upon so much of the bridge over Cobb's creek as was within the County of Delaware. The allegation of the bill is that the railway track was laid by permission of the supervisors of Upper Darby Township from the middle of Cobb's creek over roads in that township to the western line of the township, and also that the permission of the commissioners of Delaware County had been obtained to lay its rails, ties and wires over so much of the bridge as lies within the County of Delaware. The injunction was asked for because Mr. Windrim, director of the department of public works in the City of Philadelphia, had given notice in writing to Mr. John B. Reilly, the contractor who built the bridge, to remove the tracks from the bridge, and Mr. Reilly had shown this notice to the plaintiff and had informed the plaintiff that he would be obliged to remove the track from the bridge.

In the paper book of the appellant a question is raised as to the jurisdiction of the Court of Delaware County to proceed against the City of Philadelphia, in that county, on the ground that the city could only be sued in the Courts of Philadelphia County. The question is of no consequence because both Mr. Windrim who gave the order, and Mr. Reilly who was to execute it, are defendants, and are individual persons only, and are of course, subject to the jurisdiction of the Courts of Delaware County to prevent the commission within that county, of any acts of trespass.

The third assignment of error alleges that the Court below refused at the hearing on April 16, 1894, to hear oral evidence offered by the defendants. We are unable to find anything on the record to support this assignment, and no exception was taken to such refusal.

The remaining assignments raise only the question of the right of the plaintiff to lay its rails, ties and wires on the bridge, and assert that the city never had granted permission to that effect. To this the plaintiff replies that they did not lay any part of their structure east of the county line on the bridge, but only up to the county line which, the plaintiff says, runs through the middle of Cobb's creek, and therefore across the middle of the bridge. As the bill does not ask for an injunction except as to that part of the bridge which lies within Delaware County, no question can arise as to the part lying within the city limits. Some contention is made that the bridge is a joint structure, because the cost of its erection was defrayed equally by the city and the county, and therefore the city had a concurrent jurisdiction over the whole of the bridge and hence its consent must be obtained. Whatever may be the merits of such a contention, it can not affect the physical fact that one-half of the bridge is located within the territorial limits of Delaware County and is therefore subject to the jurisdiction of the Courts of that county. The tearing up and removing the ties and rails of a railway track, without authority of law, is an act of violence and force, which we have refused to sanction in other cases and can not permit in this: Easton etc., Pass. Ry. Co. *v.* City of Easton, 133 Pa. 505. We see no reason for interfering with the injunction already issued, and decline to do so. We are not prepared to hold that the consent of the supervisors of Darby Township, and of the commissioners of Delaware County, could not confer a lawful authority upon the plaintiff to lay its tracks on so much of the highway as to include that part of this bridge which lies in Delaware County. We will certainly not decide so now.

The decree of the Court below is affirmed and appeal dismissed at the cost of the appellants.

W. M. S., JR.

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July, '93, 87. February 19, 1894.

Hinds et al. v. Scranton Match Co., Limited.

Partnership association, limited—Recording of articles of association—Liability of members—Notice.

When articles of a partnershtp association, limited, have been executed but not recorded before the commencement of the negotiations, carried on in the name of the association, which culminate in the contract with a third party after they have been recorded, the members of the association do not become liable as individuals or general partners for the goods delivered to the association under the said contract, although no notice of the recording of the articles was given to the vendors other than that inferred from the record itself.

Appeal of Joseph E. Hinds and others, trading as Hinds, Ketcham & Co., plaintiffs' from the judgment of the Common Pleas of Lackawanna County, in an action of assumpsit in which Henry Battin and others, trading as the Scranton Match Co., were defendants.

This case was by agreement referred to the Hon. H. A. Knapp, as referee, from whose report the following facts appeared:

The defendants, except two, on November 1, 1886, drew up articles of association for the purpose of forming a partnership association, limited, for the purpose of manufacturing matches. Desiring to purchase boxes, they entered into negotiations with the plaintiffs, who sent a salesman to Scranton and on the 14th of December, 1886, the defendants entered into a written order to the plaintiffs to furnish them boxes and wrappers to the amount of $6,000 upon the terms contained in the order, which order expressly provided that it was subject to the approval of the plaintiffs, and that they should submit proofs of the work to be approved by the defendants and also provided that any verbal alterations between the buyer and salesman, either then or thereafter, should not be binding upon the plaintiffs. The order was signed, "Scranton Match Co., Limited, per Col. S. Broadbent, President; R. A. Zimmerman, Secretary and Treasurer." The proofs were delivered to the defendants on the 27th or 28th of January, 1887, and approved by them. The plaintiffs immediately contracted for the stock necessary for filling the order and proceeded also to procure the necessary dies, electrotypes, cylinders, rolls, cutting machines, and all other machinery necessary for the filling of the order. Some samples were forwarded and in the latter part of March defendants concluded an arrangement by which the inside of the boxes were to be made of a cheaper material than that which the order called for and the price was thereby diminished. This change in the price was effected by erasure upon the original orders brought to Scranton for that purpose, and returned to the plaintiff without a change of signature. All the boxes and goods delivered, for which this action was brought, were furnished under the orders of December 14, 1886, as modified, so far as price and quality of a portion of the material was concerned, and no goods except the samples were furnished before May 7, 1887. The plaintiffs filled the order as fast as defendants desired goods until the 2nd of June, 1888, when they were notified not to deliver any more under that order, and that defendants had gone into liquidation. On the 23rd of April, 1887, defendants filed their articles of association in the recorder's office. The plaintiffs demanded payment from the defendants for the amount of goods which had not been paid for, and damages for refusal to receive the balance of the order. The defendants claimed that they were not personally liable. The referee found for the defendants, the Court dismissed exceptions to his report and entered judgment for the defendants. The plaintiffs took this appeal and filed, *inter alia*, the following assignments of error:

First. The Court erred in dismissing the twenty-eighth exception to the finding of the referee. The exception and finding are as follows:

28th. "The referee erred in finding as requested in defendant's first request." (1st) "Whatever agreements or arrangements were made by and between the defendants, or any of them, as members of the Scranton Match Company, Limited, prior to the 7th day of May, 1887, were entirely preliminary; and the orders (Plaintiff's Exhibit 'A' and 'B') having been made expressly contingent upon the approval by them of the samples of the match boxes, wrappers, etc., to be forwarded for their inspection, the contract dates from the time of such approval, which was not given at any rate until after the 1st day of May, 1887." *Answer.* "I find as requested in this point."

Second. The Court erred in dismissing the twenty-ninth exception to the report of the referee. The exception and finding are as follows:

29th. "The referee erred in finding as requested in the defendant's second request." (2nd) "Even if the organization of the Scranton Match Company was defective by reason of the default on their part to record the articles of association as required by law prior to the 23d of April, 1887; the articles having been recorded at that time, the organization was perfected then, and inasmuch as the contract, the basis of the present suit, was not made nor entered

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into by both of the parties hereto until after the 7th day of May, 1887, the judgment in this case must be in favor of the defendants." *Answer.* "I find as requested in this point."

W. H. Jessups (*A. Hand* with him), for appellants.

The contract between the parties is in writing and is contained in the orders of December 14, 1886. The evidence is undisputed that the order was accepted and these proofs were furnished the latter part of January, 1887, or at the latest in March. When plaintiffs received the order and accepted it and notified defendants that they would submit proofs to be approved by them, it formed a contract on their part which defendants could enforce and when defendants received the proof and accepted it the contract became final and complete on their part. There is a great difference between making a contract to furnish certain manufactured articles and the fulfillment of such contract by their subsequent delivery.

The modification of an existing contract by a change of the quality of the material of the inside slide which diminished the price, while the number of boxes, their general character, terms of payment and time of delivery and all other terms and agreements remained the same, did not work the entire abrogation of the contract. By the very terms of the contract no verbal alteration by the salesman Griffin, "now or hereafter" could bind the plaintiffs without their consent and the only change consented to by them was in the price of the boxes. This being the case, it resolves itself into a question of law whether the simple modification of a valid contract by agreeing to take a cheaper material for a portion of the order, thereby reducing the price, destroys the right of the party who has expended a large sum of money in machinery and stock for the purpose of fulfilling it to enforce it; in other words destroys and annuls the contract. Such annulment cannot take place. The change was made at the request and for the benefit of defendants. The referee was in error then when he said in the preceding and other assignments of error that the contract of March 29th was a conditional one and the conditions were not complied with before April 23, 1887. He admits they were complied with and everything was all right before the 20th of May, as stated in the sixteenth assignment (Paper Book, page 107) and that all the goods were delivered for which suit was brought, and that defendants refused to receive the balance of the goods ordered. Why, then, were plaintiffs not entitled to recover for them? The referee says in his fourth conclusion of law (thirteenth assignment): "It cannot be said that the defendants assumed any liability prior to the perfecting of their organization as aforesaid and therefore this suit against them individually as general partners must fail." When the contract of December 14, 1886, was made, the defendants were admittedly general partners, doing business as the Scranton Match Company, Limited. The plaintiffs contracted with them under that name; they said they were a partnership, limited; but the record disclosed the fact that they were not, as no certificate had been recorded to bring them into existence as such.

Hill *v.* Stetler et al., 127 Pa. 145.

On the 23rd of April, 1887, they recorded their articles. No notice was given of this fact to the plaintiffs. The recording of the articles was not notice to the plaintiffs. The statute does not make the recording notice to all the world. It simply requires that the certificate be recorded to bring the association into life.

Sheble *v.* Strong, 128 Pa. 322.
Gearing *v.* Carroll, 151 Id. 79.

This being the law the referee and the Court erred in holding that the recording of the articles without notice to plaintiffs could have any effect upon the rights or contract of the plaintiffs.

Everett Warren (*E. N. Willard* with him), for appellees.

Negotiations do not make a contract in law. An agreement must be enforceable in law to constitute a contract. A sale of goods and merchandise requires the assent of the parties and to make a valid contract must be binding upon both parties. If conditions be affixed to an offer the buyer cannot be held until the conditions are complied with and any modification and change in the offer, particularly when made at the suggestion of the vendor, is an abandonment of the original offer and if made with conditions attached requires the performance of the conditions by the vendor before there can be any contract of sale. And it is just as plain that if to a proposal or offer an assent be given by vendee conditional upon anything to be done by the vendor then the performance of the condition is a term of the assent and there is no agreement independent of it.

The signing of the orders did not effect a sale of the goods, either wrapper or boxes. The acceptance of the orders did not accomplish this. A condition precedent to any contract of sale was the submission by plaintiffs to the Match Company of proofs, and proofs in the contemplation of the parties meant something besides sketches. It is too plain to need discussion or citations that the execution of the original orders did not in itself constitute a contract but entitled the Match Company to one in accordance with their terms and the agreement made by the parties. To make it a binding contract it would

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have had to be independent of conditions requiring the future assent of the alleged promissors.

If authority be needed we cite:

3 Amer. & Eng. Encyclopedia of Law, 482.
Hughes *v.* Clyde, 41 Ohio, 339.
Hunt *v.* Wyman, 100 Mass. 198.

When was the obligation on the part of the Match Company enforceable by law? The plaintiffs' were to submit proofs of wrappers and boxes to be approved by the Match Company before any liability could be imputed to it or any obligation resting upon it. The negotiations, understandings, orders, talk, etc., of December 14, 1886, were not a contract but at most merely an arrangement of terms of a contract to take effect in the future on the happening of certain things.

October 1, 1894. McCollum, J. All the equities of the case are with the defendants, and in accord with the judgment appealed from. In the negotiations which resulted in the contract under which the goods were delivered the defendants were not acting for themselves, or a general partnership, but for the Scranton Match Company, Limited, an association organized under the Act of June 2, 1874, and its supplements. The plaintiffs, through their agent, knew the nature of the association, what had been done in the way of organizing it, what its capital was and the measure of the liability of its members. The statutes under which it was formed and the articles on which it was founded were read and explained to him and his knowledge was theirs. With this information, the correctness of which is not disputed, they dealt with and furnished their goods to, and on the credit of the association, and not until it passed into the hands of liquidating trustees in consequence of losses in business and the destruction of its plant by fire, did they claim that the defendants as individuals or general partners were liable for the goods so sold and delivered. It was shown on the trial and found by the referee that the defendants paid their subscriptions to the capital stock of the association, and it is not alleged that its insolvency was the result of fraud or mismanagement. The plaintiffs' contention is, therefore, not only opposed to the terms of the contract and the understanding between them and the defendants when it was made and the goods were furnished under it, but to the equities of the case. It is a contention based upon a technicality which depends on their construction of the Act of 1874. It appears that the articles of association were not recorded when the order of December 14, 1886, was made, or when it was changed on the 29th of March, 1887, but it is beyond dispute that they were duly recorded sometime before the goods were delivered, and before the contract under which the deliveries were made became absolute and binding upon the Match Company by its approval of the samples. But the plaintiffs contend that the defendants are precluded by their admission on the trial from alleging that the deliveries were made under the modified or new orders. We do not think the admission is entitled to the effect now claimed for it. It related to exhibit "C" and was manifestly made to dispense with the production of the plaintiffs' books of original entries. That it was not intended to set aside the agreement of March 29th or to deny to the same its legitimate effect upon the issue is obvious from the proceedings on the trial and the statements of counsel in their paper-books. The learned counsel for the plaintiffs, referring to this agreement in their history of the case, said: "All the boxes and goods delivered for which this suit is brought were furnished under the orders of December 14, 1886, as modified, so far as price and quality of a portion of the material were concerned. By the arrangements of March 28th, or 29th, the plaintiffs went on and filled the orders as fast as the defendants desired it, until the 2nd of June, 1888." These orders were mere proposals subject to the approval of the plaintiffs and to the approval of the Match Company of the proofs and samples of the goods. Strictly speaking there was no contract until these approvals were given as they were in the nature of conditions precedent to its existence. The original orders were changed on the 29th of March by the maker and approvers of them and if at any time there was a binding and absolute contract in conformity with them it was avoided by the agreement then made. Whether the orders recognized and acted upon after this agreement are called new, or modified orders, is of no consequence. Surely the approval of them and the samples furnished under them constituted a contract inconsistent with any contract arising from the approval of the original orders and the proofs submitted in pursuance of them. The samples furnished by the plaintiffs under the new or modified orders were approved by the association on the 26th of May, 1887, and thenceforth there was an absolute contract between the parties on the basis of these orders by which alone their rights and obligations in respect to the subject matter of it were measured. It was a contract between the plaintiffs and the Scranton Match Company, Limited. Did the failure of the company to record the articles before the commencement of the negotiations which culminated in the contract after they were recorded render its members liable as individuals or general partners for the goods delivered to it? We

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think not. It is the status of the association when the contract was made that must be considered in answering this question, and it is admitted that when it approved the samples furnished under the new orders it was qualified to enter into contracts in connection with and for the proper prosecution of the business for which it was organized. These views are in harmony with the learned referee's findings of fact and conclusions of law.

We have not deemed it necessary to notice, *seriatim*, the numerous specifications of error filed in the case, although we have examined and considered all of them together with the argument of the learned counsel in support of them. It is sufficient to say that we discover nothing in the specifications which in our opinion calls for or would justify a reversal of the judgment. They are accordingly overruled and the judgment is affirmed.

W. C. S.

Common Pleas.

C. P. No. 2. March, 1894, 644.

The Fourth Street National Bank v. Haines et al.

Limited partnership—Renewal—Impairment of capital at the time of—Special partners—When liable as general—Act of 1887—Affidavit of defence—Promissory note—Novation.

At the time of the renewal of a limited partnership the special capital must be unimpaired or the special partner is liable as a general partner.

When the statement in assumpsit sufficiently sets out a cause of action the defendant must controvert or deny one or more of the material averments, or judgment may be entered for want of an affidavit or a sufficient affidavit of defence.

An obligation to pay debts supports a promise to pay them.

When a matured note is surrendered upon the receipt of a new one the transaction is in the nature of a novation.

Sur rule for judgment for want of a sufficient affidavit of defence.

Richard C. Dale, Samuel Dickson, for the rule.

George Tucker Bispham, R. Francis Wood, W. W. Wister, Jr., Charles Biddle, W. R. Smith, Richard C. McMurtrie, contra.

May 31, 1894. JENKINS, J. This was a rule for judgment for want of a sufficient affidavit of defence. The statement averred that the defendants were indebted to the plaintiff in the sum of $30,000, with interest, upon six notes, each for $5,000, dated respectively February 24, March 1, March 5, March 8, March 14 and March 21, 1894, payable on demand, each note being signed "Haines & Co." That the said six notes were accepted by the plaintiff upon the faith of a statement in writing, made and signed by the defendants, and each of them, under date of December 30, 1893, the same being a "certificate of the renewal and continuance of the limited partnership between Granville B. Haines, Richard Wood, Samuel B. Brown, Richard W. Bacon and William Whitaker, trading as Haines & Company, under their article and certificate dated December 31, A. D., 1891," wherein the said Richard W. Bacon and William Whitaker averred that they were special partners, and that "the amount of capital originally contributed by each of the said special partners to the common stock was $100,000, one-half thereof being in cash, and the other half thereof being in goods and merchandise, making the aggregate amount of capital contributed by them $200,000, as designated in the said original certificate, and the same remains unimpaired and undiminished as their contribution to the present renewal and continuance of the said limited partnership, being in merchandise, an inventory and appraisement whereof have been filed in the Court of Common Pleas No. 3, of Philadelphia County." "That the statement thus made, 'that the aggregate amount of capital stock paid by the special partners, to wit, $200,000, remained unimpaired and undiminished as their contribution to the renewal and continuance of said limited partnership,' was false in fact." "That at the time said certificate was made and published the entire capital stock of the special partners had been consumed and lost in the business of Haines & Co., and at that time the said firm of Haines & Co. was without capital, and was insolvent to the amount of many thousands of dollars." And that all of the defendants were liable as general partners.

Affidavits of defence were filed by William Whitaker and Richard W. Bacon, wherein they alleged that, on December 31, 1891, a limited partnership, composed of the defendants, was duly formed with the firm name of Haines & Co., under the Act of March 21, 1836, and its supplements, the deponents being special partners, each contributing $50,000 in cash and $50,000 in merchandise, their contributions aggregating $200,000. That the partnership expired by its own limitation on December 31, 1892, and was then renewed for one year, that it again expired by its own limitation on De-

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cember 31, 1893, and was then renewed for one year. That an appraiser appointed by the Court of Common Pleas reported under oath on December 30, 1893 (the 31st being Sunday), that he had carefully examined and appraised the items of the goods and merchandise of the partnership set out in an inventory, which partnership it was proposed to renew, and that the same included the original contributions of the deponents as special capital, and that the value of such merchandise was $200,000. That the said appraiser also certified that the partnership had other merchandise and good accounts and cash more than sufficient to pay the debts thereof; and that the said merchandise, appraised as of the value of $200,000, and constituting the capital originally contributed by the special partners, was set apart as such, and was transferred to the new firm at the time of the renewal of said firm." That there was made, filed and published a certificate by all of the partners, duly acknowledged, and there was filed an affidavit of one of the general partners, as required by Act of Assembly. That the deponents at the time the partnership was renewed, believed that the statement filed and the affidavit thereto were true, and that every one concerned had done all that was required to be done to renew the partnership as a limited partnership. That "when the notes given by the limited partnership of 1893 matured, the holders stated to the general partners that the notes having matured they did not like to carry matured paper, and asked that demand notes should be given them, which was then done by the general partners, and these notes are the notes on which suit is brought, the old notes being then surrendered." That the notes sued on were given by the partnership of 1894 without the deponents' knowledge or consent; that the general partners had no authority to bind the deponents except as special partners; that the plaintiff knew this fact when it accepted the notes, and that said notes were given for no consideration whatever other than the debt of the old firm. Copies of the petition, the renewal certificate, the summary of the appraisement, the affidavit of the appraiser, and the affidavit of one of the general partners, were annexed to the affidavits of defence.

Neither of the affidavits of defence averred that the capital contributed by the special partners was unimpaired at the time of the renewal of the partnership, nor denied the averment in the statement that, at the time of the making of the renewal certificate, "the entire capital stock of the special partners had been consumed and lost in the business of Haines & Co., and that at that time the said firm of Haines & Co. was without capital, and was insolvent to the amount of many thousands of dollars."

The main question in this case is, whether or not upon the renewal of a limited partnership, if the capital contributed by the special partners has been impaired, the special partners become liable to creditors as general partners.

In Andrews *v.* Schott, 10 Pa. 47, it was held that, "unless the conditions of the Act relating to limited partnerships are substantially complied with, the partners are generally liable;" and "in such cases knowledge by creditors of the existence of the special partnership agreement at the time the contracts are made does not discharge the special partner from his general liability."

The Act of March 21, 1836, P. L. 143, relating to the formation of limited partnerships, provides, in section 11 (2 Br. Purd. 1072, pl. 12): "Every renewal or continuance of such partnership beyond the time originally fixed for its duration, shall be certified, acknowledged and recorded, and an affidavit of a general partner be made and filed, and notice be given in the manner herein required for its formation, and every such partnership which shall be otherwise renewed or continued shall be deemed a general partnership." Section 8 of the said Act which requires the acknowledgment, filing and recording of the certificate of the original formation of a limited partnership, provides: "And if any false statement be made in such certificate or affidavit, all the persons interested in such partnership shall be liable for all engagements thereof, as general partners:" 2 Br. Purd. 1071, pl. 8.

In Haddock *v.* Grinnell Manufacturing Corporation, 109 Pa. 372, it was held (p. 382), "The point was made that inasmuch as the eleventh section of the Act of 1836 does not specify what the affidavit of the general partner shall contain, it is only necessary to set forth the fact of the renewal in general terms. This construction of the Act would render it insensible. It provides, as before stated, that an affidavit of the general partner 'shall be made and filed, and notice be given in the manner herein required for its original formation.' This evidently means that the affidavit shall give as full information upon the renewal as upon the original formation of the limited partnership. A mere formal affidavit setting forth the renewal only, would not give creditors any valuable information as to the condition of the firm, and the object of the Act was to provide this notice. When a special partnership is continued or renewed, it must be in the same condition so far as the special capital is concerned, as when it was originally formed. Such capital must be unimpaired; it must be in such condition as to be available for creditors, and it is the duty of the general partner to furnish this information

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in his affidavit. If this duty is neglected the partnership becomes general, and the special partner has no immunity."

It is not for us to discuss whether the view taken in the last above-quoted case, or the contrary view taken by the Court of Appeals of New York, in Fifth Avenue Bank *v.* Colgate, 121 N. Y. 381, is correct. Our Supreme Court has said, that at the time of the renewal of a limited partnership, the special capital must be unimpaired, or the special partner is liable as a general partner, and we feel ourselves bound so to hold.

Although the Courts of the two States differ as to what are the requirements, yet they agree in holding that he who claims the immunity of the Act must show that its requirements have been fulfilled. In Andrews *v.* Schott, *supra*, Haddock *v.* Grinnell Manufacturing Corporation, *supra*, and in Richardson *v.* Hogg, 38 Pa. 153, the questions were raised by the affidavits of defence, and the affidavits were held to be insufficient; so too, the averment of the limited partnership was treated as a defence to be made out by him pleading it, in Smith *v.* Argall, 6 Hill, 479, where the Court said (p. 482): "The partners rely upon the statute for protection, and they must show a compliance with what it requires:" in Durant *v.* Abendroth, 69 N. Y. 148, and in Fifth Avenue Bank *v.* Colgate, *supra*.

The affidavits of defence in the present case practically admit that on December 30, 1893, the capital contributed by the special partners was impaired; for the averment above quoted in the plaintiff's statement to that effect, though "clear, express and unequivocal," is not denied, and the rule is, when the statement in assumpsit sufficiently sets out a cause of action, "if the defendant is unable to controvert or deny one or more of the material averments of claim, a judgment in default of an affidavit or sufficient affidavit of defence, may be entered:" Byrne *v.* Hayden, 124 Pa. 170.

That the notes in suit were given after the renewal certificate was filed, to take up notes given prior to the filing of that certificate, and which had matured subsequently thereto, is no defence. As the matured notes were surrendered upon the receipt by the plaintiff of the new notes, the transaction was in the nature of a novation, as in Shafer's Ap., 99 Pa. 246.

The assets held by the partnership immediately prior to the filing of the renewal certificate, and retained by the partnership, were charged with the payment of the partnership debts, and whether sufficient for that purpose could not be ascertained till an account was taken: Andrews *v.* Schott, *supra*, p. 54. This obligation to pay the debts supports the promise to pay them: Esling *v.* Zantsinger, 13 Pa. 50; White *v.* Thielens, 106 Pa. 173. And as all the members of the partnership are to be deemed general partners, the notes are express promises to pay, upon which all the members are liable: Bellas *v.* Fagely, 19 Pa. 273.

The rule is therefore made absolute.

F. B. N.

C. P. No. 2. March, 1894, 808.

Siegel Brothers v. Wood et al.

Limited partnership—Special partner—Contribution by, of goods—Failure to specify under Act of 1865—Liable as general partner—Impairment of capital—Statement in certificate of formation in renewal—Affidavit of defence—Act of 1887.

Under the Act of 1887, where a statement sets out the place of record of any instrument of writing, the Court can consider the instrument itself as set out.

Under the Act of 1865, special partners are liable as general partners if they have contributed goods and merchandise in lieu of cash, unless the contributions are first appraised as the Act directs, and their nature and value fully set forth and described in the certificate of formation.

An averment in a statement that the capital of a limited partnership was impaired at the time of a continuance must be specifically denied in the affidavit of defence.

An original certificate for formation of a limited partnership contained the following: "the amount contributed by said special partners is $200,000, one-half thereof being in goods and merchandise." No description or valuation of the goods was given:

Held, the special partners were liable as general partners under the Act of 1865.

Sur rule for judgment for want of sufficient affidavit of defence.

The facts are set out at length in the opinion of the Court.

Samuel B. Huey, for rule.

George Tucker Bispham, Charles Biddle, R. Francis Wood, W. Rudolph Smith, W. W. Wister, Richard C. McMurtrie, contra.

June 9, 1894. JENKINS, J. This is a rule for judgment for want of a sufficient affidavit of defence.

The statement averred that the defendants were indebted to the plaintiff in the sum of $4,472.93 for goods sold and delivered by the plaintiff to the defendants between Oct. 7, 1893, and March 3, 1894. That the defendants filed a certificate as for a limited partnership under the firm name of Haines & Co., in the office of the recorder of deeds of Philadel-

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phia County, which was recorded in Limited Partnership Book, No. 6, page 136, etc., and subsequently filed in the said office two certificates for the renewal of the said partnership on Dec. 31, 1892, and Dec. 30, 1893, respectively. That in said certificates Richard W. Bacon and William Whitaker were stated to be special partners. That the original certificate and the two renewal certificates "are defective in that in none of them is the nature of the goods contributed by the special partners fully set forth and described as required by the Act of Assembly." "That on Dec. 31, 1892, the capital contributed by the said special partners was impaired and diminished, and almost entirely used and wasted in the business of the firm, and the said firm was then insolvent. That on Dec. 30, 1893, the said capital of the special partners was entirely consumed and exhausted in the business of the firm, and the said firm was then entirely without capital and hopelessly insolvent." And that the defendants, and each of them, became liable to the plaintiff for the payment of said claim. Copies of the said renewal certificates, and a copy of the plaintiff's book of original entries, were attached to the statement.

Affidavits of defence have been filed by the said Richard W. Bacon and William Whitaker, in which they aver, that they were special partners in the said firm of Haines & Co. That attached to each of the said renewal certificates, and duly recorded therewith was "an affidavit of Richard Wood, one of the general partners, stating that the contributions of the special partners had been contributed in merchandise, an inventory and appraisement whereof had been duly filed in the Court of Common Pleas No. 3 of Philadelphia County, *In re* Haines & Co., of December term, 1891, No. 715½." "That in said appraisements and inventories, the nature and value of said goods are fully set forth and described, as to article, quantity, price and amount." That "said inventories and appraisements were made in each case by an appraiser duly appointed by the Court of Common Pleas." That they believed at the time the said certificates were signed that all of the statements therein contained were true. That they are informed, believe, and expect to be able to prove, that on Dec. 31, 1892, "the said special capital was wholly unimpaired," and "that the allegation that the firm was insolvent on Dec. 30, 1893, is untrue." Copies of the said affidavits of Richard Wood, and of the said inventories and appraisements, were attached to the said affidavits of defence.

Though there is no copy of the original certificate for the formation of the partnership of Haines & Co. attached to the statement, yet as the statement sets out the place of record of the certificate, we can consider it as before us, for § 3 of the Act of May 25, 1887, P. L. 271, Sup. Br. Purd. 2369, pl. 3, provides that the statement in an "action of assumpsit, shall be accompanied by copies of all notes, contracts, book entries, or a particular reference to the records of any Court within the county in which the action is brought, if any, upon which the plaintiff's claim is founded, and a particular reference to such record, or to the record of any deed, or mortgage, or other instrument of writing recorded in such county, shall be sufficent in lieu of the copy thereof."

The original certificate of Haines & Co. states: "The amount contributed by said special partners is $200,000, one-half thereof being in goods and merchandise." No description or valuation of the goods is given.

The Act of March 21, 1836, § 2, P. L. 143; 2, Br. Purd. 1070, pl. 2, required the special capital to be contributed in actual cash payments, otherwise all the members of the partnership were liable to its creditors as general partners: Richardson *v.* Hogg, 38 Pa. 153. Sec. 4 of the said Act sets out the requisites of the certificate, which by § 5 must be duly acknowledged by all the persons signing it, by § 6 "shall be recorded and filed in the office of the recorder of deeds of the proper county, in which the principal place of business of the partnership should be situated," and by § 7 "an affidavit of one or more of the general partners shall also be filed in the said office, stating the sums specified in the certificate to have been contributed by each of the special partners to the common stock, and to have been actually, and in good faith, paid in cash." No limited partnership could be formed in Pennsylvania, unless the special capital was actually contributed in cash, until by the Act of March 30, 1865, P. L. 46, § 1, 2 Br. Purd. 1074, pl. 33, it was provided: "It shall and may be lawful for any special partner to make his contribution to the common stock of any limited partnership he may become a member of, in cash, goods or merchandise: Provided, that when such contributions are made in goods or merchandise, the same shall first be appraised under oath, by an appraiser, who shall be appointed by the Court of Common Pleas of the county in which such partnership is to be carried on: And provided also, that in the certificate now required by law, the nature and value of the said goods shall be fully set forth and described."

As under the Act of March 21, 1836, the special partners were liable as general partners unless their contributions were paid in cash, so under the Act of March 30, 1865, they will also be liable as general partners, unless the goods

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contributed by them are first appraised as that Act requires, and "the nature and value of the said goods" are "fully set forth and described" in the certificate of the formation of the partnership, and the certificate is also duly acknowledged and recorded, together with the affidavit of a general partner, as required by the Act of March 21, 1836; for, "unless the conditions of the Act relating to limited partnerships are substantially complied with, the partners are genally liable:" Andrews *v.* Schott, 10 Pa. 47. And our Supreme Court has so said in Vandike *v.* Rosskam, 67 Pa. 330, 333.

It is therefore clear that the so-called special partners of Haines & Co. were liable as general partners under the original certificate filed Dec. 31, 1891.

The partnership so formed was to continue for one year. On Dec. 31, 1892, there was filed with the recorder of deeds of this county, by the same parties, what they called a "certificate of renewal and continuance of the limited partnership" of "Haines & Co.," which set forth that "The amount of capital originally contributed by each of the said special partners to the common stock was $100,000, one-half thereof being in cash, and the other half thereof in goods and merchandise, making the aggregate amount of capital contributed by them $200,000, as designated in the said original certificate, and the same remains unimpaired and undiminished as their contribution to the present renewal and continuance of the said limited partnership." At the same time there was filed with the recorder of deeds an affidavit of Richard Wood, one of the general partners, averring that the capital contributed by the special partners remained "wholly unimpaired and undiminished," and that an "inventory and appraisement" of the merchandise contributed by the special partners had been "duly filed in the Court of Common Pleas No. 3 of Philadelphia County, *In re* Haines & Company, of December term, 1891, No. 715½."

If this "certificate of renewal" and "continuance" did renew and continue the partnership formed by the certificate filed Dec. 31, 1891, then as all of the members of that partnership were liable to its creditors, as general partners, they must continue to be so liable. The defendants' counsel sought to escape from this conclusion by arguing that the renewal certificate should be regarded as an original certificate creating a limited partnership on Dec. 31, 1892. That argument, however, does not help the defendants, for, first, the certificate does not claim to create a new partnership, but to continue one already existing and about expiring; and, second, neither in the certificate nor in the affidavit of the general partner, are "the nature and value" of the goods contributed by the special partners "fully set forth" and "described." Therefore, if the certificate filed on Dec. 31, 1892, were treated as an original certificate, as it does not comply with the requirements of the said Act of March 21, 1836, as amended by the said Act of March 30, 1865, the members of the partnership so formed would be liable to its creditors as general partners.

What has been said with reference to the certificate filed on Dec. 31, 1892, for the renewal of the partnership for one year, applies with equal force to the "certificate of renewal and continuance" filed on Dec. 30, 1893, for the renewal of the partnership for another year. In this last mentioned certificate it is stated that "the amount of capital originally contributed by each of the said special partners to the common stock was $100,000, one-half thereof being in cash, and the other half thereof in goods and merchandise, making the aggregate amount of capital contributed by them $200,000, as designated in the said original certificate, and the same remains unimpaired and undiminished as their contribution to the present renewal and continuance of the said limited partnership, being in merchandise, an inventory and appraisement whereof have been filed in the Court of Common Pleas No. 3 of Philadelphia County, *In re* Haines & Co., of December term, 1891, No. 715½." There was also filed with the recorder of deeds an affidavit of Richard Wood like that filed on Dec. 31, 1892, but neither in the certificate nor in the affidavit are "the nature and value" of the goods contributed by the special partners "fully set forth and described." In neither certificate nor affidavit is "the nature" of the goods contributed by the special partners at all "set forth" or "described," nor their value, except in the most general way. We therefore hold that all of the members of the partnership referred to in the said several certificates are liable to its creditors as general partners.

While there is no case in Pennsylvania directly in point, under the said Act of March 21, 1836, and its said supplement of March 30, 1865, yet there are several adjudications under the Act of June 2, 1874, P. L. 271, and its supplement of May 1, 1876, P. L. 89, 1 Br. Purd. 937, 939, where it has been held that certificates for the formation of limited partnerships under the last two above mentioned Acts, must contain a specific description of the property contributed, with its valuation, or the members of the partnership will be held liable as general partners. The words of the said Act of May 1, 1876, are: "Where property has been contributed as part of the capital, a schedule, contain-

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ing the names of the parties so contributing, with a description and valuation of the property so contributed, shall be inserted." These words are no more explicit than those of the said Act of March 30, 1865, in which the words are: "That in the certificate now required by law the nature and value of the said goods shall be fully set forth and described." In Eliott *v.* Himrod, 108 Pa. 569, the Court said, on p. 579, that the Act of June 2, 1874, "was far less stringent in its terms" than the said Act of March 21, 1836.

In Maloney *v.* Bruce, 94 Pa. 249, in speaking of a limited partnership under the said Act of June 2, 1874, and its said supplement of May 1, 1876, where the description of the property contributed was in general terms, the Court, in holding that the limited partnership had not been properly formed, and all of its members were liable as general partners, said (p. 252): "This is not the kind of schedule contemplated by the Act of 1876. The description is too general to enable any one to form a correct estimate of the extent of the property, and a lumping valuation renders it equally difficult to judge of values. The property contributed was intended as the equivalent of a cash capital, and the plain object of the provision of the Act of 1876, requiring a schedule, was to enable creditors to ascertain precisely of what the property consisted, and to judge of its value. If parties seek to have all the advantages of a partnership, and yet limit their liability as to creditors, they must comply strictly with the Act. Where property has not been contributed, scheduled and valued, as the Act of 1876 directs, there is no payment of the capital." The same principle was also announced in Eliot *v.* Himrod, 108 Pa. 569, where it was held: "The members of a general partnership already engaged in business, cannot, by recording a statement in due form under the Limited Partnership Act of June 2, 1874, P. L. 271, showing that each partner has subscribed and paid in cash a sum certain, protect themselves under the provisions of said Act from individual liability for the debts of the association subsequently contracted, when, as a matter of fact, no cash has actually been subscribed or paid, but the assets of the firm as originally constituted, have simply been allowed to remain in the business;" the Court saying, p. 579: "Upon the most liberal interpretation of the statute the defendants are liable as general partners. There was no substantial compliance with its chief requisite. They all participated in the making of the statement and the subsequent conduct of the business. True, they had not been long engaged in business, and at its beginning intended to procure a charter for a corporation, but the fact remains that the business they had begun was continued. General partners, by recording a statement in due form, false with respect to subscription and payment of capital, are not within the statute which, on certain terms, abrogates the common law rule, that he who contracts to contribute capital and share in the profits of a firm, shall be liable for its debts. Each partner is liable unless saved by statute. If the partners have not complied with the statutory requisites, a limited partnership association has not been formed. Where there is no record of a proper statement, there is no statutory association. Where the chief requisite in the recorded statement is false, the partners who misstated the fact have no shield against the rule at common law respecting their liability for debts. The recorded statement is not made conclusive evidence of the formation of a limited association. If such was the intendment, it would be plainly expressed. Were it so, what could be a stronger sanction and encouragement of fraud? In that case, without publication or affidavit, upon a false representation placed on record, persons could embark in business with expectation of profit and without fear of loss. The statute prescribes no mode of correction where the apparently complete statement is untrue. No remedy can be more simple and conservative of the rights of all parties than a trial in due course of law. The creditor sues the members; they set up their recorded statement in defence; the plaintiff establishes, if he can, that the statement is untrue in an essential point; and then, if that fact be found, the defence falls."

In Vanhorn *v.* Corcoran, 127 Pa. 255, the Court said (p. 268): "*Prima facie*, a firm transacting business is a general partnership. It can only shelter itself behind the Act of 1874 and its supplements, by showing a strict compliance with the law. A limited partnership that has not complied with the law of its creation is not a limited partnership at all; it is, however, a partnership in which all the members are liable as at common law. If the defect appears upon the face of the certificate, it is the duty of the Court to rule it as a question of law. It would lead to more than confusion to permit a defective schedule like this to be supplemented by evidence to show that there really was property, and that it was of the value indicated. It would open the door to all kinds of fraud and perjury, and no man could know whether such an association was a valid limited partnership until after the verdict of a jury."

In Sheble *v.* Strong, 128 Pa. 315, where it was held: "Where a portion of the capital stock of a limited partnership, organized under the Act of June 2, 1874, P. L. 271, is contrib-

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uted in machinery, the recorded statement must show a schedule with a detailed description and valuation of the machinery, as required by the Act of May 1, 1876." . . . The Court said (p. 321, 322), "Assuming that the subscriptions to the capital stock are certified according to the fact, it is very clear that the statement is fatally defective in that it does not contain such a detailed description and valuation of the machinery as the supplement of 1876 requires. . . . . The question is not one of good faith on the part of the defendants, or of notice to creditors, but whether, in their attempt to form a limited partnership, they conformed to the law. If they did not, their attempt was abortive, and it is no defence that creditors had actual knowledge of the facts required to be set out in the recorded statement. The averment in the affidavit of defence that plaintiffs had actual knowledge of the extent and nature of the capital of the association, and gave credit to it on the basis of a liability limited to such capital, is, therefore, insufficient. . . . . All our cases on the subject sustain the position that a strict compliance with the statutory requirements is essential to the formation of a limited partnership. Where there is no record of such a statement, as the statute requires, there is no statutory association. When immunity from liability is claimed under the provisions of the Act, it is competent for the plaintiff, either to point out a fatal defect on the face of the recorded statement, or to prove that an essential requisite, though formally stated, is falsely asserted."

We consider the affidavits of defence defective in that they do not deny the averment in the statement, "that on December 30, 1893, the said capital of the special partners was entirely consumed and exhausted in the business of the firm." In Fourth Street National Bank *v.* Wood et al., which was also an action against the present defendants, we considered the effect of an impairment of the capital of a limited partnership at the time of its continuance, in making all of its members liable to its creditors as general partners, and we need not add anything to what we there said. Upon the argument of that case no question was raised as to the sufficiency of any of the certificates. The only certificate then before us was that of December 30, 1893. The plaintiff rested its claim upon the fact that the special capital was impaired at the time of the renewal on December 30, 1893, and as we sustained the plaintiff's contention it was not necessary for us to consider the informality of the certificate.

The rule for judgment is made absolute.

F. B. N.

C. P. No. 3. March, 1894, 706.

Reitzel v. Haines & Co.

Limited partnership—Act of 1836—Of 1887—Special partner—When liable as general—Assumpsit—Capital—Impaired and diminished.

A partnership formed under the Act of 1836 is a limited partnership, whose secured rights and powers and consequent liabilities are all set out with minute particularity in the Act.

A false statement in a certificate of renewal of a limited partnership does not give cause for an action in assumpsit.

Under the Act a falsehood in a statement of original formation of a limited partnership is penalized by holding the special partner liable as a general partner; but there is no imposition of this penalty for a false statement in a certificate of renewal. The 11th section of the Act imposes the penalty only where the "manner" of renewal was "otherwise" than that required for original formation.

The only question as to the statement in the certificate of original formation is whether it is true or not; if it is not, the special partners are liable as general partners.

The capital of a business firm comprises the money, merchandise, and other valuable things which the firm has subject to demands of business, and which may be applied to the payment of debts, or may be reached by execution.

FINLETTER, P. J., dissented.

Sur rule for judgment for want of sufficient affidavit of defence.

This was an action upon a note given by the defendants to the plaintiff and accepted by the latter, she avers in her statement, "upon the faith of a statement in writing, made and signed by the defendants, under date of the 30th day of December, 1893," in which defendants, who were about to renew their limited partnership, averred that the original capital remained unimpaired and undiminished. The plaintiff avers that this was false in fact.

The affidavit of defence and further facts in the case will be found in the opinions.

John C. Bell and *Joseph L. Caven*, for the rule.

George Tucker Bispham, Charles Biddle, W. Rudolph Smith, Richard C. McMurtrie, contra.

July 9, 1894. GORDON, J. The Act authorizing the formation of limited partnerships particularly specifies the things to be done in order to constitute that contractual relationship. When those things are done in the manner and at the times specified by the Act the legal contract called a "limited partnership" is formed. It cannot be formed otherwise than in the manner prescribed by the statute, and the omission

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of any prerequisite makes a partial conformity or compliance a mere nullity, and the limited partnership never comes into existence. When, however, all the necessary precedent things have been done conformably to law, then, in the language of the Act, "such partnership shall be deemed to have been formed." Having been thus called into lawful being, the Act declares that it shall exist "upon the terms, with the rights and powers, and subject to the conditions and liabilities, herein prescribed."

To the Act, therefore, we must look for every right, privilege or immunity claimed by the members of the partnership and for every liability sought to be imposed upon them. It is unscientific and misleading to regard a partnership formed under the Act as a general partnership with conditional immunities. It is a limited partnership with secured rights and powers, and consequent prescribed liabilities, and these rights and powers and liabilities are all set out with minute particularity in the Act.

Having this fixed standard for logical inquiry before us, the primary question, therefore, in every litigation such as the present one, is whether the limited partnership was lawfully formed? Were the things necessary for its creation done in conformity to the statute?

The documents submitted by both the plaintiff and the defendant show that the requirements of the Act of Assembly were strictly complied with, and that the limited partnership was formed in the proper manner in 1891 and renewed in the proper manner in 1892 and 1893. No deviation or omission in any matter of form or manner prescribed by the statute is alleged against the partnership papers. From these papers it appears that the original contribution to the capital of the firm by the special partners was $100,000 each, half in money and half in merchandise. The certificate of renewal simply sets out the terms of the original formation, and correctly and truthfully sets them out, and, in addition, states that the contribution to the capital made at first by the special partners "remains unimpaired and undiminished as their contribution to the present renewal and continuance of the said limited partnership, being in merchandise," etc.

The plaintiff avers that this latter statement of the renewal certificate is "false in fact," and that, at the time it was made, "the entire capital stock of the special partners had been consumed and lost in the business, ... and that at that time the said firm was without capital and was insolvent," and therefore claims that the special partners are liable generally upon the firm's engagement held by the plaintiff.

Accompanying the renewal papers, set forth in the affidavit of defence, there is the appraisement of the capital stock of the firm, made by an appraiser appointed by the Court of Common Pleas in accordance with the Act, who certifies that the merchandise set apart as the contribution of the special partners is worth over $200,000, and that the firm has other merchandise, "cash" and good accounts more than sufficient to pay the debts of the firm. The affidavit of defence, which sets out these facts, avers the special partners' belief in the truth of this appraisement when the renewal was effected. The affidavit also denies the plaintiff's allegation of the insolvency of the firm at the time of its renewal.

It appears, therefore, that the cause of action set up by the plaintiff is the alleged false statement contained in the certificate of renewal of a limited partnership, and because of this false statement, it is sought to hold the special partners liable as general partners.

If we turn to the Act of Assembly to look for the imposition of this liability for a false statement in a certificate of renewal, we shall look in vain. The 11th section of the Act provides that the renewal may be brought about "in the manner herein required for the original formation" of the limited partnership, and that, if "otherwise" renewed, it shall be "deemed a general partnership," but it does not say that this shall be the consequence of a false statement in the papers of a renewal effected in the proper "manner." The argument that liability as general partners, provided in a former part of the Act as the penalty for falsehood in a statement of original formation, is implied for falsehood in a statement of renewal, is answered by the fact that such liability was not considered by the Legislature as implied for failure, upon a renewal, to conform to the "manner" of original formation, otherwise they would not have specially imposed it. This penalty of liability as general partners the 11th section imposes for a renewal, "otherwise" or not in the "manner" required for original formation. In the present case, as has been said, the papers show that this "manner" was strictly followed. The fundamental canons of legal construction exclude liability, except for the causes expressed in the clause upon the subject.

Haddock *v.* Grinnel, 109 Pa. 372, has been cited as sustaining the view that falsehood in a statement of renewal makes the special partner liable as a general partner. In our judgment, it sustains the position we have taken above, for it expressly held that, as the statement of renewal did not contain the same particularity of description of the capital contributed as is required in an original formation, therefore it did

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not conform to the "manner" prescribed by the statute, and hence being "otherwise" renewed, was merely a general partnership, and not a limited one at all. That is, liability was imposed strictly for the cause expressly set out in the 11th section. In the present case, as that section was conformed to, its penalty does not fall.

We do not think, therefore, that the plaintiff's statement shows a cause of action in assumpsit, and had it been demurred to upon this ground the defendant would have been entitled to judgment. The plaintiff may, however, not be without his remedy for any damage he may have sustained by reason of a false representation made by the defendants, but the remedy must be sought in another form of action, where both the allegations of the plaintiff and the defence would be different from what they are here.

The question here decided is a new one in our State, but, in New York, upon a statute identical with ours, the ruling was in an accordance with the view we have taken: Ropes *v.* Colgate, 17 Abb. N. C. 149. Though the decision is a technical one, yet the plaintiff's case is technical also, for no wilful fraud or knowing misrepresentation is alleged, and the plaintiff parted with his money before the alleged false statement, and was not misled by it, while the affidavit of defence fully rebuts any presumption of wilful wrong, or profit or benefit to the special partners.

Another question, also of equal importance and equally new to our State, is raised by the present case as it is now before us. While the plaintiff avers that the certificate of renewal is false in fact in stating that the capital contributed by the special partners is unimpaired and undiminished, yet there is further set out, as the basis of this averment, that the capital had been consumed and lost in the business of the partnership, and that the firm was in fact insolvent. That is to say, while the plaintiff does not deny that $200,000 worth of merchandise remained in the possession of the firm, as stated in the certificate of renewal, and set apart in the inventory and appraisement as the contribution of the special partners, yet, because of the debts of the firm, the plaintiff avers, it was insolvent, and therefore its capital was impaired and diminished.

But is this the meaning of the words "impaired and diminished" as applied to the capital of a business firm? If it is, then an insolvent firm has no capital. Surely the meaning of the word "capital" is entirely different from this, and is perfectly clear, and comprises the money, merchandise, and other valuable things which a firm has in its possession subject to the demands of its business, and which may be applied to the payments of its debts or reached by execution. Is capital impaired or diminished the moment a debt is created? If so, there could be no renewal of a limited partnership without liquidation. Obviously that only is an impairment or diminution of the things called "capital" which reduces their quantity or decreases their value. If a firm starts with $200,000 capital, and contracts debts to any amount, its capital is, nevertheless, still $200,000, if it is still in the business and has not been withdrawn, or has not depreciated in value. It still stands there, liable for debts, capable of being taken in execution, and a subject for caption by a receiver if one were appointed. To deny that a firm has capital simply because it has debts, is to deny the existence of matter and the evidence of the senses.

The plaintiff's statement therefore shows that the averment of falsehood as to the condition of the capital on renewal is a conclusion unwarranted by the facts upon which it is based, and unsound in law. For this reason likewise, then, the plaintiff's statement is insufficient to found a judgment upon against the defendants.

The case of Andrew *v.* Schott not only does not support the plaintiff's contention, but is clearly against it. While a number of questions entered into that case, and were decided against the special partner, yet it was expressly decided upon the ground that the alleged renewal was in fact the formation of a new firm, and not a continuance of the old one, because of the lapse of ten days after the expiration of the first partnership before the second was formed. Therefore, it being an original partnership, and not a renewal, the Court held that the averment that the special partner put certain "cash" in the new firm represented by the assets of the old one, was not true, and hence the liability fixed by the Act for falsehood in a statement of original formation followed, and the special partner was liable generally. That the same ruling would not have been made had the Court found the partnership to be a renewal, may be inferred from the following language of the opinion: "Was the second a renewal or continuance of the first partnership, or was it the formation of a new partnership? This may be material in its bearing on the construction of the 11th and 12th sections."

The two questions heretofore considered have no reference to the sufficiency of the affidavit of defence, supposing the plaintiff's statement to present a good cause of action, except so far as it establishes the existence in the possession of the firm at the time of renewal of actual

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merchandise to the value of $200,000. In view of our decision upon those questions, it is not practically necessary to consider the other points raised by the affidavit. A brief reference to them, however, is probably due to the very able and learned argument of counsel.

As to the proposition that the sincerity of the special partner's belief at the time of the statement of renewal, is a good defence to its falsity, it may be said that if the plaintiff's contention is sound that the statement of renewal is in this respect to be treated under the Act exactly like a statement upon original formation, then it makes no difference what the belief of the parties was. The only question then would be whether the statement was true or not. If, in a statement of original formation, the parties would be liable if it was falsely stated that $200,000 was contributed to the capital, and the same rule holds as to a renewal certificate, then they would be liable without regard to their "belief," if they stated in such a paper that the $200,000 was still in existence and unimpaired, when in fact it was not so.

The question whether the plaintiff's claim is an old debt or another contract in the nature of a novation, is a narrow one. The plaintiff sues upon a due bill payable on demand, with interest, which was given in return for the surrender of a matured note which was given by the firm before the renewal in 1893. There would be no question that this was in the nature of a novation but for the character of the paper given for the surrendered note. The plaintiff in taking it received nothing less than he surrendered, and the defendants got nothing more than they gave. The surrendered note, it is true, was matured, and therefore might have been sued upon. But the demand bill was also presently due, and might have been forthwith sued upon. Suit would have been demand. These facts, therefore, may distinguish the present case from those covered by the decisions upon the point of law raised, and make it an interesting question whether the due bill was anything more than an acknowledgment of the old indebtedness and a promise to pay it when demanded.

The rule for judgment is discharged.

Eo die. FINLETTER, P. J., dissenting. It has been contended that the proper form of action is in deceit; that the defendants should have been impleaded as general partners, and that the statement does not show their liability.

In all similar cases under the Act, the proceedings were in assumpsit. Whatever may have been the procedure before, the Act of 1887 requires the plaintiff to state his case fully, and the defendant in like manner to make defence.

It was proper, therefore, for the plaintiff to make averments which imposed liability upon the defendants. As the statement showed the partnership to be a limited one, it was necessary to state such facts as made them liable.

It is evident from the affidavits and the appraisement that merchandise of the value of $200,000, was set apart from the general stock of merchandise of the old firm, as the property of the partners, Whitaker and Bacon. It nowhere appears that they contributed any merchandise, of which they were exclusively the owners, when the renewals occurred.

The Act of Assembly relating to limited partnership has been several times considered by the Supreme Court. The conclusions arrived at are that the requirements of the Act must be followed as well in renewals as in original applications; that for the information and protection of creditors, the statements must be substantially true, and if they are not, the special partners shall be liable as general partners.

Judge PAXSON, in Haddock *v.* Grinnel, 109 Pa. 382, sums up the purpose of the Act and the tenor of the decisions as follows: "Was this renewal a substantial compliance with the foregoing provisions of the Act of 1836? In considering this question he must bear in mind that while the Act was not intended to trip up those who have substantially and in good faith complied with its terms, yet, inasmuch as it confers the privilege of embarking in business as a special partner without liability beyond the capital employed or put in by him, this Court has uniformly held parties to a strict compliance with all the essentials of the law, all our decisions from Andrew *v.* Schott, are consistent upon this point."

"The Act of 1836 was intended to furnish information to creditors. . . . . The creditors are entitled to know when the partnership is renewed, whether the special capital is a reality or a myth; whether it is in a shape to respond to their claims. It may never have been drawn out by the special partner; the affidavit may truly say it remains in the common stock of the firm, yet it may be in such shape as to be of no more value to creditors than if drawn out by the special partner."

"It (the Act) provides, as before stated, that an affidavit of the general partner 'shall be made and filed, and notice given in the manner herein required for its original formation.' This evidently means that the affidavit shall give as full information upon the renewal as upon the original formation of the limited partnership. A mere formal affidavit, setting forth the renewal only, would not give creditors any valu-

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able information as to the condition of the firm, and the object of the Act was to provide this notice. When a special partnership is renewed or continued, it must be in the same condition, so far as the special capital is concerned, as when it was originally formed. Such capital must be unimpaired; it must be in such condition as to be available for creditors, and it is the duty of the general partner to furnish this information in his affidavit. If this duty is neglected the partnership becomes general, and the special partner has no immunity."

The plaintiff avers that false statements were made in relation to the capital of the special partners. It is evident that there can be no more substantial matter in a limited partnership than the capital of the special partners. It is that which gives confidence and credit so far as they are concerned. The plaintiff is therefore entitled to judgment unless the defendants deny the statements, or show that they are not required to make denial.

It will be observed that the affidavits do not in express terms deny the statement of falseness upon which the plaintiff's claim is founded. They are as follows:

1. That Richard Wood, one of the general partners, in his affidavit, deposed that the capital which had been contributed by the special partners remained in the limited partnership, wholly unimpaired and undiminished, in the shape of merchandise.

2. That the appraisement valued that merchandise at $200,000.

3. That at the date of the renewal the defendants believed the statement of renewal and the affidavit of the general partners were true.

In addition it was contended in argument that the special partners are not liable for false statements unless they know them to be false.

The affidavit of the general partner cannot relieve the special partners from the responsibilities and liabilities imposed by the Act, if facts stated therein are false. It was their duty to know, and to see that the affidavit was true. If all the partners had made a like statement or affidavit, it could not make that true which was false.

The appraisement does not relieve the special partners from the duty of knowing the value of the merchandise appraised, and whence it came. The appraisement is for the protection of the public, and not to relieve the partners from their duties.

If ever belief can be protection it must be based upon examination, and be effective only when proper care would not bring knowledge.

Beside, belief cannot give the information which the Act requires for the protection of the creditors, and there is no method of testing belief. Statements of facts can be inquired into.

There is no evidence that the defendants made any effort to ascertain the condition of the partnership or the correctness of the appraisement, or the truthfulness of the affidavit of Mr. Brown. How could they, then, have any belief at all about the matter? They may have had confidence or faith, the evidence of things not seen, they could not have belief. Belief in existing things is the offspring of some knowledge of those things. When Peter said, "Lord, I believe," he had abundant knowledge of things seen and known of all men.

When the partnership was formed in 1891, the money and merchandise contributed by the special partners became the assets of the company, and were subject to its liabilities. No part of that money or that merchandise remained the individual property of the special partners.

If, therefore, the merchandise appraised was partly that which they had contributed upon the formation of the partnership, and partly that which was purchased by the cash which they had contributed, it could not be appraised as their merchandise, as it was the property of the firm.

The appraisement, which avers that the merchandise was the property of the special partners, is therefore false, and the averment that they contributed $200,000 in merchandise is false.

They contributed nothing but their interest in the assets of the firm, subject to the liabilities of the firm.

The intention of the Act of Assembly is that, upon a renewal, the cash and the merchandise to be contributed by the special partners shall be their individual property; and, if there be no liquidation, shall be additional to that which is in the old firm.

The duty of the appraiser is to appraise such property, and no part of his duty to report the condition or solvency of the co-partnership.

In Andrews *v.* Schott, 10 Pa. 47, it was held, that "all the assets of the first firm are pledged for the debts of that firm, and whether it may be sufficient for that purpose it is impossible to ascertain until an account be taken. In the case in hand, instead of part, nothing was paid to the second firm, inasmuch as the first payment was liable for the debts of the first partnership."

The case has been presented on both sides with great ability and industry, and I would be glad to consider in detail the arguments of counsel for the defendants. They are, how-

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ever, mostly in contravention of the decisions of this Court and the decisions of the Supreme Court, and, in many respects, based upon New York decisions.

Whilst it would give us pleasure to reverse our own decisions, when we are satisfied that we have erred, it is not our duty to be convinced that the decisions of the Supreme Court are erroneous. In that tribunal alone may their decisions be questioned and reversed.

Much of the argument of counsel for the defendants has been based upon the idea that a renewal is a continuation merely of the old partnership, and subject to all the incidents of that partnership. The language of the Act and some of the decisions would seem to warrant this contention. It is obvious, however, that, for all practical purposes, the renewal is the formation of a new partnership. The old one expires by limitation of the term, and the assets are for the claims of creditors, and, when those claims are satisfied, for distribution among the partners.

It was contended by counsel for defendants, "that the main question is this: Are the allegations in the statement warranties or representations? If the former, the special partners are responsible for any warranties or mistaken averments, however thoroughly and on what ground they believed it. If the latter, there can be no responsibility unless the allegation was known to be false by the special partner."

It is not easy to see how this refinement, for the first time made, can have application to the facts and law of this case. The Act of Assembly requires certain things to be done, which, if not done, the special partners become liable as general partners. Whether these things be called warranties or representations can be of little importance.

It was said that a warranty was a thing to be done to secure a right. The Act in express terms declares that, before a limited partnership can have existence, certain facts shall be stated truly. These statements come within the definition furnished by counsel for the defendants, and are warranties; and, as has been admitted, if not true substantially, the defendants are liable as general partners.

If liability arises from a false statement, that is, a statement which is not true, it is none the less false, because the special partner believed it to be true, or could not know that it was false.

The very able and well considered opinion of Judge JENKINS is conclusive upon the questions involved in this controversy. I have only gleaned where he has reaped, but I adopt his whole argument.

I have come to the conclusion that the plaintiff's statement shows a good cause of action, and that the affidavits of defence are insufficient, and that the rule for judgment should be made absolute.

F. B. N.

C. P. No. 4. November 3, 1894.

Comfort v. Everhardt.

Line trees—Injunction to restrain destruction of.

An injunction will issue to restrain the destruction of a tree growing in a rural or suburban locality, on the line between two adjoining properties, at the instance of one of the owners.

Sur motion to dissolve special injunction.

A bill in equity having been filed by Ezra Comfort against George W. Everhardt to restrain the defendant from destroying a tree growing on the line of their joint properties, a preliminary injunction was issued, whereupon this motion was made.

The facts of the case are as follows:—

The plaintiff is the owner of No. 2111 Tioga street, Philadelphia, a rural or suburban locality, and the defendant is the owner of No. 2109, the adjoining property. On the boundary line between their properties and on the pavement line thereof is a maple tree, the trunk of which is about fourteen inches in diameter and about one-third of which is on the property of the defendant. The tree has a large top and furnishes shade for both of these properties. The defendant desires to build a stone coping about fifteen inches high in front of his property on Tioga street, and to build the same to the line between his property and that of the plaintiff, and threatened to cut down this tree.

The Court granted a special injunction restraining such destruction.

Francis Shunk Brown, for plaintiff.

A tree standing upon the line between adjoining owners so that the line passes through it is the common property of both parties.

Tyler on Boundaries, page 322.
Masters *v.* Polly, 2 Rolle, 141.
Holder *v.* Coates, 1 Moody's Walk. 112.
Lyman *v.* Hale, 11 Conn. 177.
Skinner *v.* Wilder, 38 Vt. 115.
Dubois *v.* Beaver, 25 N. Y. 123.
Griffin *v.* Bixby, 12 Id. 454.
Hoffman *v.* Armstrong, 46 Barb. 337.
Waterman *v.* Soper, 1 Ld. Raymond, 737.
Relyea *v.* Beaver, 34 N. Y. 547.
Obert *v.* Obert, 5 N. J. Eq. 397.

Charles L. Lockwood, for defendant.

Eo die. THAYER, P. J. Motion refused.

G. H. S.

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WEEKLY NOTES OF CASES.

VOL. XXXV.] *FRIDAY, DEC. 21, 1894.* [No. 15.

Supreme Court.

Jan., '94, 430. May 9, 1894.

Smith v. Rishel, Adm'r.

Evidence—Competency of witness—Act of May 23, 1887, Sec. 5, clause "e."

Where a levy has been made upon personal property and the property is claimed by a third party, and a feigned issue framed between the claimant and the plaintiff in the execution and the plaintiff in the execution dies and his administrator is substituted on the record, the claimant (plaintiff in the feigned issue) is incompetent under the Act of May 23, 1887, sec. 5, clause "e," P. L. 159, because he is a surviving or remaining party to a thing or contract in action whose interest is adverse to the right of the deceased party.

The defendant in the execution, however, who is not a party to the feigned issue, is not incompetent unless it appears that his interest is adverse to the right of the deceased. There is nothing in the relation of the parties to show that his interest is of that character.

Appeal of Mary E. Smith, plaintiff, in a feigned issue to try the title to personal property levied upon as the property of B. F. Crouse, under an execution in favor of E. R. Greegor. E. R. Greegor having died, her administrator, Charles R. Rishel, was made defendant in the feigned issue. The appeal was from a judgment of the Common Pleas of Snyder County, on a verdict entered for defendant by direction of the Court.

At the trial before McCLURE, P. J., it appeared that the issue was to determine the title to the personalty levied upon, the plaintiff in the issue alleging that prior to the execution she had purchased the property in dispute from the defendant in the execution, B. F. Crouse. In support of her claim plaintiff offered the testimony of B. F. Crouse, which was rejected by the Court. (First assignment of error.) She then offered her own testimony which was also rejected. (Second assignment of error.) The jury were instructed that, as there was no competent evidence in support of the claim of the plaintiff, their verdict should be for the defendant.

Verdict for defendant and judgment thereon. Plaintiff appealed, assigning errors as above.

J. C. Bucher, (*A. A. Leiser* with him), for appellant.

A. W. Potter, (*Charles P. Ulrich* with him), for appellee.

October 1, 1894. FELL, J. The issue in this case was to determine the ownership of personal property levied upon by the sheriff. The plaintiff in the execution died after the levy was made, and her administrator was substituted on the record as defendant in the interpleader. The plaintiff in the interpleader claimed title by purchase from B. F. Crouse, the defendant in the execution; and at the trial he was called as a witness to testify that he had sold the property in question to her before the levy. Her testimony was offered for the same purpose. Both witnesses were objected to as incompetent, and the objections sustained; and a peremptory instruction was given to the jury to find for the defendant.

The objection to the competency of the plaintiff as a witness was well founded. She was a surviving or remaining party to the thing or contract in action, and a person whose interest was adverse to the right of the deceased party, and came within the excluding clause (*e*) of Sec. 5, of the Act of May, 1887.

We see, however, no sufficient reason for the exclusion of B. F. Crouse. He was not a party to the action, nor does it appear that he was a person whose interest was adverse to the right of the deceased. It is only on the latter ground that he could be objected to.

It is urged that he was interested adversely to the defendant to maintain the title to the property which he had sold to the plaintiff, and which he had impliedly warranted. It must be remembered, however, that his original title was not in question, and it was to that only that there was an implied warranty under which he might be liable to the vendee. He was called to testify that he had sold to the claimant the property levied on. Whether there had been a sale to her was the real question in controversy. If the sale was made in good faith it might fail for want of proper delivery; if it was made in bad faith it was invalid as intended to defraud creditors. In either event his title had passed, and in neither would any liability to the vendee rest upon him. Having delivered possession he would not be responsible if the delivery did not meet the requirements of the law, and if there was fraud the vendee was a party to it. The contention of each party was founded upon his title and no question of its validity arose. He then had no pecuniary interest in maintaining the plaintiff's title to the goods, and his interest would seem to be with the defendant to have them sold and his debts thus paid.

We are not aware that the question before us has been raised in this Court since the first legis-

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lation enlarging the competency of witnesses, but it had previously been decided in favor of admitting such testimony in Babb *v.* Clemson, 12 S. & R. 328, and in Allentown Bank *v.* Beck, 49 Pa. 394, on the ground that the witness had no disqualifying interest in the controversy.

The first assignment of error is sustained, and the judgment is reversed with a venire facias de novo.

J. D. B., Jr.

[See Kuhn's Estate, *ante*, p. 155.]

Oct., '94, 277. October 3, 1893.

Turner for use of Hartman v. Sharpneck.

Mortgages—Sale of a moiety of mortgaged premises and subsequent release by mortgagee of balance of premises—Effect of.

A sale by a mortgagor of a moiety of the mortgaged premises and the receipt of the purchase money for the same by him, casts the burden of the mortgage debt on the remaining part when that is sufficient to pay the encumbrance.

Where a mortgagee, with a knowledge of the fact that a portion of the mortgaged premises has been bought and paid for by a third person, subsequently releases from the lien of the mortgage the remaining part, which was of sufficient value to have satisfied the debt, such release will operate as a discharge of the lien of the mortgage against the land bought by the third person.

Knowledge in fact of the position of a purchaser of land bound by the mortgage is enough, however acquired, to affect the mortgagee.

Appeal of Levi A. Sharpneck from the judgment of the Common Pleas of Greene County, in an action of scire facias sur mortgage by Rachel H. Turner, for use of William Hartman.

On the trial before Ingiram, J., it appeared that Elias A. Flenniken, James D. Flenniken and William F. Flenniken had, in 1863, inherited from their father, three hundred and sixty-six acres of land in Greene County. On April 10, 1863, they mortgaged the same for $1,400 to Rachel H. Turner.

In 1864, Rachel H. Turner's executor released from the lien of this mortgage 45 acres, which the Flennikens had sold to Wright.

In 1869, the Flennikens sold 91 acres of this land to Moffett, who subsequently sold the same to Levi A. Sharpneck.

On April 7, 1887, the executor of Rachel H. Turner assigned the mortgage to William Hartman, who, in May of the same year released to James D. Flenniken the lien of the mortgage as to 139 acres, and on August 7, of the same year, he released to John Crago, who owned the balance of the property, thus leaving only the tract belonging to Sharpneck that was not released. A scire facias was issued on the mortgage on March 12, 1891, and was served upon Elias Flenniken and James D. Flenniken, mortgagors, and Levi A. Sharpneck, as terre tenant.

The plaintiff offered to prove by endorsements on the mortgage and other evidence that the same had not been paid and that there was a balance due on the same of $609 with interest from January 1, 1887. Objected to as incompetent to remove the presumption of payment, there being no offer to show that Sharpneck made any payments or knew of any being made. Objection overruled. (First assignment of error.)

The plaintiff further offered in evidence the deposition of D. K. Turner, the executor of mortgagee, to show that mortgage was unpaid. Objected to. Objection overruled. (Second assignment of error.)

Defendant offered to show that he had bought his 91 acres and paid full value for same, had taken possession of the premises; that he never had any knowledge of the existence of the mortgage; that he never made payments on account of it or knew that such payments had been made; to be followed by proof that the land released by the assignee of the mortgage in 1887, was of more than sufficient value to have paid the mortgage debt. Objected to. Objection sustained. (Third assignment of error.)

The defendant further offered in evidence the records showing the releases. Objected to. Objections sustained. (Fourth and fifth assignments of error.)

Plaintiff requested the Court to charge the jury as follows:

1. Under all the evidence in the case the verdict of the jury should be in favor of the plaintiff and against the defendant, terre tenant, Levi Sharpneck for the amount of plaintiff's claim, debt and interest to date.

Answer. Affirmed. This point is correct and is affirmed, provided you find from the evidence that the mortgage has not been paid, or in other words that the presumption of payment, presumption by the lapse of time, has been rebutted by testimony of the plaintiff; and if you further find the fact that William Hartman, plaintiff, had not actual notice of the purchase by Levi A. Sharpneck of the land or by Richard Moffett in the first instance and Levi A. Sharpneck afterwards at the time when the defendant claims he became the purchaser. With that qualification the point is correct and affirmed. (Eighth assignment of error.)

Defendant requested the Court to charge, *inter alia*, as follows:

3. The presumption of payment having arisen

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against the mortgagee, the receipts to the mortgagors, offered in evidence by the plaintiff for the purpose of removing such presumption are of no avail against a purchaser of a portion of the mortgaged premises, the plaintiff not having shown nor offered to show that any of such payments were made by said purchaser, nor with his knowledge or consent.

Answer. Refused. (Sixth assignment of error.)

4. As against a purchaser of a portion of the mortgaged property, the evidence of the plaintiff as to payments having been made on said mortgage for the purpose of removing the presumption of payment are a nullity, if the jury believes that said mortgage has been given and collectable for a period of about 30 years before the bringing of this suit.

Answer. Refused. (Seventh assignment of error.)

The Court charged the jury, *inter alia*, as follows:

"The position of the defendant is that he is relieved or released from any further lien of this mortgage by having been in possession under the claim of ownership or as owner of the tract of land long prior to the release to James D. Flenniken and William F. Flenniken of sufficient amount to pay the part of the mortgage unpaid at that time. We instruct you that it was the duty of the defendant, if he was the owner at that time to notify the holder of the mortgage of the fact of his ownership, and of the further fact that he expected or required the holder of the mortgage to make the balance of his money remaining in the hands of the mortgagors. If he failed to give such notice to the holder of the mortgage, the holder of the mortgage would not be affected by reason of it and could release the lien from the balance of the land if he saw fit to do so, and would still be entitled to collect the amount of the mortgage unpaid from the part of the land not released." (Ninth assignment of error.)

Verdict for plaintiff for $829.45 and judgment thereon.

Defendant appealed, assigning for error the rulings on the evidence, the answers to the points and the portion of the charge as above noted.

R. F. Downey, for appellant, cited on the question of presumption of payment—

Peters' Appeal, 106 Pa. 343.
Foulke *v.* Brown, 2 Watts, 209.
City *v.* Comber, 15 WEEKLY NOTES, 502.
Cremers' Estate, 5 W. & S. 331.
Lash *v.* Von Neida, 109 Pa. 211.
Runner's Appeal, 121 Id. 649.
Shaffer *v.* Shaffer, 41 Id. 51.

The release by the mortgagee of lands 19 years after defendant's purchase discharged his land from the lien of the mortgage.

Lowry *v.* McKinney, 68 Pa. 294.
Martin's App., 97 Id. 85.
Horning's Exe'rs' App., 90 Id. 391.
Paxton *v.* Harrier, 11 Id. 312.

James E. Sayers, for appellee.

We had the right to show non-payment to rebut the presumption, and the evidence to show it was competent.

There was no actual notice of Sharpneck's title to the plaintiff, it was the duty of the former to give notice to the mortgagee that he should look to the balance.

McIlvaine *v.* Mutual Ins. Co., 93 Pa. 30.
Taylors's Exe'rs *v.* Maris, 5 Rawle, 51.
Schrack *v.* Shriner, 100 Pa. 456.
Mark *v.* Speck, 133 Id. 29.

October 29, 1894. WILLIAMS, J. The important facts in this case are not in controversy. Three brothers, viz: Elias A., James D. and William F. Flenniken, became the owners by inheritance, at some time prior to April, 1863, of a tract of land containing three hundred and sixty-six acres.

They mortgaged this tract to Rachel H. Turner on the tenth day of April, 1863, for the payment of the sum of fourteen hundred dollars with interest, and the mortgage was duly recorded. In 1864, they sold forty-five acres off the land to B. F. Wright, and Mrs. Turner released the lot so sold from the lien of the mortgage. They next sold a lot containing ninety-one acres and twenty-seven perches to Richard Moffett, who went into possession in 1868. In 1869, he paid the purchase money, which was five thousand four hundred and twenty-seven dollars, and received from the three brothers a deed of general warranty for the land. He had no actual knowledge of the existence of the mortgage and for that reason did not demand a release from its lien when he paid the purchase money to the Flennikens.

He continued in possession till 1877, when he sold to Sharpneck, the appellant, for six thousand dollars. Sharpneck paid the purchase money and took his deed in May, 1877, recorded the deed, and went at once into possession. He too was ignorant of the existence of the mortgage. In April, 1877, Hartman, who was the father-in-law of William F. Flenniken, took an assignment of the mortgage, upon which there appeared to be due the sum of six hundred and nine dollars. During the following month he released the lien of the mortgage from one hundred thirty-nine acres and thirty perches of the tract owned by and in possession of James D. Flenniken.

In August of the same year he released the balance of the tract, containing ninety-three acres, which his son-in-law, William F. Flenniken had sold to John Crago. The portions of

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the land so released by Hartman were worth many times the amount remaining due upon the mortgage, and when this was done no part of the mortgaged premises remained unreleased except the lot sold to Moffett in 1868. Upon this state of facts the scire facias in this case was issued and served on Sharpneck as terre tenant.

He defended upon two grounds; first, that the mortgage having been given in 1863, was, in 1891, when the writ of scire facias was issued, presumed to be paid; and second, that the release by Hartman of the land which was liable to him in case he was compelled to pay the mortgage had deprived him of the power to reimburse himself, and was for that reason, on equitable principles, a release of his land from liability. The first line of defence was met by the testimony of witnesses showing what payments had in fact been made on the mortgage and how much remained due upon it. This was a competent reply to the presumption of payment and, if the evidence was sufficient to satisfy the jury that a balance remained due, it effectually disposed of this branch of the defence.

The second line of defence was objected to as irrelevant and incompetent. The objection was sustained and the evidence offered in support of it was excluded. This ruling, which is the subject of the third, fourth and fifth assignments of error raises the important question in this case. The equitable doctrine asserted by the appellant seems to have been recognized to some extent at a very early day in this State. It was distinctly formulated and asserted in Nailer *et al. v.* Stanley, 10 S. & R., 450. In that case a judgment was a lien upon three or more lots of land. One of these was then sold to A.; the value of the remaining tracts being more than enough to pay the judgment. A second tract was then sold to B. The judgment creditor levied on the tract sold to B., who was compelled to pay the judgment. He then sought contribution from A., but it was held that he had no equitable right to resort to A., or his lot, as his title was acquired subsequently to that of A. This has been followed in an unbroken line of cases extending over more than seventy years. In Mevey's Appeal, 4 Pa. 80, decided in 1846, the rule was extended to mortgages, and it was held that the Court "may and will so direct the sheriff to sell, and in such order, as will produce the most money and at the same time protect the rights and equities of the terre tenants."

The consequences to the mortgagee of disabling himself for protecting the equities of terre tenants were first declared in Paxton *v.* Harrier, and Henniger terre tenant, 11 Pa. 312. In that case a tract of land was covered by a mortgage. The first piece sold was that bought by Henniger who paid Harrier, the mortgagor, the purchase money. The balance was sold to several purchasers, in separate parcels, each of whom paid a part of the mortgage debt proportioned to the number of acres bought by him, and received a release of his land from the lien of the mortgage. The mortgagee then issued a scire facias upon the mortgage, and served Henniger as terre tenant, and sought to recover the balance of the mortgage debt, which bore the same relation to the whole debt as the quantity of land in Henniger's lot bore to the whole tract covered by the mortgage.

Henniger set up as a defence the release of the lots subsequently sold by the mortgagee, and the fact that his remedy over against them had thus been taken away by the act of the mortgagor. This was held to be a good defence upon the scire facias because the land released was primarily liable for the mortgage money as between its owners and the prior vendee.

This case was followed by Martin's Appeal, 97 Pa. 85, in which the rule was stated to be that pieces of land, subject to a common encumbrance, when sold successively by the owner are liable for the encumbrance in the inverse order of alienation. Consequently if the holder of the encumbrance releases the pieces last sold, this will, if the pieces released are of sufficient value to pay the debt, operate to discharge the lien of the encumbrance on the parts previously sold. This was so far qualified in Schrack *v.* Shriner *et al.*, 100 Pa. 451, as to make the knowledge of the holder of the mortgage an element to be considered in the application of the equitable doctrine. If he was without any knowledge of a previous sale of a part of the premises, and acted in good faith in the making of a release for another part of the land bound by the mortgage, then the rule of Paxton *v.* Harrier would not apply; but if he knew of the previous sale or of facts that fairly put him upon notice, then the subsequent release of the remainder, if of sufficient value to pay the debt, would operate as a release of the lot first sold. This case was commented on and followed in Milligan's Appeal, 104 Pa. 503.

The distinction between junior encumbrancers and successive purchasers is considered in McIlvaine *v.* The Mutual Insurance Company, 93 Pa. 30. A junior encumbrancer must give notice of the position of his lien to the mortgagee if he would affect him with the notice of his situation. Knowledge in fact of the position of a purchaser of land bound by the mortgage is enough, no matter how that knowledge is acquired.

If it was clear upon the evidence that Hartman had knowledge of the possession and claim of Moffett and Sharpneck when he made the release to the holders of the balance of the mortgaged premises, then the Court below should

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have negatived the plaintiff's first point, and given a binding instruction in favor of the defendant. If this question was involved in doubt it should have been submitted to the jury with instructions to find for the defendant if they found Hartman knew of the prior sale when he executed the subsequent releases. It is not necessary that he should have seen the deed or been informed of the exact date or terms of the sale. It is enough if he had knowledge of the fact that Moffett, or after him Sharpneck, was in possession claiming under a previous sale from the mortgagors.

The judgment is reversed for the reasons now given and a venire facias de novo awarded.

W. M. S., Jr.

Oct., '94, 228. October 16, 1894.

Walker v. Gibson.

Charge upon land — Ejectment — Judgment "non obstante veredicto."

G. by will devised a certain tract of land to his son for life and the remainder in fee to his grandson A., providing, however, that after the death of his son, his (the son's) widow, E. should "be maintained out of the products" of this land so long as she remained his widow:

Held, that this did not give the widow right of possession of the land, but constituted, during the life and widowhood of E., a charge upon the land.

Craven *v.* Bleakney, 9 Watts, 19; Pierce *v.* Livingstone, 80 Pa. 99, and Brotzman's Appeal, 119 Pa. 645, followed.

Appeal of Daniel Walker from the judgment of the Common Pleas of Butler County, entered *non obstante veredicto* in favor of defendants in an action of ejectment wherein appellant was plaintiff and Addison B. Gibson, Elizabeth Gibson, Bell Gibson and Mrs. —— Crowley, were defendants.

On the trial of this cause before GREEN, P. J., the facts appeared as follows:

Hugh Gibson, by his last will and testament, dated October 31, 1865, devised to his son, W. H. Gibson, 150 acres of land, upon which his son was then residing, for life, with the provision that if Elizabeth Gibson, wife of W. H. Gibson, should survive him, she was to be maintained out of the product of said land so long as she remained his widow; the said land at the death of W. H. Gibson to be the property of testator's grandson, Addison B. Gibson, son of W. H. Gibson and Elizabeth, subject, however, to the maintenance of said Elizabeth Gibson. W. H. Gibson, by deed of May 10, 1870, quit claimed all his interest in the land to his son, the said Addison B. Gibson. W. H. Gibson died several years ago, intestate and insolvent, leaving to survive him his said wife, Elizabeth, who, at the time of the trial was about eighty years of age.

The interest of Addison B. Gibson in this land was sold at sheriff's sale March 10, 1874, on judgments entered against him, and the sheriff's vendee, J. Y. Foster, conveyed 80 acres of said land to Daniel Walker, the plaintiff, by deed dated July 21, 1876. This was the land for which this suit was brought.

Elizabeth Gibson had been in continuous possession of said land since prior to the death of Hugh Gibson, concurrently with her husband during his lifetime, and since his death in assertion of her rights under Hugh Gibson's will; her daughters, Bell Gibson and Mrs. Crowley, named as defendants, resided with her. The other defendant, Addison B. Gibson, was not served, and was not in possession of the land.

The jury found for the plaintiff, under instruction of the Court, giving nominal damages; the question whether the bequest of maintenance did not give the defendant, Elizabeth Gibson, the right to possess the land being reserved.

Judgment was subsequently entered for defendant, *non obstante veredicto*, and plaintiff took this appeal.

John M. Thompson and *R. P. Scott*, for appellant.

The defendants have no possessory right to the land itself.

Gibson's Appeal, 25 Pa. 191.

The enforcement of her right to the products can not be obtained in ejectment by the widow; the remedy is in the Orphans' Court.

Craven *v.* Bleakney, 9 Watts, 19.

J. M. Galbreath and *S. F. Bowser* (*J. B. McJunkin* with them), for the appellees.

A devise of the third part of the "proceeds" of an estate is a devise of a third part of the estate itself.

Carlyle *v.* Cannon *et al.*, 3 Rawle, 489.

A grant or devise of the "profits" of land passes the land itself.

Drusadow *v.* Wilde, 63 Pa. 170.

By a devise of the rent, profits and income of land, the land itself passes, and a devisee of one-third the rents or income of land for life is, prior to partition, tenant for life in common of one-third of the land with those to whom the land was given by the will, subject to such devise.

Anderson *v.* Greble, 1 Ashm., 138.

An unqualified gift of the "income" of land is to be taken as a gift of the land itself.

Kline's Appeal, 117 Pa. 147.

November 5, 1894. STERRETT, C. J. Both parties claim under Hugh Gibson, who died,

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seized of the land in controversy, in 1870, having first made his last will wherein he devised the same as follows:

"I give and bequeath to my son, W. H. Gibson, one hundred and fifty acres of land on which he now resides, during his natural life, and if Elizabeth, his wife, survives him, she is to be maintained out of the products of said land so long as she remains his widow; and it is my will that at the decease of my son, Wm. H., that the above described land be the property of my grandson, Addison B. Gibson, subject to the maintenance of Elizabeth Gibson, as aforesaid."

After William H. Gibson's death, the interest of his son Addison in the land was sold and conveyed by the sheriff to John Y. Foster, who afterwards conveyed the same to the plaintiff. Defendants' contention is that, under the devise above quoted, the right of possession is in said Elizabeth Gibson. The case thus hinges on the construction of said devise.

It may be conceded that had there been an absolute gift of the "products," Elizabeth Gibson would have taken an estate in the land devised by Hugh Gibson. The gift was, however, not of the "products" as such, but of maintenance "out of the products" during her widowhood. The direction that she "shall be maintained out of the products" implies service by some one else than herself; and the explanation of this is furnished by the following clause: The land itself is devised to A. B. Gibson, subject to her maintenance "as aforesaid." Her husband, W. H. Gibson had had the right of possession for life; and at his—not her—decease, the land was to be—not hers—but "the property of . . . Addison B. Gibson." The devise to A. B. Gibson was of an estate in remainder dependent on the particular estate of W. H. Gibson, and subject to the duty of maintaining his mother. The son was intended to succeed to the father in title. His right of property and duty of maintenance implied a right of possession which was intended to begin with his mother's widowhood and right of maintenance. The land was pointed out as the source of maintenance, but Mrs. Gibson was by necessary implication excluded from any title in its products as such, and therefore from possession. The object was simply to secure her a comfortable support after her husband's had been taken away, and it was accordingly charged on the land. The title being in the plaintiff, ejectment was his appropriate remedy, and she had no status to defend her possession or that of her co-defendants. W. H. Gibson living, and maintaining her, she did not even have a right of maintenance out of the "products" of the land; for the event upon which that was to begin had not yet happened and there was no reason for acceleration. But if she had, she had no equities she could work out through an action which is always predicated of title in land; and such title, as we have seen, she does not have. It is made the plaintiff's duty to maintain her after her husband's death "out of the products" of the land; but he cannot fulfil this duty without possession. There is no reason to say that he will fail; for he has not been tried. In any event the land is her surety; but her remedy will be that of a creditor in case of default. The widow's remedies in case of intestacy before assignment of dower furnishes no analogy here. She has an estate in the land and a right of possession in common with the heirs; while Mrs. Gibson's right of maintenance is but a charge on the land and her remedy is exclusively in the Orphans' Court: Craven *v.* Bleakney, 9 Watts, 19; Pierce *v.* Livingstone, 80 Pa. 99; Brotzman's Ap., 119 Pa. 645.

It follows, therefore, that the learned Court erred in entering judgment for defendants, on the question of law reserved, *non obstante veredicto.*

Judgment reversed, and judgment is now entered on the verdict in favor of the plaintiff and against the defendants, subject to the charge aforesaid in favor of Elizabeth Gibson.

W. D. N.

Oct '94, 208. October 4, 1894.

Longwell v. Oil City Electric Co., Garnishee, et al.

Attachment execution — Garnishee — Judgment against by default—Effect of—Practice—Act June 16, 1836.

The garnishee failing to appear after service of the attachment, with clause of summons, but no specific attachment of goods or credit, plaintiff will be entitled to a judgment by default. But such judgment will be interlocutory only, and plaintiff cannot liquidate it, or have execution, without first by writ of inquiry or before the prothonotary, as the rules of Court or the practice, in cases of default, may prescribe, establishing his claim by evidence of the garnishee's possession of goods or credit of the defendant; and the measure of his damage will be the value of such goods.

If the attachment is levied upon specific goods, the default may be taken as an admission of the possession of such goods, but the plaintiff must, by writ of appraisement or otherwise, establish their value.

If the attachment is of money, or a debt, and the amount appears in the sheriff's return, the default is an admission of all the requisite facts, and no further evidence or inquiry is necessary.

The proper form of judgment is for the plaintiff against the garnishee, and that the garnishee has in his hands certain goods, effects or credits, to wit: (naming them) of

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the value, etc., or that the garnishee is indebted to the defendant in the sum of, etc.

Plaintiff's measure of damages which determines the amount of the judgment against the garnishee, is the value of the goods attached, of course not exceeding the amount of his judgment, interest and costs against the defendant. The single exception is when garnishee neglects or refuses to answer interrogatories, in which case by the express terms of sec. 57 of the Act of 1836, the judgment against him is that he has goods or effects of the defendant sufficient to satisfy the plaintiff's demand, and execution may issue against him as for his own debt.

Appeal of Oil City Electric Company, from the judgment against said company as garnishee in an action by W. H. Longwell against Hartwell, defendant, and said company and other garnishees.

The records showed, *inter alia*, the following facts:—

On February 18, 1891, Longwell recovered judgment against Hartwell for $1273.75.

On June 23, 1893, an attachment execution was issued on this judgment, summoning, *inter alios*, the Oil City Electric Company as garnishee. On the same day the sheriff served the writ upon defendant and garnishee.

On October 12, 1893, judgment was entered against defendant in default of appearance, and also the following motion was made:

Eo die. "Motion in open Court for judgment against the Oil City Electric Company, one of the garnishees, in default of an appearance, the amount thereof to be liquidated by the prothonotary, being the debt, interest and cost of the plaintiff's judgment against C. F. Hartwell in this case, and that the plaintiff have execution of so much of the debt, etc., due by the said Oil City Electric Company to the said C. F. Hartwell and attached in its hands, as will satisfy the judgment of the said plaintiff, W. H. Longwell, against the said C. F. Hartwell, with interest and cost, and if the said Oil City Electric Company refuse or neglect on demand by the sheriff to pay the same, then the same to be levied of its goods and lands according to law, as in case of a judgment against it for its proper debt, and that the said garnishee, the Oil City Electric Company, be thereupon discharged as against the defendant, C. F. Hartwell, as of the sum so attached and levied, granted.

By the Court."

On October 13, 1893, judgment was entered against the garnishee for $1473.75. On the same day counsel for garnishee made the following motion:—

"And now, October 13, 1893, motion in open Court for leave to strike off judgment herein, taken against the garnishee, the Oil City Electric Company, on the 12th day of October, 1893, for want of an appearance; for the reason that an appearance on behalf of the garnishee was not entered by inadvertence and for the further reason that the said garnishee is not indebted to said defendant, nor so was at the time of service of said writ of attachment."

"October 13, 1893, rule to show cause granted. Returnable to fifth Monday of October next at 2 p. m. By the Court."

Said rule to show cause was put upon the Argument List for the third Monday of March, 1894, when it was ordered and adjudged by the Court, "Improperly on Argument List, as motion to strike off judgment was disposed of November 6, 1893." The entry of November 6, 1893, was as follows: "Petition of Oil City Electric Company to open judgment denied."

Subsequently counsel for garnishee filed another motion as follows:—

"And now, June 4, 1894, motion in open Court by the Oil City Electric Company, garnishee, to strike off the judgment taken against it, said garnishee, by default for want of an appearance to the attachment in execution served upon said company as garnishee; on the ground that said judgment was erroneously and irregularly taken, and said judgment is contrary to law and the practice of this Court."

"June 4, 1894, this motion is denied for the reason that a motion to strike off the judgment was withdrawn before and a motion to open the judgment was substituted that afterwards was disposed of as shown by the records.

By the Court."

Garnishee then appealed, assigning for error the original entry of judgment and the refusal of the motions to strike off the same.

J. H. Osmer (*A. R. Osmer* with him), for appellant.

No rule nor interrogatories were served on the garnishee, and judgment against them was irregular.

Act of June 16, 1836, sec. 33.
Rules of Court of Venango County.
Ringwalt *v.* Brindle, 59 Pa. 51.

A judgment improvidently entered will be stricken off.

Comth. *v.* Hoffman, 74 Pa. 105.
Post *v.* Wallace, 110 Id. 121.
Allen *v.* Kripps, 119 Id. 1.

Isaac Ash (*P. M. Speer* with him), for appellee.

A scire facias was served upon garnishee, and the penalty for failure to appear is a judgment by default.

2 Brewster's Prac. 3261.
1 Troubat & Haly's Pr. 696.
Layman *v.* Beam, 6 Wh. 181.
Jones *v.* Tracy, 75 Pa. 417.

November 5, 1894. Mitchell, J. The

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judgment against the garnishee, appellant, on the attachment execution, being out of the course of the common law and founded entirely on statute, must be shown to rest on positive provision. The Act of 16th June, 1836, sec. 33, authorizes the issue of "process in the nature of an attachment . . . . with a clause of summons . . . . in the nature of a writ of scire facias against garnishees in a foreign attachment; and thereupon the plaintiff may proceed to judgment . . . . in the manner allowed in cases of foreign attachment against personal estate." P. L. 767. We must look therefore to the law of foreign attachment for the rules governing the present case.

It was said by SERGEANT, J., in Layman *v.* Beam, 6 Whart. 181, and repeated in Jones *v.* Tracy, 75 Pa. 417, that "no provision is made in the Act of Assembly as to the nature of the judgment which the plaintiff is to have against the garnishee where the garnishee makes default in appearance after service of the scire facias." It might have been said more broadly that the statute makes no provision in express terms for any judgment at all on such default. Neither the Act of 1705, 1 Smith's Laws, 45, nor the Act of 1789, 2 Sm. 502, appears to contemplate a judgment at that stage of the proceeding against the garnishee. Nor does the revised Act of 16th June, 1836, make any direct provision therefor. Hence it is argued by appellant that there can be no such judgment. But the Act of 1836, sec. 45, directs that every writ of attachment shall contain a clause of summons to the garnishee to be and appear before the Court at the day and place mentioned in the writ to abide the judgment of the Court therein. The garnishee therefore being summoned, is thus to some extent made party to the suit, and the legal consequences of default would seem necessarily to follow.

The plaintiff therefore was entitled to a judgment for want of an appearance against the garnishee, but it was not by virtue of any special provision, but only in accordance with the general practice in cases of such default. By such practice judgment is only interlocutory, and plaintiff must go on and prove his demand before he can liquidate it. The question therefore arises what is the nature of his demand against the garnishee, and what is the judgment appropriate to the case?

Foreign attachment is a proceeding *in rem*, by attachment of a non-resident's goods, with the primary object of compelling an appearance to answer the plaintiff's suit. In the custom of London, where it originated, and in our early Act of 1705, it is almost exclusively a proceeding *in rem*. The Act of 1789 reciting that the previous law was defective from want of adequate provision for a disclosure of the goods, etc., of the defendant in the hands of the garnishee, added the remedy of interrogatories in the nature of a bill of discovery, and answers by the garnishee, trial and judgment for or against him. The garnishee thus becomes as already said a party to the suit, but *pro tanto* only. It is none of his quarrel, and he is brought into it only because of his possession of defendant's goods. That therefore is the extent of his liability. If he produces them he is answerable for nothing more. When the Act of 1836 added the clause of summons to the garnishee it did so in aid of the remedy, but not more for the plaintiff than for the garnishee himself. By section 54, after judgment against the defendant, plaintiff may have a writ of scire facias to the garnishee to show cause why the former should not have execution out of the goods of the defendant, etc. By section 55 the interrogatories are as to what goods, etc., of defendant are in garnishee's hands. By section 58 if issue and trial be had the jury are to find what goods or effects, if any, of defendant were in garnishee's hands. And whether on confession in the answers, or by section 59 on verdict, the execution is to be levied of the goods of defendant so found to be in garnishee's hands. This then is the complete measure of his liability, and all the elements of it must be strictly proved. Thus in Hampton *v.* Matthews, 14 Pa. 105, on an issue of nulla bona the jury found for plaintiff for a definite sum, and it was held to be error because there was no finding of what goods were in garnishee's hands and the value, the Court saying, "this is not matter of form but substance, as the garnishee may in many cases discharge himself by surrender of the property, and is not in any case answerable beyond its value." In Poor *v.* Colburn, 57 Pa. 415, a verdict that the money in the hands of the garnishee was defendant's, and that plaintiff was entitled to $69, was held bad for not finding how much was in garnishee's hands, and no judgment could be entered on it. The same point was reaffirmed in Bonnaffon *v.* Thompson, 83 Pa. 460. And in Crawford *v.* Barry, 1 Binn. 480, it was held that it was not enough for the jury to find that there were effects to the value of $800 in garnishee's hands, they must find the specific goods, TILGHMAN, C. J., saying, "there is no authority for the jury by any mode of finding to take from the garnishee the right of surrendering the goods and discharging himself from the obligation of paying the value."

I have quoted these cases to show the strictness required to make the garnishee answerable even for the defendant's goods or their value. There are two exceptional cases, and only two, in which he becomes responsible *de bonis pro-*

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priis as for his own debt. These are first under section 57, when after due service of interrogatories and a rule to answer, he neglects or refuses to do so, he may be adjudged to have in his possession goods and effects sufficient to answer the claim of plaintiff, and secondly, under section 60, if after judgment against him on scire facias he neglects or refuses to produce the defendant's goods so adjudged to be in his hands. These two exceptions, however, even more than the general rule already discussed, are *strictissimi juris*, and are not allowed except in the precise case stipulated by the statute, nor even then unless every requirement be exactly fulfilled. Thus in Ringwalt *v.* Brindle, 59 Pa. 51, it was held that filing and serving a copy of the interrogatories on the garnishee would not entitle the plaintiff to judgment under section 57, although the rules of Court provided that such judgment should be entered in default of answers. This Court said that the standing rule of Court was not sufficient compliance with the statute, there must be a special rule on the garnishee to answer in the particular case. And in Corbyn *v.* Bollman, 4 W. & S. 342, where a judgment was entered under section 57 against a justice of the peace for not answering interrogatories, it was held that while the form of the judgment, that the garnishee had in his possession goods and effects of the defendant to an amount to satisfy the demand of the plaintiff, etc., was correct, yet as the interrogatories did not concern any estate or effects of the defendant in the hands of the garnishee, or debt due or owing by the latter, but merely inquired as to the judgments entered on his docket against the defendant, they were irrelevant, and not such as the garnishee was bound to answer, and would not sustain the judgment.

The judgment in the present case was entered in default of appearance for the amount of plaintiff's judgment against the defendant Hartwell, as if under section 57 of the Act of 1836. It was not within the provisions of that section, and has nothing in the Act to support it. It was wholly irregular and should have been stricken off.

There remain to be noticed two cases which are relied upon by appellee as sustaining the judgment.

In Layman *v.* Beam, 6 Whart. 181, the garnishee having failed to appear after service of the summons, judgment by default was entered against him "to be levied of his goods," etc. This was held to be erroneous, and the proper form of the judgment was given, "that plaintiff have execution of so much of the debt due by C. (garnishee) to A. (defendant) and attached in the hands of said C. as may satisfy the judgment of plaintiff against the said A.," etc., and if said C. refuse or neglect to pay the same, then to be levied of his own goods, etc. This form of judgment, and some expressions in the opinion, such as "a default to appear is tantamount to a confession that he (garnishee) has in hands the property attached," etc., entirely correct as to the facts then before the Court, have sometimes unfortunately been taken as general rules applicable to all cases, and the forms based on them need revision. The sheriff had returned "attached a debt of about six hundred dollars due to defendant by the within named" garnishee, and the plaintiff's judgment against defendant was only two hundred dollars. It thus appeared of record that execution could be had for plaintiff's whole judgment without injury to the garnishee. There had been no literal compliance with the requirement of the statute that there should be a finding of the specific goods in the hands of the garnishee and their value, but it had been held in Flanagin *v.* Wetherill, 5 Whart. 280, that as the property in garnishee's hands was money and the amount appeared, such irregularity was one of form only and did not require a reversal. It is the excepted case from the strictness of the requirements of the statute already discussed, and how narrow the exception is appears from Poor *v.* Colburn, 57 Pa. 415, *supra*, where a verdict that money in garnishee's hands was defendant's, and plaintiff was entitled to $69, was held bad for not finding specifically how much there was in garnishee's hands. The Court in Layman *v.* Beam had the fact before it that a debt was specifically attached, larger than plaintiff's judgment against defendant, and therefore could fairly say that "a default to appear was tantamount to a confession that he has in his hands the property attached," and therefore nothing more was required to fix the liability of the garnishee. But such a rule is inapplicable to cases where nothing is specifically attached, and even to cases of specific attachment, unless followed by the liquidation, by writ of appraisement or otherwise, of the value of the goods. That the Court meant to speak only of the case in hand, and not to relax the strict general rule, is manifest from the reversal of a judgment giving execution against the garnishee's own goods in the first instance, though under Flanagin *v.* Wetherill it might have been saved, and from the care taken by SERGEANT, J., in the opinion to show how exactly the requirements of the statute must be followed.

The other case, Jones *v.* Tracy, 75 Pa. 417, is very similar in character. It is not so well reported, as some of the facts upon which the Court proceeded appear only by inference. It also was an attachment of a debt due by garnishee. But neither its amount nor that of

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plaintiff's judgment appears except that it may be gathered inferentially from the opinion that the judgment was for the amount of plaintiff's claim, and that garnishee's debt to defendant was larger. It is thus on all fours with Layman *v.* Beam, and is an exceptional case for the same reasons, entirely correct on its own facts, but not intended to lay down a general rule for ordinary cases. What is said on the subject of defendant's right of exemption is very obscure from the absence of a statement of the facts. The expression that "the effect of the default was an admission by the garnishee that he owed the defendant a sum sufficient to discharge the plaintiff's debt over and above the exemption of $300," could only be sustained on the ground that the garnishee had notice that the defendant had or would claim exemption out of his debt; a fact which nowhere appears, though presumably it was in the case. Without such notice the garnishee had neither duty nor right to meddle with the subject of exemption.

The result of all our cases may be summed up in the following propositions:—

1. The garnishee failing to appear after service of the attachment, with clause of summons, but no specific attachment of goods or credits, plaintiff will be entitled to a judgment by default. But such judgment will be interlocutory only, and plaintiff cannot liquidate it, or have execution, without first by writ of inquiry or before the prothonotary as the rules of Court or the practice in cases of default may prescribe, establishing his claim by evidence of the garnishee's possession of goods or credits of the defendant; and the measure of his damages will be the value of such goods. This is the present case.

2. If the attaachment is levied upon specific goods, the default may be taken as an admission of the possession of such goods, but the plaintiff must, by writ of appraisement or otherwise, establish their value.

3. If the attachment is of money, or a debt, and the amount appears in the sheriff's return, the default is an admission of all the requisite facts, and no further evidence or inquiry is necessary. This is Layman *v.* Beam.

4. The proper form of the judgment is for plaintiff against the garnishee, and that the garnishee has in his hands certain goods, effects or credits, to wit (naming them) of the value, etc., or that the garnishee is indebted to the defendant in the sum of, etc.

5. Plaintiff's measure of damages which determines the amount of the judgment against the garnishee is the value of the goods attached, of course not exceeding the amount of his judgment, interest and costs against the defendant. The single exception is when the garnishee neglects or refuses to answer interrogatories, in which case by the express terms of section 57 of the Act of 1836, the judgment against him is that he has goods or effects of the defendant sufficient to satisfy the plaintiff's demand, and execution may issue against him as for his own proper debt.

Judgment reversed and procedendo awarded.

W. M. S., Jr.

Jan. '94, 77. April 24, 1894.

Cupples Wooden Ware Co. v. Howe.

Appeal—Practice—No appeal lies from order reinstating appeal from alderman.

No appeal lies from an order of the Common Pleas reinstating an appeal from an alderman, which appeal had on motion been stricken off; such order is interlocutory only, and simply determines that the case is properly in the Common Pleas.

Appeal of the Samuel Cupples Wooden Ware Company, plaintiff, from the order of the Common Pleas of Erie County, striking off an order dismissing an appeal by L. E. Howe and T. W. Walker, trading as the Joplin Paper Company, defendants, from the judgments of an alderman,

Judgment was obtained by the plaintiffs before Alderman Swalley, of Erie, on August 4, 1892. An appeal was taken August 27, 1892. On September 3 the transcript was filed, and on November 7, 1892, the Court, on motion of plaintiff, struck off the appeal for the reasons that it was taken more than twenty days after the rendering of judgment, and that the necessary affidavit had not been made before the alderman. On November 12, 1892, the Court granted a rule to reinstate appeal, and after hearing on November 29, 1892, made the rule absolute.

The plaintiff took this appeal.

J. Ross Thompson (*George M. Fletcher* with him), for appellant.

S. M. Brainerd (*Isador Sobel* with him), for appellees.

The appellants have no status in this Court under the law as we understand it. The decision of the Court in reinstating and sustaining the appeal of the appellees is not such a judgment as to entitle the appellants to this appeal. It is only interlocutory, and in effect determines that the case is properly in the Court of Common Pleas of Erie County, and is now pending and undetermined.

October 1, 1894. Fell, J. The appeal in this case must be quashed, as the judgment appealed from is not a final judgment.

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What was said by this Court in the Citizens' Building and Loan Association *v.* Hoagland and Gass, 87 Pa. 326, on an appeal from an order opening a judgment is directly applicable: "It is manifest no final judgment upon the application takes place against the plaintiff until the case has been heard and the judgment entered thereon, setting it aside or lessening its amount. Here the judgment was merely opened and an issue awarded. Until the issue is tried and the Court acts on it a final judgment is not entered. It would be intolerable to have an appeal on the opening order, and then an appeal on the determination of the issue and final decree of the Court." See also Campbell *v.* Sloan, 62 Pa. 481, and Ins. Co. *v.* Hartshorne, 84 Pa. 453.

The defendants appealed from the judgment of an alderman, and filed in the Court of Common Pleas a transcript of the proceedings before him. A rule granted the plaintiff to show cause why the appeal should not be struck off was made absolute. Subsequently a rule was granted on motion of the defendants to show cause why the former order striking off the appeal should not be reconsidered and the appeal reinstated.

It is to the order making absolute this rule and reinstating the appeal that the assignment of error is directed. The effect of this rule is only to determine that the case is properly in the Court of Common Pleas. It is neither a final judgment nor an award in the nature of a final judgment, but it is interlocutory, and from it no appeal lies.

The appeal is quashed at the cost of the appellant and the record remitted with a procedendo.

H. B.

Jan. '94, 363. April 6, 1894.

Johnson v. Philadelphia & Reading Railroad Co.

Practice—Pleading—Act of May 25, 1887—Rules of Court—Evidence—Release—Act of May 11, 1881—Public policy.

The Supreme Court does not interfere with the interpretation by the lower Courts of their own rules, except in cases of plain mistake which has inflicted substantial injury on the party complaining.

Under the plea of "not guilty" filed to an action of trespass under the Act of 1887, for damages for personal injuries, an alleged release given by the plaintiff is admissible in evidence.

The Act of May 11, 1881 (P. L. 20), which requires copies of the application to be attached to all life and fire insurance policies does not apply to a beneficial association which does not issue policies.

An employee of the P. & R. R. R. Co. signed an application for membership in a relief association, whereby he agreed to have a portion of his wages applied for the purpose of securing benefits, and agreed that in consideration of the contributions by the P. &. R. R. Co. to the fund of the association, acceptance of benefits from the relief fund would operate as a release of all claims against the company:

Held (1), that the acceptance of benefits after an accident operated as a release of the company.

(2). That such a contract is distinguished from those exempting a carrier from liability for negligence which are against public policy, in that the employee retains whatever right of action he may have until after knowledge of all the facts, and an opportunity to make a choice between the sure benefits of the association and the chances of litigation.

Appeal of W. B. B. Johnson, from the judgment of the Common Pleas No. 2, of Philadelphia County, in an action for damages for personal injuries against the Philadelphia & Reading Railroad Company.

On the trial, before PENNYPACKER, J., the plaintiff proved the nature of his injuries, a crushed leg, and offered evidence to show that they were sustained by reason of the worn condition and bad repair of a switch.

The defendant offered in evidence the paper identified by the plaintiff, being an application for membership in the Relief Association by William B. B. Johnson, No. 25,962, dated Philadelphia, June 13, 1891, and said application contained the following:—

"I, William B B. Johnson, of Philadelphia, in the County of Philadelphia and State of Pennsylvania, employed in the service of the Philadelphia and Reading Railroad Company as brakeman on the main line division, do hereby, *by reason of such employment*, apply for membership in the relief association, and consent and agree to be bound by the regulations of the relief association, as contained in the book of said regulations, approved by the advisory committee, *which I have read or have had read to me*, and by any other regu ations of the said association hereafter adopted."

Further on in the application is the following:—

"And in consideration of the contribution to be made by the Philadelphia and Reading Railroad Company to the funds of the association, I agree that the *acceptance of benefits* from the said relief fund for injury or death shall operate as a release of all claims for damages against said company, my employer, arising from such injury or death, which could be made by or through me, and that I or my legal representatives will execute, or, where necessary, procure to be executed by others, such further instrument as may be necessary formally to evidence such acquittance."

And in addition to the above clauses is the following:—

"I also agree that this application, when approved by the superintendent of the relief association, shall make me a member of the relief association, and constitute a contract between myself and the said company, my employer, and that the terms of this application and the regulations of said association shall, during my membership, *be a part of the conditions of my employment by the*

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company, and the same shall not be avoided by any change in the character of my service," etc.

Defendant also offered voucher and order No. 19,071, dated September 28, 1891, in favor of William B. B. Johnson, on certificate No. 25,-962, for benefits for $3, from August 29, 1891, to August 31, 1891, inclusive, on account of the accident.

$3.00 (Signed.) WM. B. B. JOHNSON,

As having received the money thereon. (A true copy being attached hereto and marked "B.")

Also like order, 19,623, dated October 22, 1891, for $30 for benefits for thirty days from September 1, 1891, to September 30, 1891, inclusive. Signed by William B. B. Johnson as having received the same. (A true copy being attached hereto and marked "C.")

Also like order, No. 20,368, dated November 18, 1891, for $31. Signed by William B. B. Johnson as having received the money. (A true copy being attached hereto and marked "D.")

Also like order, No. 21,174, dated December 12, 1891, for $30. Signed by William B. B. Johnson as having received the money. (A true copy being attached hereto and marked "E.")

Counsel stated that these were papers identified by the plaintiff while on the stand.

(Objected to.)

Mr. Hart stated that the purpose of the offer was to show a release to the railroad company under clause B. of the contract.

It appeared that the defendant had filed a plea of record only as follows: "Not guilty," and that no notice of the proposal to introduce special matter had been given plaintiff.

And thereupon plaintiff's counsel objected, and the Court overruled the objection and admitted in evidence all of said papers.

Exceptions were taken by plaintiff (assignments of error 1 to 5 inclusive).

Defendant called the general book-keeper of the company to show the contributions by the defendant company to the Reading Railroad Relief Association, which he stated had amounted to over $60,000. Objected to by plaintiff. Objection overruled. (Sixth assignment of error.)

Defendant offered in evidence plaintiff's book of membership in the relief association.

Objected to by plaintiff. Objection overruled. (Seventh assignment of error.)

Plaintiff's counsel made the following offer in rebuttal:—

"That on June 13, 1891, the day the plaintiff was employed by the defendant company, he was asked and directed by the officers and agents of the defendant company, at the office of the defendant company, where the employés are engaged, to sign some papers relating to his state of health and was asked some questions about his family. That he was handed a paper for signature, which was stated to him contained his answers to the questions, that it was all right and for him to hurry up as the officer of the defendant company was in a hurry to go away and there were many others waiting for employment like the plaintiff. That upon those representations he signed the paper placed before him according to the instructions. That nothing was said about any Relief Association and that he did not know that he had ever signed any paper in relation to the Relief Association until it was claimed during the trial of this case. That he did not know that there were any rules, regulations or by-laws of the Relief Association until three months after the occurrence of the injury in question, when the book called 'Regulations of the Relief Association,' which has been offered in evidence by the defendant company was given to him by an agent of the defendant company."

(Objected to that the evidence affirmatively showed that under a contract with the signature to it acknowledged to be a proper signature by the plaintiff, that he contracted to do certain things therein contained. That subsequently to the signing of the contract and pursuant to it, he received the benefits contracted to be received under that contract and the receipts for those are produced in evidence and acknowledged so to be by him.)

THE COURT: "The plaintiff has executed a written paper which bears all over it the appearance of a contract in which the employer was a party. At the top of the contract, in large and bold letters are the words, 'The Philadelphia and Reading Railroad Relief Association.' Through the contract are a number of provisions which indicate to anybody examining it in the most cursory way that it is a contract with the Reading Railroad Company, and it is formally provided that it shall be such a contract. The plaintiff now asks to have it set aside on the ground that he did not know what its contents were. This was executed in June, I believe, 1891. Some two or three months afterwards the plaintiff met with the accident, and after the accident, in accordance with the provisions of the contract, he received the benefits under it. Under these circumstances it ought to appear in the clearest way in the world that there was fraud or misrepresentation, and had there been, there is apparently a subsequent ratification of it. I think, therefore, the offer will have to be overruled."

Exception for plaintiff. (Eighth assignment of error.)

Defendant requested the Court to charge the jury as follows:—

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"The plaintiff having signed the application for membership in the Philadelphia and Reading Railroad Relief Association, and become a member thereof, and having in pursuance of the contract thereby made, received the benefits to which he was entitled under said contract in consequence of the injuries which are the subject of this suit, he is bound by the conditions of the application for membership, and the rules and regulations of said association, and the defendant company is thereby released from all liability to the plaintiff in this suit, and your verdict must be for the defendant."

There was no specific answer made by the Judge to this point, but in the general charge he said:—

"This is a contract of an arrangement for the raising of a fund providing for benefits in the case of injury or death of the employés resulting from accident, and it would seem upon the face of it a contract which is beneficial to the employé. In most of the cases which arise the employé cannot recover, because of the fact that he accepts the risks of the employment, or because of the fact that an accident had arisen from the negligence of a co-employé. There is no such distinction drawn in the agreement which is here made, but the benefits are benefits which are conferred upon those who are subjected to an accident in whatever way it may occur. The contract provides that it shall be an agreement between the employé and the company, and it appears, from the evidence in this case, that it has been accepted by the company, because they have paid into the fund of the Relief Association a sum amounting to $100,000. There is a provision in the agreement that it shall operate as a release of all claim of damages against said company. It provides that: 'I agree that acceptance of benefits from said relief fund for injury or death shall operate as a release of all claims of damages against the company.' It appears, therefore, that it is not a release in all cases upon its terms, but that what constitutes a release, according to the contract between the parties, is the acceptance of the benefits after the injury has occurred. Now that, assuredly, is of great advantage to the employé, because it permits him, after he knows the extent of his injury and the manner in which it has occurred, to say whether or not he will take the benefits provided for by the contract, or whether he will rest upon his right to sue and claim damages for negligence. I cannot see that it is any different from a compromise of a case made between the parties, since it gives the employé the right to determine his course of conduct after he has ascertained the extent of his injuries." (Ninth assignment of error.)

"Under all the evidence in this case your verdict must be for the railroad company."

Answer. Affirmed. (Tenth assignment of error.)

Verdict for defendant and judgment thereon. Plaintiff appealed, assigning for error the ruling on the evidence above noted and the answers to defendant's points.

William W. Smithers, for appellant.

The record shows simply a plea of "not guilty," and no notice of special matter was given, it was clearly error therefore to admit the testimony as to the Relief Association.

Act of May 25, 1887.
Rule of Court xxxi., sec. 126 c., p. 128.

A release must be specially pleaded under the former practice.

Johnson *v.* Kerr, 1 S. & R. 25.

The above rule of Court as to notice must be complied with in actions of trespass.

Ogden *v.* Lukens, 29 WEEKLY NOTES, 258.

The release was inadmissible because it did not comply in form with the Act of May 11, 1881, sec. 1 (P. L. 20). This Act has been declared constitutional and construed in

Life Asso. *v.* Musser, 120 Pa. 384.
Ins. Co. *v.* Dunham, 117 Id. 460.
Hebb. *v.* Ins Co., 138 Id. 174.
Title Co. *v.* Ins. Co., 132 Id. 385.
Pickett *v.* Ins. Co., 144 Id. 79.
Hendel *v.* Assn., 49 Leg. Int. 484.
Conductors Mutual Aid and Ben. Assn. *v.* Robinson, 35 N. E. Rep. 168.

The contract was not admissible because it is against public policy.

Ray's Contractual Limitations, 2.
Wharton on Negligence, sec. 199.
R. R. Co. *v.* Baldauf, 16 Pa. 67.
Rose *v.* R. R. Co., 39 Iowa, 246.
Atwood *v.* Transportation Co., 9 Watts, 87.
R. R. Co *v.* Raiordon, 119 Pa. 577.
Forepaugh *v.* R. R. Co., 128 Id. 217.
Jacobus *v.* R. R. Co., 1 Cen. L. J, 374.
Crew *v.* Bradstreet, 134 Pa. 161.
Cooley on Torts, 687.
R. R. Co. *v.* Jones, 2 Head 517.
O'Neill *v.* Iron Co, 30 N. W. Rep. 688.
Johnson *v.* R. R. Co., 8 R. W. & C. J., 312.
Thompson on Negligence, 1025.
Roesner *v.* Hermann, 10 Bissell, 486.

The question of fact as to the circumstances under which plaintiff signed the application should have been left to the jury.

Railroad Co. *v.* Welch, 52 Ill. 183.
Schultz *v* R. R. Co, 44 Wisc. 638.
Butler *v* The Regents, 32 Id. 124.
O'Neill *v.* Iron Co, 30 N. W. Rep. 688.

Gavin W. Hart, for appellee.

In trespass on the case, "whatever will in justice and conscience, according to the circum-

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stances of the case, mitigate or bar the claim may be received in evidence on the part of the defendant under the general issue, and it is not only competent for the defendant to show any matter in excuse or justification, but he may also give in evidence any matter in discharge of the action as payment or release, or accord and satisfaction."

1st Troubat & Haly's Practice, section 543.
Bird *v.* Randall, 3 Burr, 1353.

In an action on the case a release executed after suit brought may be given in evidence under the general issue.

Lyon *v.* Marclay, 1 Watts, 271.

This association was not an insurance company and therefore the Act of 1881 does not apply.

Fuller *v.* B. & O. R. Assn., 67 Md. 433.
Com'th *v.* Equitable Beneficial Assn., 25 WEEKLY NOTES, 347.

The cases cited by appellant on the question of public policy have no application, the question of the validity of such a release is settled by

Graft *v.* R. R. Co., 8 Atl. Rep 206.

July 12, 1894. MITCHELL, J. The release was admissible under the plea of not guilty. By the strict letter of the Procedure Act of 1887 "the only plea in the action of trespass shall be not guilty," though the pleadings are to be "subject to the rules of the respective Courts as to notice of special matter." The rule of the Court below prescribes that defences previously pleaded specially or given in evidence under equitable pleas, shall be admissible under the general issue upon notice given ten days prior to the trial. This Court does not interfere with the interpretation by the lower Courts of their own rules, except in cases of plain mistake which has inflicted substantial injury on the party complaining. But here we see no error. The present action in its nature is trespass on the case, and the Legislature in an effort, however misdirected, to get rid of technical distinctions by calling all actions *ex delicto* trespass, and limiting the plea to not guilty, certainly did not mean to tie them all down to the technical restrictions of that plea in that action at common law. In actions on the case a release was admissible in evidence without being pleaded. 1 Chitty Plead. 491; Greenwalt *v.* Horner, 6 S. & R. 71.

The further objection that the release was not admissible because in form it did not comply with the Act of May 11, 1881, P. L. 20, requiring copies of the application, etc., to be attached to the policy, is sufficiently answered by the consideration that that Act applies only to policies issued by insurance companies, and the Relief Association is not an insurance company but a beneficial association: Com. *v.* Equitable Asso., 137 Pa. 412; N. W. Masonic Asso. *v.* Jones, 154 Pa. 99; nor does it issue insurance policies.

It is further objected, and this is the only substantial question in the case, that the release was void as against public policy, and a number of cases are cited to show that a common carrier cannot make a valid contract against his own negligence. It was quite unnecessary to go out of our own State for authority on that proposition; it is not questioned here any more than elsewhere, but it is wide of the point in this case. There is no provision exempting the company from liability for future negligence. The benefits, by the regulations of the Relief Association, become due to members whenever disabled by accident in the railroad company's service, or by sickness or injury other than in the company's service, without reference to the question of negligence at all. As these provisions include benefits in cases of accident pure and simple, of injury by the negligence of fellow workmen, and by the member's own contributory negligence, it is apparent that they cover a wide field in which there is no liability of the railroad company at all. Such cases are probably a large majority of those occurring to railroad employés, and the association therefore is of the highest order of beneficial societies. But even in cases of injury through the company's negligence there is no waiver of any right of action that the person injured may thereafter be entitled to. It is not the signing of the contract but the acceptance of benefits after the accident that constitutes the release. The injured party therefore is not stipulating for the future, but settling for the past; he is not agreeing to exempt the company from liability for negligence, but accepting compensation for an injury already caused thereby. He may as well accept it in instalments as in a single sum, and from an appointed fund to which the company has contributed, as from the company's treasury as a result of litigation. The substantial feature of the contract which distinguishes it from those held void as against public policy is that the party retains whatever right of action he may have until after knowledge of all the facts, and an opportunity to make his choice between the sure benefits of the association or the chances of litigation. Having accepted the former he cannot justly ask the latter in addition. This feature of the case brings it on all fours with Graft *v.* R. R. Co., 8 Atlantic Rep. 206, where a release under similar circumstances was held to be a conclusive bar.

There is no public policy which the contract can be said to transgress.

Judgment affirmed. W. M. S., Jr.

[See next case.]

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Oct., '94, 27. October 2, 1894

Ringle v. Penna. R. R. Co.

Railroads—Relief Association—Contract—Release—Practice—Judgment on reserved point.

K., an employee of defendant and a member of a "relief association" composed of fellow-employees, and which was contributed to by defendant, was injured in the discharge of his duties; after accepting "the benefits" from the association for some time he brought an action of trespass against defendant. One of the stipulations of the contract with the relief association was that the acceptance of benefits by a member should operate as a release of all claims for damages against the company, arising from injury for which said benefits were allowed:

Held, this acceptance of the "benefits" was a bar to a recovery by the plaintiff.

Johnson *v.* Phila. & Reading R. R., 163 Pa. 127, followed.

The jury found for the plaintiff and the Court subsequently entered judgment for him on point of law reserved:

Held, that a point reserved is authority to the Court to enter judgment for defendant, *non obstante veredicto*. In the case of the plaintiff there can be no such reservation, the verdict must be for him with authority to enter judgment for defendant against the verdict. If the authority is not exercised the reservation drops and the verdict stands as rendered.

Robinson *v.* Myers, 67 Pa. 9; Bank *v.* McCoy, 69 Id. 204; Morris *v.* Ziegler, 71 Id. 450; Glading *v.* Frick, 88 Id. 460; Hosler *v.* Hursh, 151 Id. 415, followed.

Appeal of the Pennsylvania Railroad Company, owners and lessees, operating the West Penn Railroad, from the judgment of the Common Pleas of Westmoreland County, entered on a verdict in an action of trespass wherein George E. Ringle was plaintiff, and appellant defendant.

On the trial of this cause, before DOTY, P. J., the facts appeared as follows:—

The plaintiff in the discharge of his duty as a freight conductor in the employ of defendants, was injured on the night of March 19, 1890, by a land-slide at a point some three-quarters of a mile west of Bagdad station on defendant's road.

On the night of March 13, 1890, a land-slide had occurred at this same point and caution was officially enjoined on all trainmen in passing the place; the next day orders were issued to resume schedule time and the track was reported to be in good condition.

On the 21st of July, 1886, the plaintiff executed his application to the relief department of the Pennsylvania Railroad Company, which on the 31st of July, 1886, was approved by the assistant superintendent of this department. He continued in good standing up until the time of his accident. One stipulation of this contract is as follows:

"And I agree that the acceptance of benefits from the said relief fund for injury or death shall operate as a release of all claims for damages against said company arising from such injury or death, which could be made by or through me, and that I or my legal representatives will execute such further instrument as may be necessary formally to evidence such acquittance."

For twenty-one months plaintiff received the "benefits" he was entitled to from the relief association; he declined to execute the release as required by the defendants and brought suit to recover damages received by reason of defendant's negligence.

The verdict was for the plaintiff in $8,750 which was reduced to $4,850.

The Court reserved the points—

1. Whether there is any evidence of negligence on the part of the defendant to be submitted to the jury, and,

2. Whether the release dated 21st July, 1886, as contained in the application of plaintiff for membership in the relief department of the defendant company, and the acceptance of benefits from the relief fund, defeat this action and prevent the recovery of damages against said company for injuries sustained while in its employ.

Judgment was subsequently entered for plaintiff on the points reserved.

Defendant appealed.

Paul H. Gaither (*J. A. Marchand* with him), for appellant.

This relief department is under the care of the defendant. Its officers and employés are paid by the defendant. It contributes of its own means largely to carrying on this work.

Plaintiff's membership in the relief association and reception of benefits from it bars his recovery.

Graft *v.* Baltimore & Ohio R. R., 8 Atlantic Reporter, 206.
Leas *v.* Penna. Co., unreported as yet, decided May 8, 1894, Appellate Court, State of Indiana.
Johnson *v.* R. R. Co., 163 Pa. 127.

E. E. Robbins, (with him *John E. Kunkle* and *John P. Elkins*), for appellee.

The agreement to release as set out in application for membership in the relief association is against public policy.

Penna. R. R. Co. *v.* Butler, 57 Pa. 337.
Goldey *v.* Penna. R. R. Co., 30 Id. 242.
Powell *v.* Penna. R. R. Co., 32 Id. 414.
O'Donnell *v.* A. V. R. R. Co., 59 Id. 250.
Pennsylvania Railroad Co. *v.* Henderson, 51 Id. 315.
Lackawanna & Bloomsburg R. R. Co. *v.* Chenewith, 52 Id. 382.
Farnham *v.* R. R. Co., 55 Id. 62.

Releases for personal injuries are to be scrutinized with great care; and to be upheld they must have been made upon a sufficient consideration.

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Kennerty *v.* Etiwan Phosphate Co., 17 S. C. 411. 43 Am. Rep., 607.
Tomkins *v.* Clay St. R. R. Co., 66 Cal. 163.

Under a contract stipulating that the measure of damages to an employé for injuries received shall be his regular wages until he is able to work, if not more than six months, an agreement to accept one month's wages in full of all damages, where there is no dispute as to his right to such wages, is without consideration, and will not bar his recovery of wages for a further time during which he is unable to work. See the following authorities:

Carlton *v.* Western R. R. Co., 81 Ga. 531.
Sobieski *v.* St. Paul R. R. Co., 41 Minn. 169.

Where one during his employment agreed in writing with his employer not to hold him liable for an injury caused by the negligence of the employer, but without agreement as to future employment, or other consideration, this was held void.

Purdy *v.* Rome, etc., R. R. Co., 52 Hun (N. Y.) 267.
Peterson *v.* Chicago R. R. Co., 36 Minn. 399.

An injured party, even after the signing of a release for injuries caused by negligence, must have been acquainted with its contents, and must have intended to sign such a release for the damages, as is set up as a bar to recovery in the action.

Schultz *v.* Chicago R. R. Co., 44 Wis. 638.
Packet Co. *v.* Defreis, 94 Ill. 598. 34 Am. Rep. 245.
Chicago, etc, R. R. Co. *v.* Mills, 105 Ill. 63. 1 Am. & Eng. R. R. Cas. 294.

Where party injured had been engaged as a baggage man by the defendant for a number of years, and signed a release of defendant from all liability to the plaintiff for any negligence without reading the same, it was held that there was no consideration for the release which was offered as a bar to an action subsequently instituted for injuries received through such negligence.

Purdy *v.* Rome, etc., R. R. Co., 125 N. Y., 209, above cited.

November 5, 1894. MITCHELL, J. This case is ruled by Johnson *v.* R. R. Co., 163 Pa. 127. The essential principle therein established is that a contract between employer and employé which preserves to the latter all his rights of action in case of negligence, until after the facts have occurred and are known to him, is not against public policy. "There is no waiver of any right of action that the person injured may thereafter be entitled to. It is not the signing of the contract but the acceptance of benefits after the accident that constitutes the release. The injured party, therefore, is not stipulating for the future, but settling for the past; he is not agreeing to exempt the company from liability for negligence, but accepting compensation for an injury already caused thereby." Id. 134.

The facts of that case and this are not materially different. In both the agreement is that the acceptance of benefits, of course after the accident, shall operate as a release. In the present case there is an additional agreement that the plaintiff shall "execute such further instrument as may be necessary formally to evidence such acquittance," and it is argued that no such release has been executed by plaintiff. But it is not necessary that it should be. The acceptance of benefits is the substance of the release, and the agreement for a further instrument is by its express terms a mere formality for convenience of evidence.

It is further argued that as the contract is between the relief association and the plaintiff and no evidence that the railroad company defendant has in fact paid anything into the treasury of the association there is no consideration to support a release to the railroad company. It is not, however, worth while to discuss whether the defendant is in position to take advantage of a consideration moving from another party but for its benefit, as the consideration from the defendant itself is abundant. As a member of the association it has assumed obligations to take charge of the administration, and to pay all the operating expenses, to take care of the funds and to be responsible for their safe keeping, to guarantee the obligations of the association, and to make appropriations to supply any deficiencies. These would be ample even if the amount of the consideration could be inquired into.

The release being a complete bar to plaintiff's right of action it is not necessary to consider the evidence of negligence.

As a matter of practice it may be well to notice an irregularity in the form of the judgment. A point reserved is an authority to the Court to enter judgment for the defendant, *non obstante veredicto*. There can be no reservation in favor of the plaintiff, the verdict must be for him, with authority to enter judgment for the defendant against the verdict: Robinson *v.* Myers, 67 Pa. 9; State Bank *v.* McCoy, 69 Pa. 204; Morris *v.* Ziegler, 71 Pa. 450; Glading *v.* Frick, 88 Pa. 460; Hosler *v.* Hursh, 151 Pa. 415. If that authority is not exercised the reservation drops out of the case altogether, and judgment is entered for plaintiff, not on the point reserved, but on the verdict, as if there had been no reservation at all.

Judgment reversed and judgment entered for defendant on the point reserved.

W. D. N.

[See preceding case.]

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Jan. '93, 277. May 2, 1894.

Gibson v. W. N. Y. & P. R. R. Co.

Trespass — Damages — Railroads—Release—Fraud—Ratification.

Where a release is set up in the course of a trial, and while the physical fact of its execution is admitted, the releasor gives evidence that his mental condition at the time was such that he was unable to know what he was doing, the question of the existence of a release, *i. e.*, the assent of the releasor's mind thereto, is for the jury under all the evidence.

In an action in trespass to recover damages for personal injuries received, the defence was a release, for a valuable consideration, executed by plaintiff the day after receiving the injuries, and shortly after undergoing an operation during which he was anæsthetized The plaintiff alleged that he had no recollection of having executed the release, but he omitted to return the consideration for it after having returned to his normal mental condition, and after having knowledge that it was claimed by the defendant that a settlement had been made:

Held, this was a ratification of the execution of the release and plaintiff could not recover. [STERRETT, C. J., dissented.]

Appeal of the Western New York and Pennsylvania Railroad Company, from the judgment of the Common Pleas of Warren County, entered on a verdict in an action of trespass wherein George J. Gibson was plaintiff and appellant was defendant.

The facts of the case are sufficiently set forth in the opinion of the majority of the Court.

At the trial the Court was asked by defendant to charge:—

Sixth. That if the plaintiff was unconscious at the time he executed the release in question, but afterwards, and when restored to consciousness knew, or had reason to believe and did believe, that the $240 was money left with him by the officials of the railroad and as compensation for his injuries, and knowing or believing this, he made no offer to return the money, but retained and still retains it, such retention is an acquiescence in and ratification of the release.

Seventh. That under the whole evidence the verdict should be for the defendant.

The sixth point the Court affirmed if the jury found the further fact that plaintiff knew or believed that he had executed a release or agreed to at least. The seventh point was refused.

Verdict for plaintiff for $5,134.08. The defendant took this appeal and assigned as error, *inter alia*, the answer to the sixth point and the refusal of the seventh.

The case was previously argued May 2, 1893, on which occasion MITCHELL and DEAN, JJ., were absent, and subsequently a reargument was ordered which was now had before a full bench.

William D. Brown and *Eugene Mullin*, for appellant.

It is error to submit a question of fraud to a jury on slight parol evidence to overturn a written instrument.

Penna. R. R. Co. *v.* Shay, 82 Pa. 198.
Mead *v.* Conroe, 113 Id. 220.
Elcessor *v.* Elcessor, 146 Id. 359.

The executed contract of a lunatic is not void.

Lancaster Co. Bank *v.* Moore, 78 Pa. 407.

George H. Higgins (*Allen & Allen* with him), for appellee.

The release cannot be under the circumstances of its execution a bar to plaintiff's recovery.

Ettinger *v.* Jones, 139 Pa. 218.

October 1, 1894. DEAN, J. The plaintiff, a farmer by occupation, on 23d of December, 1890, while a passenger on defendant's railroad, was injured in a wreck near Bradford; his left shoulder was dislocated and broken, and his injury, if not permanent, for a long time will seriously disable him in the performance of hard manual labor. The wreck occurred about noon, and the same day the railroad company had him removed to the Riddell House, in the town of Bradford. He received some attention the same evening, and the next morning, when about to leave for his home, was visited by Mr. Wilmoth, the agent of the railroad company, and Dr. Benninghoff, the company's surgeon, who persuaded him to stay and be treated by the company's surgeons. About eleven o'clock in the forenoon of the same day Dr. Benninghoff, accompanied by Drs. James and Stewart, two other surgeons, again visited him to make an examination of his injuries and apply such remedy as was demanded. Anæsthetics, chloroform and ether, to the extent of bringing about insensibility to pain and unconsciousness, were administered; the examination was made, and the shoulder given such treatment as the nature of the injury called for. He was insensible from the anæsthetics for from twenty-five to thirty minutes, and in this time the surgeon's work was finished; consciousness returned in five to ten minutes after; he then talked rationally; told the surgeons they would find some of his clothing in his satchel, then in the room, and seemed, if not entirely restored, to be rapidly regaining a normal condition.

The surgeons then left. In about three-quarters of an hour Dr. Stewart returned to the room and remained from five to ten minutes; inquired as to his condition, and he replied he was feeling well, except some pain in his shoulder; he seemed then to have completely recovered. Between four and five o'clock in the afternoon of

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the same day, J. D. Hancock, Esq., solicitor, and B. J. Wilmoth, agent of the company, called upon him for the purpose of settling, and obtaining a release of any claim he had for damages against the company because of his injury. They informed him of their object, and talked with him about his injury, and the basis of computation for payment. He thought he ought to have his wages while unable to work at the rate of $1.50 per day, and possibly the cost of caring for him while getting well. He named $150 as a reasonable sum covering his loss of earnings; Mr. Hancock thought this was not enough, considering the probable loss of time before he would recover from such an injury, and suggested the payment of $240, and he willingly accepted the offer.

A release was drawn, read to him, and he affixed his signature. He expressed an intention of immediately returning home, but yielding to their persuasions and suggestion that he would have better treatment in the hospital at Bradford, he agreed to remain. The $240 was handed him in money; he requested Mr. Hancock to take his pocket-book out of his hip pocket; he did so; plaintiff then counted over the $240, took a small sum of his own out of the pocket-book, and put all together back in the pocket-book. Mr. Hancock told him that all his bills would be paid, and when about leaving the room plaintiff said: "If it should happen I don't entirely recover the use of my limb, I will expect this company to give me a place."

The accident happened on Tuesday; the following Friday plaintiff went to the hospital in Bradford, where he remained more than three months, and about six months after the accident, on 11th June, 1891, he brought this suit to recover damages for the injury caused by the company's negligence.

On the trial, there was no denial by the company of its liability for damages. The release, however, was set up as a complete defence. To this the plaintiff replied that at the time it was executed, his mental condition, resulting from his injury and the effect of the anæsthetics, was such, that he was wholly irresponsible; that he not only did not comprehend the nature of the contract signed by him, but was not conscious that he was signing any paper relating to the subject of the contract.

The defendant replied that even if this were so, afterwards, at a time when no mental incapacity is alleged, he by distinct and unequivocal declarations and acts, ratified the contract. The Court submitted all the evidence bearing on the disputed points to the jury, who found a verdict of $5,134.08 for the plaintiff. Judgment having been entered on the verdict, the defendant appeals.

The assignments of error, although seven in number, may be readily condensed to two, and still embrace all there is of substance in the errors complained of.

The Court affirmed peremptorily plaintiff's first point, asking that the jury be instructed, if the release was signed by plaintiff, when by reason of the effect of the anæsthetic, he did not know or understand the nature of the act, it was not binding upon him; and peremptorily negatived defendant's second point which asked the Court to declare that as it was not disputed plaintiff had accepted the $240, and signed the release, and as he now sought to invalidate the writing on the ground of mental incapacity at the time of its execution, he must establish such mental incapacity by evidence so clear, precise and convincing, as to satisfy the Court sitting as a chancellor, of the existence of the fact.

If counsel for defendant could have convinced the Court of the correctness of their view of the law, there would have been no verdict against their client. For, sitting as a chancellor, the learned Judge of the Court below was by no means convinced of plaintiff's mental incapacity when he executed the release. The case had once been tried with about the same verdict, which, on a motion for a new trial, was set aside by the Court in an opinion filed. In this opinion the learned Judge says: "The vital question of fact was, whether or not the plaintiff, at the time of signing the writing . . . . was or was not in possession of his mental faculties. There was evidence by the testimony of plaintiff himself, which, if believed, clearly established his want of mental capacity at the time, and compelled us to submit the case to the jury. . . . A most careful and anxious review of the whole testimony has convinced us that the weight of the evidence was so clearly against this conclusion, and in favor of his entire rationality at the time of the execution of the writing, that the jury must have permitted their very natural sympathy for the unfortunate plaintiff, whose case is a hard one, or their prejudices against corporations, to over-ride their judgment."

And the second trial apparently produced no change in his mind, for on the second motion for a new trial, in overruling it he says: "In our opinion the verdict is against the weight of the evidence. For this cause we granted a new trial after the first verdict. The question now is, whether the defendant is entitled to successive new trials, until a jury shall render a verdict in accordance with the views of the Court upon the facts. . . . . While we are not absolutely limited to one new trial, two verdicts the same way ought not to be disturbed without the gravest reasons for believing that the jury have acted from mistake or corrupt motives. . . . .

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No such suggestion is made in this case, nor have we any reason to believe that a new trial would produce a different result."

So, it is manifest, if appellant could have convinced the trial Judge he was sitting as a chancellor to administer equity, where there was no adequate remedy at law, he would have refused to set aside this release, because the evidence was wholly insufficient to satisfy his conscience. But the defence here rested on a contract, the existence of which depended on the assent of two minds to the same thing in the same sense. While the evidence showed the physical act, which is evidence of assent, the affixing of the signatures, the plaintiff positively denied any exercise of mental faculty on his part in the execution of the contract. If there was no mind to impel the hand to affix the signature, there was no assent of two minds, and in respect of this, there was no contract. Where fraud, accident or mistake in the creation of the instrument is the defence, it is a purely equitable one, and equitable rules will be enforced as to the measure of proof to sustain it. But where the defence rests on the existence of a fact involving no element of fraud, the evidence is for the jury under the common law rules of evidence.

Lunacy can be given in evidence under the plea of *non est factum*. Bensell *v.* Chancellor, 5 Wharton, 370. The rule of evidence is the same here as if defendant had pleaded a release, but alleged the instrument was lost, and had then given secondary evidence of its contents; then plaintiff had replied that no such paper had ever been executed. The contention would have been one of pure fact, involving no equities requiring the interposition of the conscience of a chancellor, who enforces contracts, not always because of right but of grace, and will refuse a decree destructive of the effect of a deed, on the uncorroborated testimony of a single witness. Here there is not a spark of evidence of any misrepresentation, fraud, or over-reaching in the procurement of the contract; there is, however, the positive oath of the plaintiff that from the effects of the anæsthetics his intellectual faculties were in a state of paralysis, so complete that he had no knowledge of the contents of the paper, or that he was signing any instrument whatever. If this were the fact, then it could not bar his recovery any more than if it had no existence; the plaintiff's claim was of right according to law, and not of grace according to equity. The dispute was as to the fact of a deed, not as to the equities under it. Whether the fact was established was to be answered by the conscience of the jury; whether their finding was against the manifest weight of the evidence was for the determination of the Court on a motion for a new trial, and not by binding instructions on the evidence. Nevertheless, we cannot but think that the Court would have performed only a plain duty by expressing to the jury its opinion on this evidence, at the same time telling them they were not bound by it. In two opinions of record the learned Judge, in unmistakable language, has declared the verdict was against the manifest weight of the evidence. A careful perusal of every word of this evidence prompts us to a like conclusion; but he had far better opportunities than we for forming an opinion; during the course of the trial he had the advantage of observation of the witness on the witness stand. Here were five disinterested witnesses, with every means of observation, on the day the paper was executed, testifying positively to the mental capacity of the plaintiff, at the same time describing his conduct and giving his conversation. Four of them were men whose professional knowledge and experience must have so sharpened their perceptions, that mental incapacity was not likely to escape their notice; not a suspicion of their credibility is suggested; yet the uncorroborated, contradictory testimony of the plaintiff, on whose oath depended a verdict, is accepted by the jury as the truth. We say uncorroborated because the testimony of Nolan does not contradict that of the defendant's witnesses, and, if significant at all, it tends to prove that plaintiff's conversation after the operation was connected and rational. The best that can be said of the verdict on this first question is that the credibility of witnesses was passed on by the jury, and that they, in face of all probability, decided that the testimony of one pecuniarily interested witness was more worthy of belief than that of five pecuniarily disinterested ones, and thus the functions of the jury were preserved, while it is somewhat doubtful whether the functions of the Court were. In this there was no error we can correct on review. To what length the trial Court shall go in efforts to correct injustice by granting new trials is in their discretion, not ours.

The second error preferred by defendant is raised by the answer of the Court to its sixth and seventh points. The Court was requested to say to the jury: "That if the plaintiff, after being restored to consciousness, knew, or had reason to believe, and did believe, that the $240 was money left with him by officials of the railroad, and as compensation for his injuries, and, knowing or believing this, he made no offer to return the money, but retained and still retains it, such retention is an acquiescence in and ratification of the release." And then by the seventh: "That, under the whole evidence the verdict should be for defendant."

Taking these points together should both have received an unqualified affirmation?

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Assuming that plaintiff was not conscious of the act when he signed the release and accepted the money, what knowledge did he have of the subject afterwards, when restored to mental health, and does his conduct then amount to ratification? Any evidence of a clear and unequivocal character, showing an intention to affirm, will bind him. And it is not necessary that the affirmance be as solemn as the original act itself. Acquiescence, with other circumstances, may establish ratification. Irvine *v.* Irvine, 9 Wall. 627; Sims *v.* Everhardt, 102 U. S. 312; Frink *v.* Roe, 70 Cal. 311. "If he will knowingly, and in the exercise of his proper faculties, take the benefit of a contract made while he was insane, it is competent for him to do so. But the consequence will be to give force and effect and legal validity to the contract, which was before voidable." Allis *v.* Billings, 6 Met. 415. Or as is said in 1 Gray, 434, when he retained and enjoyed the benefits of the contract: "Had he then full capacity to judge? Could he then balance the advantages and disadvantages to himself?" The same principle was again announced in Gibson *v.* Soper, 6th Gray, 279, in the case of a conveyance of land: "If the grantor, having been restored to sound mind, still retains and uses the consideration of the deed, without offering to restore, or seeks to enforce the securities, or avail himself of the contract which constitutes the consideration, such conduct may furnish satisfactory, and it may be conclusive, evidence of ratification." To the same effect is Pearsoll *v.* Chapin, 44 Pa. 9, where the same principle is held applicable to contracts merely voidable, and which are the subject of affirmance or ratification without a new consideration.

What was the evidence bearing on the question of ratification? The last seen of the $240, before he went to the hospital, was when plaintiff was yet at the Riddell House, in his room; then he placed it in his pocket book with $10 of his own; this was Wednesday evening; on Friday he went to the hospital; the same day the pocket book with the money was delivered to Miss M. D. Whitney, the matron, by one of the nurses. She then took it to plaintiff for purpose of giving him a receipt for it, which she did, and he said to her, naming the amount, it was the money he got from the railroad company in settlement for his injury; afterwards he told her the railroad company had offered him work. He said to Mrs. Ellen Lee, about ten days after his admission to the hospital, that he had settled with the railroad company and they had paid him. She was there visiting another patient, D. P. Smith, an inmate of the hospital; Smith and plaintiff also talked together concerning a settlement with the railroad company. Plaintiff said he had settled with the company and they had paid him $240, and agreed to pay his expenses while at the hospital; that they had talked together three or four different times on the same subject, and plaintiff expressed his satisfaction with the settlement. Dr. A. M. Straight visited him in the hospital two or three weeks after his admission, and plaintiff told him he had settled with the railroad company for $240, and they were to pay his expenses until he got able to be out; the doctor suggested a further operation on his shoulder, and plaintiff requested it to be done soon, as he was there at the expense of the railroad company. He said to Dr. Benninghoff about two months after he had been in the hospital, that Wilmoth, the agent of the company, had promised to get him a situation. As has been noticed, in discussing the first question raised by the assignments of error, Solicitor Hancock and Agent Wilmoth had made him a conditional promise of a situation at the time the release was signed. On this subject Mr. Wilmoth testifies, that about three months after the accident he received from plaintiff, while he was still in the hospital, a letter, which is now lost, in which he asked for a position on the railroad. He made application and secured the situation of watchman for him at Olean; then, in a few days, informed plaintiff, who said he was first going home, and then would tell him if he would accept it. The witness further stated that the company paid all the bills at the hotel and hospital.

The plaintiff says when he counted the money on the evening of the second day at the hotel, there was $250 in the pocket book, and he had no knowledge from whence it came; that he gave the money to the nurse at the hospital; then follows this question and answer: "Q. You said nothing to her about where you got the money? A. Not, that I know of; the question was not asked me." When asked if the conversation occurred as testified to by Drs. Benninghoff and Straight, he answered, "Not that I know of." When asked if the conversation narrated by Daniel Smith had been had, he answered, "Not that I know of," but further on, said he told him there was $240 left there, but he did not know who left it. Then is this question: "State how you thought that $240 got into your pocket book? A. I don't understand the question." Then on the question being repeated, he said: "I don't know how I thought it got in there. I can't remember my thoughts at that time; I didn't write them down." He further testified that he never saw Mrs. Lee that he knew of. He admitted that at the first trial he had said "he didn't know, but supposed" the company had given it, for he had more money than he had before. He further stated at the close of his

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testimony, that he had never said to any one he had settled with the railroad company; that what he did say was that the railroad company claimed they had settled with him, but that he hadn't settled with the railroad company to his knowledge.

From the testimony of these witnesses called by defendant, and the plaintiff's own statement in answer to it, there can be no dispute that after he entered the hospital, he knew, in some way, that a settlement had been made, and the principal terms of it. He knew he had the money, and where it came from, and that the company had agreed to pay his bills; and, while not undisputed, there is little doubt that as part of the consideration he expected up until he left the hospital to get from the company employment. Whatever may have been the condition of his mind four or five hours after the operation when the paper was signed, there is no pretence that it was not in a normal condition all the months he was at the hospital.

The evidence then shows, without contradiction, that the fact of a settlement, if not binding when first executed, was at this time known to him; with this knowledge he retained the money, and has it to this day; never returned it, or offered to return it; permitted the company to pay all the bills for his surgical attention, support and comfort at the hospital, and then solicited the employment that was conditionally promised him.

This is undisputed evidence of ratification of a contract by distinct and unequivocal conduct and declarations when *compos mentis;* and of a contract too which could be ratified without a new consideration, because it was only void if he chose to so treat it. It was his duty when he first heard of the existence of release, to disavow it, and at least, before suit was brought, return or offer to return the money received under it; for it is not pretended any fraud was practiced upon him in obtaining the release; in its worst aspect, that was executed when those acting for the company were wholly ignorant of the incapacity which is now alleged to have existed. Every day that he retained the money and continued to accept benefits, after a knowledge of the settlement, without regard to how he gained such knowledge, was in affirmance of it. One of the very points made by his counsel at the trial, requesting that the jury should allow defendant a credit for the $240, and render a verdict for the balance, was wholly inconsistent with their claim that no such contract existed.

Where there is a disaffirmance of the contract because of fraud, the injured party may in some cases bring his action without repaying, or offering to repay the money received on the fraudulent contract. In such case the money is retained, not as part of the consideration of a contract he denies, but as part indemnity for the fraud perpetrated on him. As he was deceived into accepting it by a falsehood or fraud, there is no admission that it was a consideration for a contract, and there is, consequently, no obligation on him to return it. But the case is wholly different when it seeks to avoid a contract, solely because of a temporary incapacity when he made it; an incapacity of which he gave no sign, and which was unknown to the other party to the contract. His conduct in keeping the money, in accepting payment of all his bills at the hospital, after restoration to complete mental health, with the undoubted knowledge as to where the money came from, and as to who paid his bills and why, is only consistent with an intention to affirm the contract. It is conclusive of affirmance.

He cannot both affirm and disaffirm; cannot affirm for what he got, and disaffirm for the difference between that and what he hoped to get.

The defendant was entitled to an unqualified affirmation of its sixth and seventh points; therefore the judgment is reversed at costs of appellee.

Eo die. STERRETT, C. J., dissenting. While a passenger on defendant's road, the plaintiff was very seriously and permanently injured in consequence of defendant's negligence, and without any fault of his own. His shoulder was broken and dislocated, and other injuries were suffered by him, from the shock of which he was rendered unconscious for several hours. He received no surgical or medical attention until the next morning when the company's surgeons called on him and, at about eleven o'clock in the forenoon, in a small bedroom without any outside windows for ventilation, administered an anæsthetic, and, as far as possible, reduced the fracture. For forty minutes of time the operation was in progress the plaintiff was completely anæsthetized. Between four and five o'clock of same day a special agent of the defendant, in company with its solicitor, called and gave plaintiff $240, on behalf of the company, and took from him a release of any claim or demand he had against the company for damages. That release was interposed as a bar to plaintiff's recovery in this action. In response to that plaintiff alleged and testified that he was not aware he had executed the release, and was not conscious of anything that transpired from the time the anæsthetic was administered until he awakened in the evening. In this he was strongly corroborated by several facts and circumstances referred to in the testimony. On the trial, the defendant virtually admitted its original liability to plaintiff for the injuries he had suffered. Its

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sole defence was that his claim had been settled by compromise, and that the $240 paid by defendant was received by him in full satisfaction.

The controlling question presented by the record for the consideration of this Court, is embraced in defendant's second specification of error, complaining of the Court's refusal to affirm its third point, viz: "The undisputed testimony being that the release was executed by the plaintiff under his hand and seal, and for the sum of $240, as therein acknowledged, the plaintiff assailing the validity of the release on the ground of his unconsciousness and mental incapacity at the time of its execution, must establish such unconsciousness and incapacity by evidence so clear and conclusive as to satisfy the Court, sitting as a chancellor, of such incapacity."

The principle is well settled that parol evidence to amend, alter or rescind a written instrument under seal, on the ground of fraud, must be clear, precise, and indubitable, otherwise it should be withdrawn from the jury. But the case at bar is not of that character, and it would be an utter perversion of the sound and salutary principle referred to, to apply it to the undisputed facts of this case. No attempt was made by the plaintiff to amend, alter or rescind the release in question. He alleged in substance that there was no release; that if he signed the paper at all, he did so while he was under the influence of an anæsthetic, and was *non compos mentis*. His own testimony with strong corroborating facts and circumstances was to that effect.

The execution of a written instrument, to be legally binding upon the person executing it, requires more than his mere signature. It is necessary that both mind and will shall co-operate in the execution and delivery of the instrument. The testimony on behalf of plaintiff, direct as well as circumstantial, tends strongly to prove that there was no such co-operation in this case. If there was not, then, in contemplation of the law, there was no execution and delivery of the alleged release. A substantial question of fact was thus presented which it was the exclusive province of the jury to determine in the ordinary way. The case is much the same as if the plaintiff had alleged the release was a forgery and had introduced testimony tending to prove that fact. Surely in such case the Court would be bound to submit to the jury, even on plaintiff's unsupported testimony, the question of the genuine ness of his signature. If authority for so plain a proposition be required, there is an abundance of it to be found. In Dixon *v.* Brooklyn City, etc., Railway Co., 100 N. Y. 170, the defendant set up a release, executed by plaintiff, of all claim for damages. There was testimony tending to show that at the time the release was executed plaintiff was in a condition of mind that rendered him incompetent to appreciate the character of the instrument which he signed. The Court held that it was for the jury to determine whether it was his free act, done with full knowledge, at the time, of the facts, and with a full appreciation of what he was doing. To the same effect are George *v.* Railroad Co., 1 Am. & Eng. R. Cases, 297, and Railroad *v.* Lewis, 109 Ill. 120. The same principle is also recognized by Mr. Chief Justice PAXSON in Ettinger *v.* Jones, 139 Pa. 218, 223. Referring to the release that was set up as a bar in that case he says: "It is to be further observed that there was no attempt to reform or contradict the release. The paper was admitted, but the allegation was that it had been procured by fraud, which is quite another matter." So in this case, there was no attempt to reform or contradict the release. The plaintiff merely sought to show by his own and other testimony that such was the condition of his mind at the time that he was wholly incompetent to execute the release—that he was unconscious of what he was doing at the time.

The learned Judge was clearly right in qualifying his answer to defendant's sixth point, recited in the fourth specification of error. If the release was obtained at a time when plaintiff was incapacitated to contract, it was void *ab initio*, as between the parties, and could not stand in the way of plaintiff's right to recover. An absolutely void instrument cannot affect the successful assertion of a legal right which it purports to release. The release never had any binding force, and hence there could not be anything to rescind. A contract void on account of fraud or for any other reason is, in law, as though it had never been executed; and plaintiff in the circumstances was not bound to return the money to defendant before bringing suit. At most, it was entitled if at all, to nothing more than a credit on account of plaintiff's demand, for the amount paid to and expended for him.

A careful examination of all the testimony has convinced me that there was an abundance of competent testimony, which the Court was bound to submit to the jury, to justify them in finding as they did, and that their verdict cannot be set aside without doing violence to the well settled principle that as a general rule the determination of questions of fact is exclusively for the jury. Upon them, in this case, rested the responsibility of determining whether, at the time the release was procured, the plaintiff was incapacitated to execute the same and thus settle his claim for damages; and upon them that responsibility should be permitted to rest.

It is also contended that there was evidence of subsequent ratification of the release by the

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plaintiff, such as his retaining the money that was given him by defendant's agents, etc., and that, upon that evidence, the learned Judge should have held, as matter of law, that having thus ratified the release he could not recover. Conceding, for the sake of argument, that there was some testimony bearing on the question of ratification, the Court surely would have had no right to invade the province of the jury and undertake to determine whether plaintiff did or did not ratify the release. If the testimony was sufficient to raise that question, it was clearly one of fact for the exclusive determination of the jury, and not one of law for the Court.

In view of the evidence as to the serious nature of plaintiff's injuries the verdict was not excessive. The case was twice submitted to and passed upon by a jury. The verdict of the first jury was $5,000; that of the second, upon which this judgment was entered, was $134.08 more. If the facts and circumstances of the more than questionable transaction, in which the pittance of $240 was thrust upon the then unconscious plaintiff, as full compensation for the serious and permanent injuries he received, are withheld from the consideration of the constitutional triers of fact, and the so-called release pronounced valid and binding, the defendant, in my opinion, will be the unjust gainer and the plaintiff the unfortunate loser of nearly $5,000. I am unable to discover any error in the judgment or in the proceedings leading up thereto, and would therefore affirm it. W. D. N.

Oct. '94, 89. October 2, 1894.

Schwartz et al. v. The Keystone Oil Company et al.

Distribution—Auditors—Costs—Counsel Fees.

Where only a few of a class of persons who are equally interested in the distribution of a fund in Court appeal from the decree of the Court, it is proper that the fund should bear the costs and expenses of the litigation.

Statement of method of considering and assigning cases upon appeal, per WILLIAMS, J.

Appeal of R. N. Marvin, Commercial Bank of Titusville, National Oil Company, Limited; American Chemical and Manufacturing Company, American Oil Works, Limited, and Sherman & Grumbine, from the decree of the Common Pleas of Venango County, entered in a bill in equity in which William Schwartz, F. H. Taylor, Geo. H. Torrey, Charles L. Sicardi and The German-American Bank of Buffalo were plaintiffs, and The Keystone Oil Company, John B. Smithman, John C. McKisson, J. E. Bicknell, J. B. Berry, Charles A. Hotchkiss and Henry W. Mather, directors and officers, defendants.

Appellants being creditors of the Keystone Oil Company.

The main facts of the case appear in Schwartz *v.* Keystone Oil Co., 153 Pa. 283, and the facts incident to the present proceeding are fully set out in the opinion of the Supreme Court.

Upon the return of the record in the above named case an auditor was appointed to distribute the fund as directed by the decree of the Supreme Court therein.

Before the auditor, C. A. Meyers, Esq., appellants claimed the payment of their claims in full, and reimbursement of the expenses incurred in the litigation; these claims were disallowed by the auditor who awarded additional compensation to the receiver and his counsel, and distributed the balance among all of the creditors of the Keystone Oil Company. These awards were sustained by the Court, and this appeal was taken.

Roger Sherman, for appellants.

The appellees were not entitled to share in the present fund.

Kline's Appeal, 86 Pa. 363.
Fowler's Appeal, 87 Id. 449.

The decrees of distribution of certain sums to certain creditors are final and conclusive upon them; and, when they had accepted the sum so adjudged to them, this, also, was conclusive.

Finney's Appeal, 3 Pa. 312.
Gratz *v.* The Lancaster Bank, 17 S. & R. 278.
Yerkes's Appeal, 8 W. & S. 224.

C. Heydrick, *Wm. McNair*, *George S. Criswell* and *J. H. Osmer* (with them *Carl I. Heydrick*, *Thos. McGough* and *E. H. Lamberton*), for appellees.

October 22, 1894. WILLIAMS, J. This appeal is from a decree distributing the sum of $13,959.-16, secured by a surcharge of the receiver of the Keystone Oil Company. The surcharge was made by the decree of this Court, upon the appeal of the same parties now before us as appellants, from a decree confirming the account of the receiver. The case is reported in 153 Pa. 283.

The sum which the account admitted to be in the hands of the receiver was distributed by the same auditor to whom the present fund was referred. He ascertained at that time the names of the creditors of the Keystone Oil Company, and the sums due them respectively, and nothing remained to be done at this time but to adjust the amount of the charges to be deducted from the fund, and distribute the remainder pro rata to some or all of the creditors in the list already settled by the action of the auditor and the Court below. This was neither difficult nor laborious.

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Charges against the fund were presented by the receiver and by the appellants. The auditor adjusted the former, and rejected the latter. He then made distribution among the creditors pro rata. The correctness of his rulings on each of these subjects is challenged by the appellants, and we will consider the assignments of error in the order of the subjects just stated.

The accountant claimed an allowance for services in connection with the fund distributed under the decree of the Court below, confirming the report of the auditor and directing payment in accordance therewith, made on the 3d August, 1891. That fund was paid over in May and June, 1892. The compensation allowed the receiver upon his account included the disbursement, as well as the collection, of the fund covered by it. That compensation was fixed by the decree of this Court, and cannot be increased by the auditor. So much of his claim should have been rejected. For necessary services in distributing this fund he may be allowed compensation. This the auditor estimates may require ten days' time, and at the rate per diem which he allows would entitle the receiver to the sum of two hundred dollars. The allowance for counsel fees and professional aid asked for and allowed is seventy dollars. The record costs are set down at two hundred and thirty dollars and five cents; and the costs of the audit at the sum of one hundred and sixty-six dollars. The existence of this fund as an available one is due, however, to the efforts of the appellants. We agree with the learned auditor that it belongs to the creditors and not alone to such of their number as excepted to the decree of the Court below and brought their appeal into this Court. Any of them had the right to appeal. Such of them as did so expended their money for the common benefit of the class to which they belonged, and are entitled to be reimbursed before distribution is made.

Distribution of a fund is to be governed by equitable considerations: Br. Equity Jurisprudence, page 548. The right to charge a fund with costs and expenses depends on whether the litigation in which the costs and expenses were incurred was in promotion of the interests of those eventually found to be entitled to the fund: Br. Eq. Jur., 555. Whoever had appealed, a paper book and the services of counsel were necessary. Money paid for such purposes was paid to promote the interests of all who are entitled to share in the fund, and should be borne by the fund. The cost of the paper book, two hundred and fifty-five dollars, should be allowed appellants, together with a reasonable sum for the services of counsel in prosecuting the appeal from the decree confirming the account of the receiver. This sum should be fixed by the learned Judge of the Court below, and when added to the other expenses charged upon the fund, will complete the list. The learned auditor correctly rejected the claim for two hundred and fifty dollars attorney's fees in the original case. Such services have no connection with this fund, and should be rejected for the same reason that the claim for compensation of the receiver for services not connected with this fund have been rejected.

The expenses chargeable to the fund are as follows:

Expenses of audit, ...	$166 00
Record costs, ...	230 05
Compensation of receiver, ...	200 00
Compensation to counsel of receiver, .	70 00
Cost of paper book, ...	255 00
	$921 05

To this should be added the allowance for attorney's fees in the case in which the paper book was prepared. No expenses connected with this appeal should be allowed except the taxable costs.

The remainder of the fund should be distributed pro rata among the creditors named in the auditor's report now before us.

This need not require a recommittal of the case to the auditor, as the calculation can be readily made by the clerk and without further cost.

We notice with surprise the following statement in the opinion of the learned Judge of the Court below: "The auditor, as well as every member of the bar, knows that, in equity cases particularly, only the Judge who is assigned to write the opinion has any knowledge of the evidence in the case." We refer to this extraordinary statement not because of the temper or the taste it displays, but because it is flatly untrue. After cases are heard they are examined by each of the members of the Court who heard the argument, separately. They are then considered and decided upon consultation. After the decision has been made the case is assigned; and the duty imposed upon the Justice to whom the assignment is made is to place upon the record the decision made by the Court, and the reasons therefor. The decree in 153 Pa. 283, was, and the decree in this case is, the unanimous judgment of the Court. The writer of the opinion is responsible for any want of distinctness in the statement of the conclusions reached, for the words are his; but the conclusions he states are those of the Court whose scribe, *pro hac vice*, he is.

The decree appealed from is now reversed, and the record remitted that the allowance to the appellants' counsel for services in carrying their appeal to this Court and obtaining a decree surcharging the accountant, may be made by the Court below, and that the balance of the fund after deducting the items now allowed be distributed as hereinbefore directed. W. D. N.

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WEEKLY NOTES OF CASES.

VOL. XXXV.] *FRIDAY, DEC. 28, 1894.* [No. 16.

Supreme Court.

Jan., '94, 64. March 13, 1894.

McCollum v. Riale, owner, and Messenger, contractor.

Mechanics' liens — Apparent owner — Secret verbal agreement as to ownership distinguishable from contract.

Where the record and the appearances and the representations of the party in possession unite in presenting the case of an owner of a lot ordering materials for, and erecting, a house upon it, the material-man who furnished materials relying upon such apparent ownership is entitled to a lien for his claim.

Such a case is wholly distinct from one in which the labor was done or the materials furnished on the order of a principal contractor who was known as such and as to whose contract with the owner the sub-contractor is chargeable with knowledge since he has an opportunity, and it is his duty to ascertain its terms before performing labor or furnishing materials on the credit of the building.

Appeal of M. D. L. McCollum, claimant, from the judgment of the Common Pleas of Lycoming County, on verdict for defendant upon a sci. fa. sur mechanic's lien against James A. Riale, owner or reputed owner, and W. H. Messenger, contractor.

The case was tried before SAVIDGE, P. J., specially presiding, and the facts appear from the charge of the Court, which was as follows:

"The mechanic's lien on which the scire facias in this case was issued, was filed on March 17, 1890, by M. D. L. McCollum, as plaintiff against James A. Riale as owner, and W. H. Messenger as contractor. Recovery is claimed at your hands for frames furnished by the plaintiff upon the credit of the house built in the fall of 1889, upon a lot located on Park avenue at the corner of an alley in this city.

"The frames were furnished in three different lots at three separate times. The first lot is claimed by the plaintiff to have been delivered on the 24th of September, 1889, and it is claimed the frames amounted to $42.80. The second lot it is claimed was delivered on October 8, 1889, and amounted to $8.80. The third lot, consisting of one frame, a door frame with transom, was delivered on October 15, 1889, the price of which was $2.25.

"Mr. Messenger was the owner of a tract of land located at Park avenue and Campbell street in this city, of which the lot on which this house was built was a part. Some time in the summer of 1889, either in July or August, he made a verbal agreement with Mr. Riale, by which he sold him a thirty-five foot lot on Park avenue and the alley, upon which this house was built. The consideration was $750. It was understood and to be agreed between them that the purchase money was not paid, for reasons which they have detailed in the evidence, by Mr. Riale, until the 1st of October, when the deed for the lot was to be delivered by Mr. Messenger. The purchase money was paid on or about the 1st of October, and on the 5th of October, 1889, the deed was executed by Messenger and his wife and delivered to Riale. At or about the time, perhaps shortly after, the verbal agreement was made by which this lot was sold to Mr. Riale, there was an agreement entered into between them, also verbal, whereby Mr. Messenger was to construct for Mr. Riale, upon this lot, a house for the contract price of $1,200. [It is contended by the plaintiff that, at the time it was a part of the verbal agreement which was had between them for the construction of this house, that no liens were to be permitted to be filed against the property, but that Mr. Messenger was to turn it over complete and finished to Mr. Riale, for the contract price, free and clear of all encumbrances and liens.

"The plaintiff contends that there was no such understanding, no such agreement, no such stipulation made when the contract for building this house was entered into. That, gentlemen, is for you to determine. It is a question of fact with which the Court has nothing to do, and I leave it to you as a fact for you to determine from the weight of the testimony in the case, not intimating to you what my opinion or judgment is, of the evidence bearing on that question. You have seen the witnesses upon the stand; you have heard them testify; you have noted their manner, their conduct upon the stand; their credibility is for you, and you must determine from all the evidence bearing upon that question, what that verbal agreement was, as made between Mr. Messenger and Mr. Riale, concerning the erection and construction of this house, whether or not it was a part of the understanding that Mr. Messenger was to suffer no liens to be filed against the building.

"Of course, a stipulation of that kind, as has been decided by the Supreme Court, must be either an express agreement or the words used must be such as necessarily imply that no liens were to follow. The mere agreement or understanding between the parties that Messenger was to pay for all materials and work and labor

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would not be an express agreement that there were to be no liens; nor would they be such words as would necessarily imply a stipulation of no liens, or that no liens were to be allowed to be filed against the property. Where there is an entire contract for the building of a house, it is a part of the contract, of course, and is understood that the contractor pays for the material, work and labor that goes into the building; otherwise he would not be able to turn over the property complete to the owner, and it is no express stipulation, as I have just stated that the building should be turned over free from all liens. Such a stipulation is not implied by the mere use of such words as 'the contractor is to pay for the labor and material that go into the building.' But the stipulation must be express that there are no liens to be filed against the building or else the words used must be such as necessarily imply an understanding between the parties that no liens are to be filed. The minds of the parties must come together by a clear understanding on that question as to whether the building is to be turned over free and clear of liens or not.

"You determine that question and ascertain how this parole or verbal contract was]. (First assignment of error.) If you find that there was no such verbal contract made between these parties prior to the commencement of this building, (and I believe that the only evidence of any verbal contract was that it was prior to the commencement of this building) if you find that there was not, as a part of this verbal contract, this stipulation against liens, the plaintiff ought to recover a verdict at your hands for as much as was due him, if anything was due him, for the material furnished by him which went into the construction of this building. If you find that there was a stipulation against liens made at the time of this verbal contract—that such a stipulation was part of the verbal contract, then I instruct you that the plaintiff would have no right, no standing in this Court, and no standing in law, to recover for any goods, any material, or any frames furnished Mr. Messenger, the contractor, which were delivered upon this lot, and which went into the construction of this building, prior to the one frame, the transom frame, which was delivered on the 15th of October, 1889.

"This remedy by a mechanic's lien is a purely statutory remedy. It must be strictly pursued. It is in derogation of the common law. It gives material-men rights which they did not have, which never existed at common law. By the use of it they are proceeding against, not the real debtor, not the person to whom they sold the goods, at whose instance the goods are furnished or delivered, but they are proceeding against the building itself. They have still their remedy left against the person of the real debtor in the case, but they are given by the statute this proceeding, as it is termed, *in rem*, against the building itself. However, they are not favored by the Court, and they are not permitted to recover unless they bring themselves under the strict terms of the statute and the strict letter of the law; as I understand the decision of the Supreme Court, the material-man can recover only on the basis of the contract which exists between the contractor and the owner of the property. [And that if the circumstances are such that the contractor himself could not recover, then the material-man who recovers through him, and whose rights rise no higher than his, whose equities and rights are dependent upon the contract he has with the owner; if the contractor himself cannot recover, then the material man cannot recover.] (Second assignment of error.)

"[A great deal has been said in this case about the possession. I will simply say to you that in my judgment if these dealings between Messenger and Riale were bona fide and honest, if there was no fraud connected with them, and whether there was or not you must determine from all the circumstances of the case, there does not appear to my mind to be anything to indicate that there was any fraudulent intent upon the part of Mr. Riale, but I leave it to you to determine whether there was or not. If the transaction was honest and bona fide, and there was no fraud in the transaction, then I say to you that when Mr. Messenger went upon that lot, after having agreed to sell it, by verbal contract, to Mr. Riale; when he went upon that lot and began the construction of a building for Mr. Riale, under his verbal agreement with him to build for a stipulated sum, he went there as the contractor for Mr. Riale and his possession as contractor became the possession of Mr. Riale. In short if he agreed and stipulated to turn the building over free from all mechanics' liens, and guaranteed that no mechanic's lien should be filed against it; if he did that then he could not file any mechanics' liens against this building, and if he could not, neither could the material-man who must work out his rights and equities through Messenger.] (Third assignment of error.)

"[So you see, very much depends upon what this verbal agreement was, as to whether there was a stipulation against liens. If there was not, as the plaintiff contends, then Mr. McCollum ought to recover anything that was due him at the time of the filing of the mechanic's lien on account of the frames furnished. If there was such a stipulation, then he cannot recover for any articles unless it be for the transom door frame furnished on the 15th of October.

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"I think you must understand what I mean to leave to you pretty clearly in this connection. Now then, if you find that no such stipulation was made by the verbal agreement, then Mr. McCollum would recover for any balance that was due him on account of the frames furnished. If you find that there was such a stipulation then he could not recover for any but the transom door frame.] (Fourth assignment of error.) And whether he could recover for that or not would depend upon whether it had been ordered by Mr. Messenger or whether ordered by Mr. Riale, on his own account. If it was ordered by Mr. Riale on his own account, and the order was after the legal title had been conveyed to Mr. Riale, he would undoubtedly be liable therefor.

"Now, the plaintiff contends that this order for the transom door frame was by Mr. Riale on his own account; that he made himself responsible for it; that it was not on account of Mr. Messenger that this was ordered at all. On the other hand the defendants claim that all that Mr. Riale did was to go down there and indicate what he wanted and how he wanted it. That the order was by Mr. Messenger and that it was furnished on Mr. Messenger's account. Of course, if that is all he did, he had a right to do that. On the other hand if he ordered it himself, he is bound to pay for it, and this though you may find against the plaintiff as to all the other frames. You have a right to find for the plaintiff as to this $2.25 for the transom door frame, if you find it to be as the plaintiff contends it was; otherwise you would find for the defendant on that account.

"Should you find for the plaintiff at all, you would find for him for such an amount only as was due him at the time of the filing of the mechanic's lien on account of the frames which were furnished to this building. It is contended by the defendant that there was nothing, or if anything, that not the whole amount claimed, to wit, $53.85 was due; that the amount was less than that. Now, you heard the evidence on that question and you have the books of Mr. Messenger in evidence. Counsel have commented upon that and your attention has been called to it by their comments; you have heard the testimony of Mr. McCollum himself and he explained to you how much was due, and how it was that this balance remained due. You must say, in case you find for the plaintiff at all, whether the whole amount was due, and if not the whole amount, how much, if any, was due on account of the material furnished to this house, and render your verdict for that amount.

"Plaintiff's counsel ask me to charge you,—

"*First.* That if the jury believe the frames in question, with the exception of the last door frame with transom, were ordered, manufactured and delivered to said lot, and for which payment has never been made, then, under the evidence, the house in question was, in any event, commenced not later than the 30th day of August, 1889, when the ditch was dug for the water pipes and sewer for said house, three days before it was alleged that Riale took possession, under the verbal contract for the sale of said lot to him, which acts of possession took place on the 2nd day of September, 1889; hence W. H. Messenger was such 'owner or reputed owner in possession' of the lot in question at the time said house was commenced as is contemplated by the Act of Assembly, and your verdict must be for the plaintiff for the value of the first two orders.

"*Answer.* This point is refused. (Fifth assignment of error.)

"*Second.* That, as the lot in question was a portion of a larger lot, the greater part of which was still owned and possessed by W. H. Messenger at the time the erection of said house was commenced; with nothing to indicate that it had been divided or set apart, and with a fence running around the entire piece; the fact that a few old sticks had been thrown on the rear by Riale amongst tall weeds, would not in law be such acts of ownership or exercise of possession on the part of Riale, as would be 'open and notorious,' and as would constitute 'constructive notice to the public of a change of possession and ownership,' or as would put the plaintiff or any other person dealing with the legal owner upon inquiry, or warn him of an existing equity in any portion of said larger lot, and your verdict must be for the plaintiff.

"*Answer.* This point is refused. (Sixth assignment of error.) . . . .

"*Seventh.* That under all the evidence in this case, your verdict must be for the plaintiff.

"*Answer.* This point I do not affirm. I leave it to you to say whether under all the evidence in this case, your verdict should be for the plaintiff or whether it should be for the defendant, with such instructions as I have just given to you. It is not a question for me to determine in this case how your verdict should be. That is a question for you to determine, and I propose, gentlemen, that you shall determine that question. (Seventh assignment of error.)

"The counsel for Mr. Riale, the defendant, request me to instruct you as follows:

"*First.* If the jury find from all the evidence J. A. Riale bought the lot upon which the house was erected by parole agreement, in August, 1889, from W. H. Messenger, and took possession of the same, and that the house erected thereon was built at the instance of J. A. Riale, and

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that subsequently the parole agreement by which the said J. A. Riale purchased the said lot, was carried out in good faith by a conveyance of the legal and equitable title thereto, the said J. A. Riale had such an interest in the land as would be bound by a mechanic's lien.

"*Answer.* This point is affirmed. (Eighth assignment of error.)

"*Second.* If the jury find from all the evidence that the relation of contractor and owner existed between W. H. Messenger and J. A. Riale in the erection of the house against which the plaintiff has entered his lien in this suit, and that Messenger as contractor agreed with the said J. A. Riale, as owner, not to allow any lumberman's or mechanic's liens to be entered against said house, which Messenger was erecting for Riale, then the plaintiff cannot recover and the verdict of the jury must be for J. A. Riale, the defendant.

"*Answer.* This point is affirmed, except that I instruct you that it would not apply to the $2.25 transom door frame furnished about the 15th of October. Notwithstanding that you may find that there was a stipulation by verbal agreement against liens, yet if you find that Mr. Riale ordered this door frame on the 15th day of October, the plaintiff would still be entitled to recover for that; and for whatever amount you find verdict for the plaintiff, if any, you are to add interest from the day of the delivery of the goods. (Ninth assignment of error.)"

Verdict for defendant and judgment thereon. Plaintiff appealed, assigning errors as above.

W. M. Stephens, for appellant.

H. T. Ames, (*T. H. Hammond* with him,) for appellee.

October 1, 1894. McCollum, J. Four-fifths of the materials for which this claim was filed were furnished on the order of Messenger while he was the apparent owner of the lot, and all of them except the transom door frame were furnished before the material-man was informed that Riale had any legal or equitable title to or interest in it. All the appearances were in accord with Messenger's representations, when he ordered the materials, that they were for a house he was building on his lot on Park avenue. His deed for the lot was on record, and there was no visible change in his possession of it. There was absolutely nothing discernible anywhere to suggest or in the remotest degree indicate any change in his relations to the property or that in erecting a house upon it he was the representative or agent of another. In short the record, the appearances and Messenger's representations to the appellant united in presenting the case of an owner of a lot ordering the materials for and erecting a house upon it. But it is urged that the appellant is not entitled to a lien for his claim, because (1) in August, 1889, Messenger verbally agreed with Riale to sell the lot to him and that in pursuance of this agreement a deed of it was made and delivered to the latter on the 5th of October following; and (2) that soon after the agreement to sell the lot he verbally agreed with his vendee to build for him a house upon it, and "not to allow any lumberman's or mechanic's lien to be entered against it." The agreement in respect to the erection of the house was not reduced to writing and signed until September 26, 1889, or six days after the materials were ordered, nor was anything paid on the lot until that time.

The appellant whilst conceding the principles enforced in Schroeder *v.* Galland, 134 Pa. 277, and kindred cases, contends that upon the facts above recited he is entitled to a lien upon the building for materials furnished and used in its construction. In considering this contention it must be remembered that when Messenger ordered the materials for the house he was the owner of the lot and his title to it was shown by the record. Riale had then no enforceable equity or claim in or upon the lot because the verbal agreement gave him none, and he had done nothing in pursuance of it which prevented his vendor from successfully repudiating it. Messenger's possession of the lot when he commenced the erection of a house upon it, was in accord with his title, and so were his representations that the materials he ordered were for a house he was building on his lot on Park avenue. What was there in the circumstances surrounding the transaction to suggest to the material-man the existence of an equitable interest or title in Riale or anyone else, or to put upon him the duty of further inquiry? Absolutely nothing. The case before us is therefore wholly unlike the cases relied on by the appellees, in which it is held that a sub-contractor is bound by a stipulation against liens in the contract between the owner and the principal contractor. In none of them is it held or suggested that a secret verbal agreement such as is interposed here will prevent or defeat a lien. They were cases in which the labor was done or the materials were furnished on the order of or under a contract with the principal contractor, who was known as such, not, as in this case, on the order of or under a contract with the apparent owner. In them the sub-contractor was chargeable with knowledge of the contract between the owner and the principal contractor, because he had an opportunity and it was his duty to ascertain its terms before performing labor or furnishing materials on the credit of the building. In this case, no such opportunity was presented or duty imposed. It is in accordance with equity that the sub-contractor should be bound by the

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terms of the contract between the principal contractor and the owner, in the former case, and against it to hold him bound by the terms of the secret agreement relied on in this case to defeat the claim of the appellant. We hold, therefore, that the appellant is entitled to a lien for the material furnished before he knew or ought to have known that such agreement existed.

To the extent that the rulings of the learned Court below are in conflict with this opinion, the specifications of error are sustained.

Judgment reversed and venire facias de novo awarded. J. D. B., Jr.

Oct. '93, 241. May 3, 1894.

Pittsburgh & West End P. R. W. Co. v. Point Bridge Co.

Highways—Bridges, use of—Tolls—Act of 14 May, 1889, P. L. 211—Eminent domain—Electric Passenger Railway—Equity—Jurisdiction.

Aside from the right of the bridge company to demand and receive reasonable tolls from the traveling public, a bridge does not differ from the ordinary highway constructed and maintained by the inhabitants of the district through which it passes.

The right to exact tolls does not carry with it the power to prohibit such use of a bridge by the public as is reasonably consistent with the purpose of its erection.

The natural and reasonable construction of the Act of May 14, 1889, P. L. 211, is that the streets or highways mentioned therein include the bridges connecting with and constituting portions of them.

The use of a bridge by a railway company which operates its road by electricity does not constitute a taking of or an injury to the property of the bridge company in the exercise of its power of eminent domain. It is a use which is reasonably consistent with the purpose for which the bridge was erected, and is necessary for public travel and accommodation.

Where a right is claimed by a passenger railway company to string wires for the purpose of carrying its electric system of transportation across a bridge owned by an incorporated bridge company, and to run its cars across the bridge, which right is denied by the bridge company, a Court of equity has jurisdiction both to determine the right and to fix the compensation to be paid by the railway company for the use of the bridge.

Appeal of The Point Bridge Company, defendant, from the decree of the Common Pleas of Allegheny County, granting an injunction upon the complaint of The Pittsburgh and West End Passenger Railway Company.

The plaintiff, a company incorporated under the Act of May 14, 1889, filed a bill in equity to restrain and enjoin The Point Bridge Company from interfering with or preventing the stringing of wires and other appliances upon and across the bridge of defendant, and using the iron tracks of the bridge for the purpose of operating plaintiff's railway by electricity, and, furthermore, praying the Court to fix the tolls to be paid in the future for the use of the bridge, and that the Court should also decide and declare by final decree that plaintiff company is of right entitled to construct, maintain and use over and along the Point Bridge the wires, etc., necessary for the use of electricity as a motive power.

The defendant filed its answer, denying the equitable jurisdiction of the Court of the matters in controversy; denying that plaintiff had the rights and privileges claimed by it. or that it had any right to use and occupy the bridge; and, furthermore, alleging the insufficiency of the bridge to sustain the weight and impact which would be produced by electric cars and rapid transit. In addition the answer called in question the alleged corporate rights of the plaintiff to do the things intended to be done, or to appropriate the use of defendant's bridge to establish and maintain rapid transit over the bridge in the manner proposed by the bill. It also raised the question of the validity of the rights and powers alleged to have been derived by the incorporation of the plaintiff under the special provisions of the 20th section of the Act of 1889.

The case was heard upon a motion for a preliminary injunction. The Court (WHITE, J., delivering the opinion,) refused the injunction, but referred the matter to a master to take testimony and report, first, what changes should be made in the rails or floor of the bridge to adapt it to electric cars; second, the frequency and speed of the cars; and third, what tolls and compensation should be paid by plaintiff.

On the coming in of the report the Court fixed the yearly compensation for the use of the bridge at eight thousand dollars, being two thousand more than the amount recommended by the master's report; with that exception the report was sustained, and thereupon on March 18, 1892, the Court made the following decree:—

"First. The exceptions filed by the parties respectively to the master's report are overruled except the defendant's exception as to the amount of compensation to be paid by the plaintiff to the defendant.

"Second. The Point Bridge Company, the defendant herein, its servants and agents, are hereby restrained and enjoined until further order of this Court from any and all interference with the Pittsburgh and West End Passenger Railway Company, and its servants and agents in the preparation of and use of said bridge for the operation of its cars by electricity over and across the same; but such preparation and the

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use of the bridge shall for the present be as follows: It is ordered that the cars shall not run at a greater rate of speed than four miles per hour while upon said bridge, and that there shall not be more than two cars upon the same span of said bridge at any one time.

"Third. The wires and other apparatus for applying electricity as the motive power in propelling said cars shall be erected and constructed upon and across said bridge as shown in the testimony of S. L. Tone, one of the witnesses examined before the master, and the plan produced by him and now filed in this case, it being the same plan recommended by the master and to which no exceptions have been filed by the defendant. That in doing the work contemplated under the provisions of paragraph two, three and four of this decree, the ordinary travel over the bridge shall be allowed and accommodated to the fullest extent reasonably possible.

"Fourth. While The Point Bridge Company is restrained from interfering with the Pittsburgh and West End Passenger Railway Company in the use of the bridge and the rails as at present laid, it is ordered that the said railway company at its own expense and within six months from the date, with the consent of the bridge company, lay down over and across said bridge girder rails in lieu and place of the rails now on said bridge, and properly plank said bridge to suit said rails. The rails shall be laid and bridge planked under the supervision and care of the engineer of the railway company and also of the bridge company, and the said work shall be done where commenced as rapidly as it can be reasonably done, and with no unnecessary hindrance to travel upon and over said bridge.

"Fifth. That the Pittsburgh and West End Passenger Railway Company shall pay to the Point Bridge Company for its use of said bridge the sum of eight thousand dollars per year, payable monthly. This rate shall not control for the use of said bridge for a longer period than five years from this date.

"Sixth. That the Pittsburgh and West End Passenger Railway Company shall pay the costs and expenses of stringing wires across said bridge, and of taking up the old rails and laying the girder rail and planking the bridge in connection therewith, and shall pay the costs in this suit to date.

"Seventh. Either party hereto at any time may during the continuance of this order make application to the Court and for proper cause may move a modification of this decree or such other and further order in this case as may under the circumstances then existing be proper.

"Eighth. Before issuance of the injunction the plaintiff company shall file a bond in the penal sum of ten thousand dollars, with sufficient sureties, to be approved by the Court, conditioned to indemnify the defendant company for all damages that may be sustained by reason of such injunction."

The plaintiff gave the bond required and the injunction was issued and served November 19, 1892.

An appeal was taken by the defendants and error was assigned, (1) That the Court erred in assuming equity jurisdiction of this suit: (2) The appeal does not state a case within the jurisdiction of a Court of equity, and (3) The Court erred in making the decree suggested by the master.

P. C. Knox and *J. D. Brown* (with them *J. H. Reed* and *A. M. Brown*), for appellants.

The plaintiff was organized under Act of March 19, 1879, P. L. p. 9, which Act with its supplement of June 2, 1881, P. L. p. 39, were held unconstitutional as being local and special Acts.

Weinman *v.* Wilkinsburg & E. L. Pass. Ry. Co., 118 Pa. 192.

In 1889 was passed a general law entitled "An Act to provide for the incorporation and government of street railway companies in this Commonwealth," approved May 14, 1889, P. L. 211, which Act was accepted by the plaintiff.

Section 17 of this Act provides that any passenger railway company incorporated under the Act, shall have power to define its route over, upon and along any turnpike or turnpikes, and to construct its railway thereon, provided that before entering upon and using such turnpike, laying tracks, etc., it shall make compensation to the owner or owners thereof, for such occupation, etc., in the mode provided in section 14 of the Act.

The Act of March 19, 1879, and the supplement thereto were absolutely void, and the Legislature was as incapable in 1889 as in 1879 to give to them any force, life or validity, therefore the new letters patent issued under the Act of 1889 did not endow plaintiff as a corporation with the rights and privileges conferred upon it by the said Acts of 1889 and 1879. But even if so, then the plaintiff takes its rights and privileges, subject to all the burdens imposed by the legislation of 1879 and 1881 above recited; if it can enter upon and use the defendant's bridge it must first make and pay compensation in the mode prescribed by the supplemental Act of June 2, 1881, which assumed to confer the right and imposed the precedent liability. If then the Act of 1879 and its supplement have been revived by the general Act of 1889 to the extent of preserving and confirming "all rights and privileges" intended to be conferred by that special, local and void legislation, as claimed in the bill, we deny the validity of such legislation.

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The Act of 1889 is entitled "An Act to provide for the incorporation and government of street railway companies in this Commonwealth." It contains twenty sections and but one of them, the 20th, relates to companies "incorporated" under special and local laws. The other sections of the Act provide only for the incorporation and government of street railway companies formed under it. Its title does not give notice of the provisions in the twentieth section, intended to revive or validate void charters granted ten years before its enactment; said section is therefore unconstitutional. Furthermore it attempts to revive the Act of 1879 without recital of its title or provisions, and for this reason it is obnoxious to Section 6 of Article III. of the Constitution and to the provision contained in Section 7 of the same article which prohibits the passage of any local or special law creating corporations, or amending, renewing or extending the charters thereof.

Union Passenger Railway Co.'s Appeal, 81* Pa. 91.
Rogers *v.* Manufacturers' Improvement Co., 109 Pa. 109.

If, however, the twentieth section of the Act of 1889 is a valid enactment, its utmost effect is to protect and preserve property rights of the company acquired by gift, grant, conveyance, etc., during the period of its disability and prior to its incorporation. If legally incorporated under the Act of 1889 it became a corporation only under that Act and not under the void Act of 1879. The plaintiff does not now nor ever did at any time heretofore own any tracks, roadway, or fixtures on defendant's bridge. It never acquired any right of way by adverse proceedings or otherwise to enter upon or use said bridge, save and except a limited right by an amicable arrangement. The plaintiff has not a legal right to enter upon, appropriate, or use the bridge as a part of its proposed electric way. The use of electricity as a motive power would involve much more than the stringing of wires over the bridge. The plaintiff has assumed to have the right and power to appropriate and use defendant's bridge and to use electricity as a motive power, and it asked the Court below to decree accordingly, and to determine the compensation to be paid for such use. The Court had not jurisdiction to hear or determine the questions thus presented. The rights and powers alleged can be maintained only by showing an express grant thereof consistent with constitutional limitations.

While the franchise of any corporation may be taken, impaired or burdened under the power of eminent domain, yet when property has been, as in the present case, lawfully acquired by a corporation for public uses it cannot be taken or used by another corporation for another use, except by express grant or necessary implication, and certainly not in any case without ample provision for compensation for the property so taken or injured. The municipality could not empower plaintiff to occupy and use the bridge and release it (plaintiff) from its liability to make compensation. Any act of the municipal authorities to that end would be clearly *ultra vires*.

Snow *et al.* *v.* Deerfield Tp., 78 Pa. 181.
Phillips *v.* Dunkirk, Warren & Pitts. R. R. Co., 78 Id. 177.
Pittsburgh Junction R. R. Co.'s Appeal, 122 Id. 511.
Sharon Railway Company's Appeal, 122 Id. 532.
Penn. Railroad Co.'s Appeal, 93 Pa. 150.
Lewis on Eminent Domain, secs. 269, 271, 276, and authorities cited.

The plaintiff does not show a right to exercise the power of eminent domain by any express grant, unless it be derived from the Act of 1881, being the supplement to the Act of 1879. The Act of 1889, section 17, provides "that before" any railway company incorporated under it enters upon and uses a turnpike "it shall make compensation to the owner or owners thereof in the mode provided in section 14 hereof."

The right to occupy and use the bridge does not arise by necessary implication from a liberal interpretation of the Act of 1889, because that Act contains no provision for the ascertainment or assessment of compensation or damages in such case, and this omission is not only fatal to plaintiff's claim of right but it furnishes a conclusive answer to the argument that the alleged right arises from necessary implication. All acts of incorporation and acts extending corporate privileges are to be construed most strongly against companies setting them up, and what is not unequivocally granted must be taken to be withheld.

Packer *v.* The Railroad Co., 19 Pa. 211.
Com. *v.* Erie & N. E. R. R. Co., 27 Id. 339.
Cake *v.* Phila. & Erie R. R. Co., 87 Id. 307.
Pennsylvania R. R. Co.'s Appeal, 93 Id. 150.

The law never implies a right to appropriate and use the property of individuals or corporations for any purpose without their consent and without just compensation. If the alleged right arises by liberal interpretation of the statute and from absolute necessity, then the remedy of the plaintiffs is by proceedings at law and not in equity. The equitable powers of the Court of Common Pleas cannot be invoked in such a case as this.

Appeal of the Sharon Railway Co., 122 Pa. 533.

The defendant's bridge is a highway only in a limited and qualified sense, being the property of a private corporation, and upon and over which the public has only a conditional right of traveling, to wit, upon payment of tolls. The

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use to which the plaintiff seeks to subject it is not an occupation or use for which it was erected, or contemplated, or provided for in its charter. The defendant actually purchased and owns by absolute title the entire land between the south end of its bridge (at low water line of the Monongahela river) and Carson street, being a piece of land 57 feet wide and about 345 feet in length, whereon the approach of its bridge is constructed, and which never has been dedicated to general public use, but now and heretofore only used by the patrons of the bridge who comply with the legal requirements as to payment of tolls, etc. The plaintiff company has no legal right to occupy and use this land, but may under its charter acquire as defendant did by purchase a route for its railway, although it might be a less economical mode of accomplishing its purpose. It is not an uncommon error to conceive that whenever the law fails to produce a desired result, a remedy may be had in equity. Nor is this erroneous idea of recent origin. See the remarks of Lord LANGDALE in

Ryves *v.* The Duke of Wellington, 9 Beavan, 600.

D. T. Watson (*Johns McCleave* with him), for appellee.

The principles involved in this case have already been decided by this Court in favor of the railway company in the case of the Monongahela Bridge Company *v.* The Pittsburgh & Birmingham Passenger Railway Company, 114 Pa. 478.

The single question not directly decided by that case is: Does it make a difference as to whether cars are propelled by horse power or by some other power, such as electricity? And the solution of that question would seem to be this: If propelled by electricity, is such use reasonably consistent with the purpose for which the bridge was erected? And as it is now a demonstration that such use does not interfere with the ordinary uses of the bridge by the traveling public and that it is merely an improved mode to facilitate public travel, it seems obvious that this question must be decided as it was by the Court below and in favor of the appellee.

Covington Bridge Co. *v.* South Covington R. R. Co., 50 American and English R. R. Cases, 395.
Lockhart *et al.* *v.* The Craig St. Ry. Co., 139 Pa. 419.
Rafferty *v.* The Central Trac. Ry. Co., 147 Id. 592.
Taggart *v.* The Newport Ry. Co., 7 Ry. & Corp. Law Journal, 385.
The Louisville Bagging Co. *v.* The Central P. Ry. Co., Booth's Street Railway Law, section 67.
Pelton *v.* The East R. R. Co., 22 W. L. B. 67.
DuBois Traction Co. *v.* The Buffalo Ry. Co., 10 Pa. Co. Ct. 404.
Keasley on Electric Wires, pages 15, 16.

The Point Bridge Company was incorporated under the General Corporation Act of 1874, by the State of Pennsylvania, for the purpose of "erecting, constructing and maintaining a toll bridge and approaches thereto for public travel and accommodation," and for such purpose it constructed and opened in 1877 the Point Bridge. This bridge and the approaches thereto thereby became a public bridge, part of the public highways of the State, and the State had and has the power to authorize such use of it for a public thoroughfare, as was or is reasonably consistent with the purpose of its erection, subject to reasonable tolls for such use. The bridge is a portion of a public highway. Just as much a highway as if it had been a plank road or turnpike, with right to take tolls. The structure is not private, not like one's house or land. In its essentials it is public, expressly made so by its charter, and just the same as any other portion of the highway or public streets.

Monongahela Bridge Co. *v.* P. & B. R. R. Co., 114 Pa. 485.
Erie County *v.* Commonwealth, 127 Id. 207.
U. P. R. R. *v.* Commissioners, 4 Nebraska, 456.
Commonwealth *v.* Central Bridge Co., 12 Cushing, 244.

The plaintiff was authorized by the Commonwealth to construct, maintain and operate its street passenger railway over and along a certain route in the City of Pittsburgh, including the Point Bridge, and to operate its cars by electricity. This Act of 1889 gave to the street railway company organized under it the power to construct and maintain a street railway "on any street or highway," and also the right to operate the same "by any power other than locomotive." If the words "on any street or highway" do not include bridges built for public use and travel the passenger railway system of Pennsylvania is defective, for no company organized under the Act of 1889 has power to cross any bridge, or construct or maintain or operate a street railway upon any bridge. Even if the bridge company gave consent this could not confer the power on a corporation of the State, which can look to its charter alone for power. In the entire Act the word bridge is not used, but the word "highway" is used. The word "highway" includes bridges.

Rapho *v.* Moore, 68 Pa. 408.
Penn Township *v.* Perry County, 78 Id. 459.
Monongahela Bridge Co. *v.* P. & B. R. R. Co., 114 Id. 485.
Erie County *v.* Commonwealth, 127 Id. 207.
Washer *v.* Bullitt County, 110 United States, 564.
Commonwealth *v.* Central Bridge Co., 12 Cushing, 244.
City of Chicago *v.* McGinn, 51 Illinois, 272.

The State may authorize the use of new means for public travel and accommodation, and new modes of transporting the passengers over any

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of the highways or bridges of the State, subject only to the bridge company's right to demand reasonable toll. The State, in the General Passenger Railway Act of 1889, authorized street passenger railways incorporated under it to use and cross the highways and bridges of the State within the defined route of each railway, using electricity as a motive power.

Monongahela Bridge Co. *v.* The Pittsburgh & Birmingham Passenger Railway Company, *supra.*
Penna. R. R. Co. *v.* Electric Railway, 152 Pa. 127.
Reeves *v.* Philadelphia Traction Co. Id. 162.
Williams *v.* The City Electric Railway Co., Federal Rep. vol. 41, page 556.
Roake *v.* American Telephone Co., 41 New Jersey Equity, 35.
Phila. & Trenton R. R. Co., 6 Wharton, page 25.

When the State granted the charter to the Point Bridge Company to erect a bridge it did not and could not part with any of its powers to control and regulate and pass laws for the benefit of the general public. The defendant therefore took its charter subject to the future exercise of the rights of government by the State of Pennsylvania.

Charles River Bridge *v.* The Warren Bridge Co., 11 Peters, 547.
Stone *v.* Mississippi, 101 U. S. 814.
In re Provident Institution for Savings, 9 Cushing, 604.
Morawits on Private Corporations, sec. 1062.
Mott *v.* Pennsylvania R. R. Co., 6 Casey, 9.

The grant to the passenger railway company organized under the act of 1889 does not constitute a taking of the property of the bridge company, because (a) the use is given only in common with the ordinary public use of the bridge; and (b) because the grant is within the reserved power of the State, and is reasonably consistent with the purposes for which the bridge was erected.

The stringing of a wire across the bridge is no more of a taking than the use by rails for cars or by horses, cars, etc. It is a mode of public use and accommodation, and is within the dedication and not a taking.

Lockhart *v.* Craig St. Ry. Co., 139 Pa. 419.
Rafferty *v.* Central Traction Ry. Co., 147 Id. 592.
Taggart *v.* Newport R. R. Co., 7 Railway and Corp. Law Journal, 385.
Williams *v* City Electric Ry. Co., 41 Fed. Rep. 556
Louisville Bagging Co. *v.* Central P. Ry. Co., Louisville, Law and Equity Court Booth's Street Railway Law, sec. 67.
Pelton *v.* East Cleveland R. R. Co, Circuit Court of Cuyahoga Co., Ohio, 22 W. L. B., 67.
DuBois Traction Co. *v.* Buffalo R. Ry. Co., 10 Pa. County Court Rept., 404.

The grant to use electricity includes the right to erect poles and string wires to conduct the electricity.

Commonwealth *v.* West Chester, 9 Pa. Co. Court, 546.

If, however, the Court should think that the right granted to the passenger railway company by the Act of 1889 is the right to take and condemn then the railway company would be liable for all damages the bridge company would suffer, and there is ample provision under the Constitution of the State, and the general laws, affording an adequate remedy to the bridge company.

Duncan *v.* Penna. R. R. Co., 94 Pa. 435.
Penna. R. R. Co. *v.* Duncan, 111 Id. 352.
Chester Co. *v.* Brower, 117 Id. 647.
Appeal of the County of Delaware, 119 Id. 159.
O'Brien *v.* The Ry. Co., 119 Pa. 191.

The twentieth section of the Street Passenger Railway Act of 1889, P. L. 217, is not in conflict with Article III. of the Constitution, owing either to defect in the title or because it is a local or special law. But it is useless to argue such a question in this case, because the legality of the incorporation of the Pittsburgh and West End Passenger Railway Company is not only not attacked in this case but indeed could not be thus attacked collaterally. It would be the attorney-general only who could raise this question.

Western Pa. R. R. Co's. Appeal, 104 Pa. 399.

November 13, 1894. McCollum, J. The Point Bridge Company was incorporated under the general corporation Act of 1874 for the purpose of erecting, constructing and maintaining a toll bridge and approaches thereto for public travel and accommodation "from a point near the junction of the Allegheny and Monongahela rivers, across the Monongahela river to a point at or near the Lorenz Glass Works." The bridge it was thus authorized to build and maintain, constituted when it was opened to public travel in May, 1877, a portion of the highway with which it was connected. It was, by the charter under which it was erected, dedicated to a public use, subject only to the right of the company to exact reasonable tolls for such use: Monongahela Bridge Company *v.* The Pittsburgh and Birmingham Railway Company, 114 Pa. 478; Rapho *v.* Moore, 68 Id. 404; Penn Township *v.* Perry County, 78 Id. 457; Erie County *v.* The Commonwealth, 127 Id. 197; Commonwealth *v.* Central Bridge Co., 12 Cushing, 244, and Washer *v.* Bullitt County, 110 U. S. 564. Citations in this line might be multiplied indefinitely, but it is believed that the charter and the cases already referred to justify the appellee's contention that the Point Bridge is a public highway. Aside from the right of the company to demand and receive reasonable tolls from the traveling public for the use of it for the purpose for which

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it was erected, it does not differ from the ordinary highway constructed and maintained by the inhabitants of the district through which it passes. But the right to exact such tolls does not carry with it the power to prohibit such use of it by the public as is reasonably consistent with such purpose.

The Pittsburgh and West End Passenger Railway Company was incorporated on the 27th of March, 1879, under the Act of March 19, 1879, P. L. 9. Its route was from the corner of Liberty and Fifth avenues, and upon Liberty avenue, Fifth street, Penn avenue, Water street, Point Bridge, Carson, Main and Walnut streets to the Washington turnpike road. It proceeded at once to construct its railway on this route, and finding tracks upon the bridge adapted to the passage of cars over it, connected its tracks with them. It opened its railway for public travel on the 4th of July, 1879, operated the same by horse power, and paid tolls to the bridge company until this contention arose in December, 1891.

The Act under which the railway company was incorporated having been declared unconstitutional in Weinman *v.* Passenger Ry. Co., 118 Pa. 192, the company accepted the provisions of the Passenger Railway Act of 14th May, 1889, P. L. 211, and received new letters patent. By this acceptance the company became entitled to all the privileges, franchises and powers conferred by the later Act upon corporations created under it. What are the powers, privileges, and franchises thus conferred, so far as the same are applicable to this controversy? The Act authorizes the formation of companies for the purpose of constructing, maintaining and operating a street railway upon any street or highway for public use in the conveyance of passengers by any power other than by locomotive. Do the words "any street or highway," as used in this Act, exclude bridges? We have already seen that a bridge erected for public travel and accommodation is a public highway whether built and maintained by the inhabitants of the district, or by a corporation authorized to demand tolls for passage over it. Surely it would be a narrow construction of these words which would exclude a bridge and thereby make it a terminus of the railway. If the bridges across the Schuylkill River in Philadelphia, and the bridges across the Allegheny and Monongahela rivers at Pittsburgh are not highways within the meaning of the Act, it signally fails to provide the facilities which are required for the public travel and accommodation. In all the cities and populous districts of the Commonwealth where street passenger railways are necessary for easy access to and convenient travel in them, there are bridges to be crossed, some of which are maintained by the municipality or district, and some by corporations chartered for the purpose of erecting and maintaining them for public use. In view of these known conditions the natural and reasonable construction of the Act of 1889 is that the streets or highways mentioned therein include the bridges connecting with and constituting portions of them. When the Pittsburgh and West End Passenger Railway Company accepted the provisions of the Act and acquired new letters patent, it was, and for ten years previous thereto, had been operating its railway by horse power on the route already described. The Point Bridge Company made no objection to the passage over its bridge of the cars of the railway company. The tolls were adjusted by an arrangement between the companies which was satisfactory to both. This arrangement continued until the railway company proposed to operate its road by electricity. It was the proposed change in the method of operating it that led to this litigation in which the bridge company contends that the railway company has no right to use the bridge in moving its cars over its established route. The consent of the local authorities has been duly given to the latter to operate its railway on that route and in the manner proposed. It has all the powers, franchises and privileges granted by the Act of 1889 to street passenger railway companies. The title of the Act is broad enough to authorize the incorporation of companies organized under the unconstitutional Act of 1879. The use of the bridge in the manner proposed does not constitute a taking of or an injury to the property of the bridge company in the exercise of the power of eminent domain. It is a use which is reasonably consistent with the purpose for which the bridge was erected, and is necessary for public travel and accommodation. We conclude therefore that under the legislation and with the municipal consent to which we have referred, the railway company has the right to operate its line across Point Bridge "by any power other than by locomotive," in such manner and on such terms as will protect the rights of the bridge company and the traveling public. The learned Court below, after a careful inquiry into the facts and circumstances affecting the issue raised by the bill and answer, entered a decree which appears to be reasonable and just. It is a decree which carefully guards the rights of the bridge company, which properly regulates the use of the bridge by the railway company and exacts from the latter the payment to the former of a toll rate, the adequacy of which is not questioned.

We have not overlooked the contention which denies to a Court of equity jurisdiction of the matter complained of, but we cannot assent to

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it. On the contrary we think the railway company applied to the proper tribunal for the relief sought.

The specifications of error are overruled. Decree affirmed and appeal dismissed at the costs of the appellants. W. C. S.

Oct., '94, 160. October 9, 1894.

Coulter v. Township of Pine.

Highways and bridges—Duties of township—Traction engines—Loss of life—Amount of insurance policy not to be deducted from damages.

When the use of steam engines for threshing, etc., becomes so general that their transportation amounts to an ordinary use of the roads, it may be necessary to strengthen the bridges so as to withstand the increased strain: Clulow *v.* McClelland, 151 Pa. 583. The generality of such use would ordinarily be a question for the jury.

How far and under what circumstances it may become the duty of the township to strengthen for this purpose bridges which are otherwise safe and in good repair, not decided.

Plaintiff's husband having been killed by the breaking down of a township bridge from the weight of his traction engine, and the jury having been instructed that the case turned upon the qnestion whether or not traction engines had become a usual and ordinary mode of travel, when the supervisors reconstructed the bridge in June, 1888, a verdict for the plaintiff was sustained.

Money paid on a policy of insurance is not the pecuniary value of the life, but of the premiums paid, hence the amount recoverable under the policy is not to be deducted from damages allowed for injuries resulting in death.

Appeal of the Township of Pine, defendant, from the judgment of the Common Pleas of Mercer County, on a verdict for plaintiff, Rachael C. Coulter.

At the trial, before MEHARD, P. J., it appeared that plaintiff's husband died from injuries received in consequence of his traction engine, which he was running, breaking through a bridge in October, 1893. It was shown that the same engine had been taken across this bridge seven times previously during the year, and that the bridge had been reconstructed by the supervisors and pronounced safe in 1888.

Evidence having been given that the life of the decedent had been insured for $2,000, which sum was paid to the plaintiff shortly after the death, the Court in charging the jury withdrew this evidence from their consideration, stating that it ought not to have been admitted. (Tenth assignment of error.) The other instructions to which error was assigned are sufficiently indicated in the opinion of the Supreme Court. Verdict for plaintiff, $7,995, and judgment thereon. Defendant appealed.

S. R. Mason and *B. Magoffin*, for appellant.

The township is only bound "to construct its highways and bridges for ordinary use in an ordinary manner, and not for an unusual or extraordinary use, either by crossing at great speed or by passing a very large and unusual weight."

McCormick *v.* Township of Washington, 112 Pa. 185.
Clulow *v.* McClelland, 151 Id. 583.

If recovery could be had at all it would be on the ground of compensation for actual pecuniary loss, hence evidence as to the value of the policy of insurance should have been admitted.

Q. A. Gordon, (with him *G. W. McBride* and *S. H. Miller*,) for appellee.

November 5, 1894. MITCHELL, J. This case is governed by Clulow *v.* McClelland, 151 Pa. 583, but it is an error to suppose that that case, or Com. *v.* Allen, 148 Pa. 358, decided as matter of law that the moving of traction engines for steam threshing and other purposes, over roads or bridges, was at that time an extraordinary or unlawful use of the public highways. On the contrary the nonsuit in Clulow *v.* McClelland was sustained expressly on the ground that "plaintiffs themselves testified that they knew that the machine was a good deal heavier than the ordinary travel in the neighborhood, ... that in fact they had examined this bridge, taking off a plank to do so, and considered it safe." In other words they were aware of the risk and voluntarily accepted it, while as to the defendant it was said, "It was not negligence in the township not to know what an inspection by the plaintiffs failed to disclose." The point of that case, therefore, is that the extraordinary use of the highway was clear from plaintiff's own evidence, and therefore there was no ground on which the township could be held liable for the accident. To make it still more clear that this was the extent of the decision, the Chief Justice added a warning that "when the use of steam engines for threshing, etc., becomes so general that their transportation over the roads amounts to an ordinary use of them, it may be necessary to strengthen the bridges so as to withstand the increased strain." This generality of use would of course, ordinarily be a question for the jury.

How far, and under what circumstances it may become the duty of townships to strengthen for this purpose alone, bridges which are otherwise safe and in good repair, we need not discuss until the question is really before us. In the present case it appeared in the evidence that the bridge had been altered and reconstructed in 1888, and the Court instructed the jury that

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if it was properly constructed with reference to ordinary travel at that time, any intervening defect would have to be brought to the knowledge of the supervisors, but that if the timbers had been in use as long as such timbers usually last, or longer, then length of time would be equivalent to knowledge. This was in effect an instruction that if the bridge was properly constructed and maintained with reference to ordinary travel in 1888, the township would not be liable though the moving of steam threshers had in the meantime become an ordinary use of the highway. This was at least as favorable to defendant as it was entitled to ask. On the main issue the jury were told, "this case turns upon the question whether or not traction engines had become a usual and ordinary mode of travel when the supervisors reconstructed the bridge in June, 1888." It was a question for the jury and was thus submitted in exact accord with the principle of Clulow *v.* McClelland. The difference in result was due to the difference in the facts as appearing there in plaintiff's own evidence, and as found here by the jury.

The assignment of error to the withdrawal of the evidence as to the insurance on the life of Joseph Coulter cannot be sustained. There was no basis on which such evidence could be admitted. Money paid on a policy of insurance is not the pecuniary value of the life, but of the premiums paid. The evidence was entirely irrelevant to the liability of defendant, or its amount: North Penn. R. R. Co. *v.* Kirk, 90 Pa. 15. Appellant cites the authority of Lord Campbell from Sedgwick on Damages, but the eighth edition of that work, Sec. 67, discusses the subject more fully and concludes thus, "The amount received by the plaintiff on an insurance policy cannot be shown to reduce the damages. . . . . When an action is brought under a statute for damages causing death, the rule in England is different. . . . . In the United States, however, the ordinary rule is followed, and the amount recovered is not reduced by the amount of insurance money," citing Sherlock *v.* Alling, 44 Ind. 184, 199; Althorf *v.* Wolfe, 22 N. Y. 355; Terry *v.* Jewett, 17 Hun 395; and Harding *v.* Townshend, 43 Vt. 536.

Judgment affirmed.

J. D. B., Jr.

Oct. '94, 177. October 30, 1894.

In re Fifty-fourth Street.
Appeal of the City of Pittsburgh.

Roads and highways—Benefits—Assessments—Properties not on the line of the improvement.

The doctrine of assessment for benefits, to pay for public improvements, can only be defended upon the ground that the benefits are local and essential to the very property assessed, and then the assessment can only be made once.

Owners of property, not abutting directly upon the line of the improvement, can not be subjected to such an assessment, even when the property is situated on the same street.

In re Morewood Avenue, 159 Pa. 20, followed.

Appeal of the City of Pittsburgh, from the decree of the Common Pleas No. 3, of Allegheny County, sustaining the exceptions of the Frank Kneeland Machine Company, Limited, to the report of the Board of viewers *in re* Grading, Paving, and Curbing Fifty-fourth Street, from the Allegheny Valley Railroad to Butler Street, 18th Ward, Pittsburgh.

The facts of this case were as follows: On July 24, 1891, an ordinance was passed by the councils of the City of Pittsburgh, authorizing the grading, paving and curbing of Fifty-fourth street from the Allegheny Valley Railroad northward to Butler street, which ordinance was passed upon the petition of a majority in number and interest of the owners of property fronting or abutting upon the line of the improvement, in which petition the Frank Kneeland Machine Company, Limited, did not join. Based upon this ordinance was a petition to the Court and the appointment of a board of viewers, as provided in the Act of Assembly of May 16, 1891. The viewers, after personally visiting all the property along the line and in the neighborhood of the improvement, and hearing testimony, assessed benefits upon the property of the Frank Kneeland Machine Company, Limited, in the sum of $750. It appeared that Fifty-fourth extended northward from the Allegheny River to the tracks of the Allegheny Valley Railroad Company, which it crossed, and thence ran north to Butler street. The property of the Frank Kneeland Machine Company is situated on the eastern line of Fifty-fourth street, between the right of way of the Allegheny Valley Railroad and the river; and does not abut upon any portion of the street upon which the improvement was made. The Frank Kneeland Machine Company therefore excepted to the report of the viewers in assessing benefits upon their property. This exception was sustained by the Court. Whereupon the City of

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Pittsburgh took this appeal, assigning for error this action of the Court.

William C. Moreland (*Thomas D. Carnahan* with him), for appellant.

The facts in this case are wholly dissimilar to those in Morewood Avenue, Chambers' Appeal, 139 Pa. 20, and in Ferguson's Appeal, 159 Id. 39.

In this case the appellees have no access from their property, except over the improved street.

S. B. Schoyer (*S. Schoyer, Jr.*, with him), for appellee, cited

In re Morewood Avenue, 159 Pa. 20.

November 12, 1894. GREEN, J. In the case of Morewood Avenue, 159 Pa. 20, we said: "As we have repeatedly decided, the doctrine of assessment for benefits, to pay for public improvements, can only be defended upon the ground that the benefits are local and essentially peculiar to the very property assessed, and then it can only be done once. This can only be the case when the property assessed abuts directly upon the line of the improvement. Having their own burthens to bear in this respect the owners cannot be subjected to the discharge of similar burthens upon other properties, whether situate on the same street or in the same neighborhood." This ruling, made after much deliberation and the most mature consideration, disposes of the present contention. Our reasons for holding this doctrine were most fully set forth in the case referred to, and it is not necessary to repeat them now. The property in question in the present case does not abut upon the line of the improvement, and therefore is not subject to an assessment for benefits. We are of the opinion that the learned Court below was entirely correct in sustaining the exceptions to the report of viewers.

Decree affirmed. S. H. T.

January 30, 1894.

Seip's Estate.

Probst's Appeal.

Evidence—Privileged communications—Attorney and client—Husband and wife—Compromise of will controversy—Who entitled to participate in benefits of.

The mere fact of the employment of counsel is not privileged, but is open to inquiry in any Court in which counsel appear as such. Therefore counsel is competent to testify in a collateral proceeding as to the fact of his having in a prior proceeding represented certain parties.

The declarations of a husband that in a particular transaction he acted as agent both for his wife and for a third party are competent in support of a claim by such third party against the estate of his wife.

The declarations related only to his own conduct, and are explanatory of it. They involved no breach of domestic confidence; they related to no act or contract of the wife; they fixed no liability upon her estate.

An issue *devisavit vel non* is in the nature of a proceeding *in rem*. Hence it would seem that money received upon the compromise of a contest to set aside a will should belong to all parties entitled in case the will had been set aside.

No contestant can compromise anything beyond his or her own personal interest in the contest, and can be entitled to no more than his or her distributive share of a sum received by way of general compromise.

Where three sisters had the same interest in the setting aside of a will, two appearing of record as contestants, the presumption as to the third sister is that she was entitled to share in the benefits secured by the litigation, and the burden of proof is upon the others to show some contract, release or state of facts sufficient to rebut the presumption.

Appeal of Lydia Probst from the definitive decree of the Orphans' Court of Lehigh County, confirming auditor's report, and making distribution of the estate of Catherine Seip.

The facts are stated in the opinion of the Supreme Court. The assignments of error on behalf of the appellant cover the action of the Court in sustaining the report of the auditor rejecting the testimony of John Rupp, Esq., and the declarations of Matthew Seip.

Marcus C. L. Kline (*John Rupp* with him), for appellant.

James S. Biery (with him *Thomas B. Metzger* and *Reuben J. Butz*), for appellee.

October 1, 1894. WILLIAMS, J. The facts to be considered in the determination of this appeal appear in the auditor's report, which was concurred in and confirmed by the Orphans' Court.

From this report we learn that George Probst died testate in February, 1885, leaving a large estate. He left three half-sisters to survive him, Christiana Knauss, Catherine Seip, and Lydia Probst. By his will he gave his estate to certain of his collateral relatives, excluding his half-sisters and other relatives from any share whatever therein.

Those who had been thus excluded, or some of them, determined to contest the validity of the will; and for these Nathan Seip, the husband of Catherine, appears to have acted as agent. He consulted with and retained counsel and took general charge of the preparation and conduct of the proceedings. An issue *devisavit vel non* was framed, in which Mrs. Knauss and Mrs. Seip were named as plaintiffs, and in which Lydia Probst was named as one of the defendants. This was upon the list for trial and in a position

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to be reached in a few days when it was settled upon the payment of ten thousand dollars to the attorneys for the contestants.

The question now raised is to whom did the money paid by the proponent belong? Lydia Probst alleges that she was entitled to share with her sisters in it, and they now claim the whole. This controversy was referred to an auditor who sustained the contention of the accountant that Lydia Probst was not entitled to share in the money obtained by the settlement.

It should be remembered that the three sisters stood in the same position. They had certain rights under the intestate laws that the will denied. If the estate of George Probst was to be distributed under his will, they were all alike excluded. If the will was set aside they would be admitted on exactly the same terms regardless of their apparent position on the record as parties to the issue, and of their contribution to the expenses of the contest.

But the auditor and the Court below held that the right of Lydia Probst to share with her sisters depended on the answers to two questions; first, was she "an active contestant on record with Mrs. Seip and Mrs. Knauss? Second, did she contribute towards the expenses in carrying on the contest with the understanding that she should share in the proceeds realized?"

The evidence relied upon to show that she was a contestant, and had promised to contribute to the expenses, consisted of the testimony of John Rupp, Esq., one of the counsel for the contestants, and the declarations of Nathan Seip, now deceased, made while the contest was being carried on and while it was in process of settlement. The testimony of Mr. Rupp was excluded because of his confidential relations to Mr. Seip and Mrs. Knauss. The declarations of Nathan Seip were excluded because he was the husband of the decedent whose estate is now for distribution.

The whole of the evidence relating to the questions stated by the auditor being thus taken out of the case, the questions were decided against Lydia Probst, and the two sisters were allowed to retain the share of the third in the money realized from the settlement of the issue *devisavit vel non.*

Was John Rupp properly excluded on the ground of privilege? He is an attorney-at-law and was employed as counsel for the contestants. If the issue had been on trial and the proponent had undertaken to examine him about what Blackstone calls "the secrets of the cause," which had been communicated to him by his clients, it is clear that the clients could have objected and relied on the fact that the communications made by them to their counsel, relating to the cause, were privileged. But this was not a controversy between the contestants and their adversaries. It was a controversy among themselves. Here were three sisters standing in the same relation to the testator, and having the same interest in defeating his will. Two of them appeared as plaintiffs, and the other as one of the defendants in the issue. Neither of them appears to have consulted counsel personally, but Nathan Seip, the husband of one of them, did all that was done on behalf of the contestants. Whom did he represent? For whom did Mr. Rupp appear? This is the present question. It is a search, not after some communication by client to counsel, but after a fact that could be inquired into on the trial of the issue if such trial had been reached. It could have been settled in advance by a rule on counsel to file a warrant of attorney, and this at the instance of the adverse party. It is the fact of employment that creates the confidential relation. Until this relation exists there can be no privileged communication. The mere fact of employment is not privileged, but from the nature of the relation between client and counsel, it is open to inquiry in any Court in which the counsel appears as such. So, for a very obvious reason, the fact of a settlement between litigants, and the terms upon which it was made, are open to inquiry. An attorney who assisted in adjusting the terms of such settlement is a competent witness to show what the terms were. Schubkagel *v.* Dierstein, 131 Pa. 46. If an attorney represents two or more persons he may be called as a witness in a controversy between them and statements made to him by one of them in the presence of the others will not be treated as confidential or privileged communications: Goodwin Gas Stove and Meter Company's Appeal, 117 Pa. 514. And generally where several persons employ the same attorney in the same business, as for example, to contest a will, communications made by them in relation to such business, while privileged as to their common adversary, are not privileged *inter sese:* Jackson *v.* French, 3d Wendell, 337; Am. and Eng. Ency. of Law, vol. 19, page 139 and note. All have a property in confidential communication made under such circumstances. One cannot waive the privilege for his co-suitor nor enforce it against him: Beltzhoover *v.* Blackstock, 3 Watts, 20. In this case three sisters had a common interest in defeating their half brother's will. A contest was entered upon. All of them were parties to it. Their position on the record was just what Nathan Seip chose to make it. This contest was settled by him, acting for those interested, for the sum of ten thousand dollars.

The question now raised is to whom did this money belong? Not to Nathan Seip, for he could not have taken under the intestate laws as

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an heir of George Probst. It must go, says the learned auditor, to those whom Seip represented, and for whom Mr. Rupp appeared. To disclose their principals both Rupp and Seip are competent, and no one of the parties can successfully interpose the objection of privilege. But Seip is now dead, and his declarations made to Mr. Rupp showing for whom he acted in making the contest are objected to on the ground that he is not competent to testify against his wife. But the declarations relate only to his own conduct and are explanatory of it. They involve no breach of domestic confidence; they relate to no act or contract of his wife; they fix no liability upon her estate.

He acted as the agent for his wife but not for her alone. For whom else did he undertake to act? Who were his principals in the litigation he began, carried on, and finally settled? The auditor finds that he was the agent of Mrs. Knauss as well as of his wife; and in his twelfth finding of fact he said: "That during the progress of the George Probst will contest and at the time the settlement was consummated and the money paid to the counsel of contestants, Nathan Seip attended to the business affairs of Lydia Probst, the claimant, receiving money for her and paying bills." In other words he was the business agent of Lydia Probst in general charge of her affairs. We can see no way by which the auditor reached the conclusion that he was not her agent in the management of the contest over the will also, except by rejecting the testimony of Mr. Rupp, and the declarations of Seip, and then holding as matter of law that a compromise which affected the rights of Lydia Probst gave her no interest in the sum received.

We hold that the rejected testimony was competent so far as it was offered to show for whom Seip acted as agent, and for whom Rupp appeared as counsel.

This disposes of the questions really raised on this record, but before dismissing the case it may be well to suggest another. Is it true, as the auditor seems to assume, that the money received upon the compromise of a controversy like this belongs only to those who appear as active contestants and contribute money towards the employment of counsel? The statute provides that any person interested may file a caveat, but it is well settled that thereafter the proceedings are not strictly between the parties, but are in the nature of a proceeding *in rem;* and a decree when made is conclusive on all the world: Ottinger *v.* Ottinger, 17 S. & R. 142. For this reason it is the duty of the Court to see that all persons interested are brought in before a decree is made: Miller's Appeal, 159 Pa. 562. If this is not done, or if a compromise is effected without notice to any of those interested, and a verdict taken in favor of the will in pursuance of such compromise, the verdict will be set aside on application of the omitted or neglected party: Hambleton *v.* Yocum, 108 Pa. 304; or the omitted party may take another appeal if the time allowed has not elapsed: Miller's Appeal, *supra.*

From this it results that no contestant can compromise anything beyond his or her own personal interest in the contest, and can be entitled to no more than his or her distributive share in a sum received by way of general compromise.

This was said in substance by the late Justice GORDON in the opinion delivered in Hambleton *v.* Yocum, *supra,* and seems to result necessarily from the nature of the proceeding. The interest of Lydia Probst was identical with that of Mrs. Seip and Mrs. Knauss. For what reason she was put upon the record as a co-defendant with the proponent of the will that disinherited her, it is probable that no one since the death of Seip can tell. But wherever her agent placed her on the record, her interest was identical with that of her sisters. She had the same right to appeal from the decree of probate, and the same motive for doing so. There could have been no settlement made without her consent given personally or through her agent. Her acquiescence in its terms was a surrender of her right to contest the will, and her distributive share of the net results of the compromise stood to her in place of her right to contest. In such case the law would presume her joinder with her sisters in the compromise to have been upon the same terms and conditions assented to by them, and that the sum received was to be divided in conformity with the intestate laws. This would shift the burden of proof and impose on her sisters the duty of showing some contract, release or state of facts, sufficient to rebut the legal presumption and strip her of her rights as "a person interested" in the estate of her half-brother.

The decree appealed from is reversed, the record remitted and a procedendo awarded.

J. D. B., JR.

Jan., '94, 427. April 19, 1894.

Scott's Estate.
Gwin's Appeal.

Wills — Construction of — Distribution — Per stirpes or per capita.

Where there is a testamentary gift to one person, and to the children of another person, who stand in the same relation to the testator, the donees take *per capita.*

A contrary intent will be inferred where under the in-

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testate laws, which are always resorted to in cases of doubtful interpretation, a distribution would be made *per stirpes*; e. g., where the claimants are in different degrees of consanguinity; but where the gift is to persons or classes of persons who stand in the same relation to the testator, the analogy furnished by the intestate laws indicates a division *per capita*.

Testatrix after giving the residue of her estate to her niece, provided as follows:—

"*Third*, Should my beloved niece, Miss Jessie A. Barnes, die without issue, then in that case I will and devise the remainder of my estate, after her decease, without issue as aforesaid, to be *divid* among my nephews and nieces, to wit: The legal heirs of Mrs. Lilly A. Gwin, the heirs of my deceased brother, James A. Scott, and the lawful heirs of my beloved brother, John W. Scott, and Anna R. Stuckey, each to take share and share alike."

Said niece died without issue.

Held, That the division of the estate among the nephews and nieces should be *per capita*, and not *per stirpes*.

The words "share and share alike" *might* refer to a division among classes, but this cannot be said of "each to take," which plainly indicates a division *per capita*.

Appeal of M. Scott Gwin et al. from the decree of the Orphans' Court of Blair County affirming an auditor's report making distribution under the will of Jennie E. Scott.

The auditor, B. L. Hewit, Esq., found as follows:—

Jennie E. Scott died September 10, 1891, leaving a will, which provided as follows:

"First—I give, devise and bequeath to my niece, Mrs. Anna R. Stuckey, formerly Miss Anna R. Barnes, one thousand ($1,000.00) dollars, to be paid to her or her heirs within three (3) years after my decease, the same to be paid to her, the said Mrs. Anna R. Barnes, by my executrix hereinafter named.

"Second—I give, devise and bequeath unto my beloved niece, Miss Jessie A. Barnes, all the residue of my estate of whatsoever character, real, personal and mixed property, to have and to hold and to enjoy the same during her natural lifetime, and in case of her marriage, should she leave heirs of her body, then in that case the estate to go to her children, share and share alike, in fee simple.

"Third—Should my beloved niece, Miss Jessie A. Barnes, die without issue, then in that case, I will and devise the remainder of my estate after her decease, without issue as aforesaid, to be *aivid* among my nephews and nieces, to wit: The legal heirs of Mrs. Lilly A. Gwin, the heirs of my deceased brother, James A. Scott, and the lawful heirs of my beloved brother, John W. Scott, and Anna R. Stuckey, each to take share and share alike."

Jessie A. Barnes died December 23, 1893, intestate, unmarried and without issue.

The question before the auditor was whether the distribution should be made *per capita* or *per stirpes*.

Testatrix left surviving her a brother, John W. Scott, and two sisters, Mrs. Gwin and Mrs. Hutchinson. Her brother, James A. Scott, and her sister, Mrs. Barnes, died before her. All of the brothers and sisters left children; and those of John W. Scott, Mrs. Gwin and James A. Scott, and one of the two children of Mrs. Barnes, Anna R. Stuckey, were intended to be beneficiaries under the third clause of the will, while the children of Mrs. Hutchinson and Rush Barnes, a brother of Mrs. Stuckey, were not mentioned in the will.

The auditor was of opinion that the distribution should be *per stirpes*, and recommended a decree in accordance with that opinion.

His report was confirmed by the Court, BELL, P. J., and a decree as recommended was entered. An appeal was taken from this decree.

H. M. Baldrige and *John M. Reynolds* (*Kooser & Kooser* with them), for appellants.

Our statute provides that when an intestate leaves neither brother nor sister, but nephews and nieces only, they shall take *per capita*.

§ 4, Act of April 8, 1833.
Miller's App., 40 Pa. 389.

A division among my lawful heirs, share and share alike, means a division *per capita*.

Thomas' Estate, 18 WEEKLY NOTES, 28.
Osburn's Appeal, 104 Pa. 637.
Heistand *v.* Meyer, 150 Id. 504.
McNeiledge *v.* Galbraith, 8 S & R. 43.
Bender's Appeal, 3 Grant, 210.
Lewis' Appeal, 89 Pa. 509.
Hicks' Estate, 134 Id. 507.
Warrington *v.* Warrington, 2 Hare, 54.
Butler *v.* Stratton, 3 Bro. C. C., 367.

In the cases cited by appellee the objects of testator's bounty stood in different degrees of consanguinity, and the same rule does not apply.

Wm. M. Hall, Jr., and *Wm. M. Hall*, (*M. A. Points* with them), for appellee.

Where the legacy is to a class the general rule is that they take *per capita*, but this rule readily yields to a contrary intention expressed in the will.

Schouler on Wills, § 540.
Osburn's App., 104 Pa. 637.

The law favors a distribution by representation.

Schouler on Wills, § 539.
Fissel's Appeal, 27 Pa. 55.
Risk's Appeal, 52 Id. 269.
Minter's Appeal, 40 Id. 111.
Harris' Estate, 74 Id. 452.
Baskin's Appeal, 3 Id. 304.
Hoch's Estate, 154 Id. 422.

By the use of the words "*legal heirs*," "*heirs*" and "*lawful heirs*" the testatrix meant that there should go to *each family*, of several of her brothers and sisters *one share*, which the objects of her bounty should take by representation of such brothers and sisters respectively. The naming of her brothers and sisters whose families she proposed to favor

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shows that the beneficiaries were to be substitutionary for their ancestors. This is in consonance with the first principle cited.

It is clear that the testatrix meant a classification by representation. No one is "heir" of a living person, and hence a gift expressed to "the heirs" of one who proves still alive could not in strictness vest, especially as evidence *dehors* the will, to show that the testatrix thereby intended "heirs" in some special sense, would be inadmissible. Courts, however, lay hold of descriptive words or other indications in the will that the testatrix regarded the object of her bounty *as a class* reckoned at the time of vesting.

"Each" qualifies the individual as well as the classes. The individual and the classes are connected by copulatives that apply all the qualifying terms to them alike.

Risk's Appeal, 52 Pa. 269.

The beneficiaries stood in equal degree in the following cases:

Heistand *v.* Meyer, 150 Pa. 501.
Alder *v.* Beall, 11 Gill & J. 123.

July 12, 1894. FELL, J. The contest in this case relates to the distribution of the residuary estate of Jennie E. Scott. The third clause of her will, under which the question arises, is: "Should my beloved niece, Miss Jessie A. Barnes, die without issue, then in that case I will and devise the remainder of my estate after her decease, without issue as aforesaid, to be divided among my nephews and nieces, to wit: The legal heirs of Mrs. Lilly A. Gwin, the heirs of my deceased brother, James A. Scott, and the lawful heirs of my beloved brother, John W. Scott, and Anna R. Stuckey, each to take share and share alike."

Jessie A. Barnes died without issue, and the question before the auditor was whether distribution should be made *per capita* or *per stirpes*.

The testatrix left surviving her a brother, John W. Scott, and two sisters, Mrs. Gwin and Mrs. Hutchinson. Her brother, James A. Scott, and her sister, Mrs. Barnes, died before her. All of these brothers and sisters had children; and those of John W. Scott, Mrs. Gwin and James A. Scott, and one of the two children of Mrs. Barnes, Anna R. Stuckey, are beneficiaries under the third clause of the will, while the children of Mrs. Hutchinson and Rush Barnes, a brother of Anna R. Stuckey, are not mentioned.

The learned auditor, for reasons stated in his very full and elaborate report, concluded that distribution should be made *per stirpes*. He awarded it accordingly, and his report was confirmed by the Orphans' Court.

We are of opinion from a careful examination of the case that this judgment is not correct. The scheme of the testatrix in disposing of her estate was to give to Anna R. Stuckey a bequest of $1,000, and the residue for life to Jessie A. Barnes, with remainder to her children, and upon failure of such issue to fourteen of her twenty nephews and nieces, to the exclusion of the other six.

Whether we apply to the residuary clause of the will, the technical rules of construction, or give to it the plain meaning which its words import, and its grammatical structure requires, the result is the same. When there is a testamentary gift to one person, and to the children of another person who stand in the same relation to the testator, the donees take *per capita*. This rule under the English authorities yields to slight indications of a contrary intent; and in Pennsylvania the contrary intent is inferred where under the intestate laws, which are always resorted to in cases of doubtful interpretation, the distribution would be made *per stirpes*, as in the case of a gift to a son or brother of the testator and to the children or heirs of a deceased son or brother.

Where, however, the gift is to persons or classes of persons who stand in the same relation to the testator, the analogy furnished by the intestate laws indicates a division *per capita*, for in such cases under sec. 14 of the Act of April 8, 1883, and sec. 1 of the Act of June 30, 1885, persons so standing "if there be more than one, shall take in equal shares."

The benefit here was evidently intended for the legatees individually, and as nephews and nieces, and not as representing their parents, who in two instances are still living, and were entirely passed over. The nephews and nieces are treated as if their parents were dead; and in that case, if there were no will, the estate would go under the intestate laws to the beneficiaries and others occupying the same position *per capita*.

The intestate laws, which would have required a distribution *per stirpes*, are passed over in order to exclude brothers and sisters, and give the estate directly to nephews and nieces. That having been done, distribution under the law would then be *per capita*; and the presumption is in favor of such an intention on the part of the testator in the absence of evidence in the will of a purpose to further supersede the statute. The will seems clearly and affirmatively to show that the distribution was to be in equal shares.

Leaving out the parenthetical enumeration of the persons intended to be embraced in the gift, the language is as follows: "I will and devise the remainder of my estate after her decease,

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without issue as aforesaid, to be divided among my nephews and nieces . . . . each to take share and share alike." Nothing could be more explicit than this, and the meaning is not changed by the parenthetical clause. Its manifest object was to limit the generality of the preceding words, and to define the persons who were to take. She had before written "my nephews and nieces," which included all her nephews and nieces. This was not her purpose, and she proceeded to designate those who were to take in order to exclude the others. The design was not to classify, but to discriminate and exclude.

The word heirs is not used technically, but in the sense of children or descendants, as the brothers and sisters would be collateral heirs of each other in case of death without issue, and until death there could be no heirs, either lineal or collateral.

The nephews and nieces intended as beneficiaries having thus been ascertained, there is no uncertainty how they are to take. The division is to be such that "each" is "to take share and share alike." Each refers to the person described in the first part of the paragraph, the nephews and nieces who are identified by the videlicet clause. The expression "share and share alike" standing alone might refer to a division among classes, as well as among individuals; but this cannot be said of "each to take," which, unless applied to individuals, as the grammatical structure of the paragraph requires, must be regarded as redundant and meaningless. This would violate the elementary rule of construction which forbids the rejection of a word if a meaning can be found for it. "Where a testator uses an additional word or phrase he is presumed to have an additional meaning."

The decree is reversed, at the cost of the appellee, and it is ordered that distribution be awarded in accordance with this opinion.

W. M. S., Jr.

Orphans' Court.

March 17, 1894.

Trust Estate of John Lawrence and Ann Appleton, Deceased, Under the Will of Henry Lawrence.

Decedent's Estate — Trustees — Signature to mortgage — Use of trust funds — Notice — Jurisdiction.

The omission of the word trustees after their signatures is immaterial when the mortgage deed recites them as such.

A mortgage was executed upon a trust property to a corporation for $5,000, and upon it over $10,000 was loaned to the trustees individually; all but $2,000 of this being paid. As security for the payment of this individual debt another corporation took an assignment of the trust mortgage with other securites and paid the debt to the first corporation. It was held that the second corporation was affected with notice and put upon inquiry. And that the trust mortgage must have been presumed to have been paid to the first corporation, since in course of its dealing with the trustees more than $5,000 had been paid.

The Orphans' Court has jurisdiction to enjoin the sale of mortgaged trust property, although the Court of Common Pleas may have refused to open the judgment upon the bond.

Sur petition of the Union Trust Company, trustees under the will of Ann Appleton, for an injunction to restrain certain mortgagees from selling the mortgaged premises under a judgment which was entered on the bond.

The petition set out the following facts:—

That by the will of John Lawrence, in execution of a power of appointment conferred upon him under the will of Henry Lawrence, he devised the real estate in question to trustees under a responsibility to repair, and in trust to pay the net income to Ann Appleton as long as she shall live, for her sole and separate use, remainder to such person or persons, etc., etc., as she should direct by will. In default of testamentary appointment the real estate was to go to testator's grandchildren surviving Ann Appleton, and the issue of deceased children, etc., etc.

There being no power to mortgage or sell real estate under the will of Henry Lawrence, on June 11, 1870, the trustees who were then Henry Pomerene and George W. Appleton, presented their petition to the Orphans' Court for leave to mortgage. Same day, leave granted.

On October 6, 1870, they presented a supplemental petition, asking that another property be substituted, and otherwise changing the terms. Same day, decree made accordingly.

On October 24, 1870, their bond, with sureties, was entered under the decree.

No mortgage was, in fact, given, so far as appears, and the matter was apparently abandoned until the year 1872.

On February 24, 1872, the trustees executed to a building association a mortgage upon the real estate in question, reciting themselves as trustees, but signing as individuals only. Payments were made on account of this mortgage to the building association, and more money was loaned to one of the trustees. Finally, in 1884, the mortgage which had been kept alive unsatisfied, was assigned by the building association, mortgagee, to the "M. L. S." and Building Association of Haddonfield, New Jersey, for $2,000, which it was agreed was the

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sum due upon it. In 1887, judgment was entered on the bond, and an execution was issued against the premises. An issue was framed in the Court of Common Pleas upon petition of one of the trustees, whether the mortgagee knew when it loaned the money that it was to be misappropriated. This issue having been found for the plaintiff a fi. fa. and vend. ex. were issued when this petition was filed, and a preliminary injunction granted.

The prayer of the petition was for an injunction as above, and the matter was referred to a master, who reported, *inter alia*, that the burden of proof was upon the mortgagors of showing the negative that not any of the money was, in fact, not used for the benefit of the estate, to which exceptions were duly filed in behalf of the Union Trust Company, trustees. And to which findings exceptions were duly filed in behalf of the Union Trust Company, substituted trustees, under the will of Henry Lawrence.

E. Spencer Miller and *J. Howard Gendell*, for the petitioners, exceptants.

B. F. Clapp, *W. W. Wiltbank*, *C. C. Lister* and *A. F. Custis*, contra.

April 14, 1894. ASHMAN, J. This application starts out with an unusual question: Whether a decree authorizing, in general terms, the creation of a mortgage for the discharging of prior liens on the improvement of real estate, is carried out by a mortgage effected with a building association? The conditions which the mortgagor assumes in such a case are essentially different from those which accompany an ordinary bond and mortgage. He becomes a shareholder in the association; is subject to the payment of dues upon its stock; and is compelled to submit to the deduction of a premium from the amount of the loan. The order of Court in this instance contemplated a borrowing of $5,000, and the mortgage was given for that amount, but the sum actually received was only $4,445. It would be matter for very serious consideration if the point was raised in a proper way, and within a reasonable time; but the transaction under review took place nearly twenty-four years ago. The decree itself was in proper shape, and it is too late to discuss the manner in which it was carried into effect.

The verdict and judgment in the Common Pleas established the fact that the trustees did not fraudulently misappropriate the money obtained upon the mortgage. This finding bound the petitioning trustee by his own acquiescence. He applied and was permitted to intervene as a party to the suit, and he did not object to the issues which had been framed, but asked only for their enlargement. He is therefore controlled by the inference which irresistibly follows the fact thus ascertained by the jury, and which is, that the trustees reimbursed the lifetenant for the amount she paid to relieve the property from the original encumbrance, because they must have misappropriated the fund if they had done otherwise.

The case then stands in this shape: The estate of the decedent was relieved of an encnmbrance by contracting a new debt, the mortgage to secure which is still unsatisfied of record, and has been assigned, along with the judgment on the bond, to the present holder, for a valuable consideration. The estate is therefore morally responsible to the extent of that consideration, if it has not repaid the loan, because it received the benefit accruing from the loan; and the sole inquiry is whether it is legally bound to the plaintiff.

Various reasons were assigned for its exemption from any legal obligation. The first was that the bond and mortgage purporting to have been given by the obligors as trustees, were in reality their acts as individuals, because the instruments were signed by them as individuals. But the fact that they were trustees, and that they intended to bind themselves as trustees, was fully set out in both papers. The addition to their signatures of their official title could add no force to the writings in which their office was fully disclosed; and its omission could have no greater effect in impairing their force. Whether, however, this issue determined the final point in this controversy, is doubtful. For it appears, and the master reports it as a fact, that the association mortgagee dealt on its books with George W. Appleton, one of the trustees, as an individual, and that it loaned no money at any time to him or to his co-trustee, in their official capacity. On the contrary, it loaned, in the year 1872, to George W. Appleton, at least $8,700, and to his brother, Samuel Appleton, with whom he seems to have had certain business ventures in common, $2,000, and for these personal accommodations it accepted the trust bond and mortgage as security. Its officers could not well shut their eyes to the inference, which was at least palpable enough to put them on inquiry, that the sum for which the mortgage was given represented the maximum sum which the trustees were authorized to borrow, and that the security was *functus officio* for any loans beyond its face value. They may have honestly believed that they were dealing throughout with the borrowers as trustees, and the trustees may have been equally honest in applying the moneys, and this was all which the judgment in the Common Pleas determined. Before 1880, as the master reports, and as we think the evidence fairly shows, a large portion of these loans had been repaid to the associa-

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tion, so that $2,000, the purchase money which the present holder paid in that year for the mortgage, was the full balance of the indebtedness. The presumption would thereupon be that the borrower intended to repay first of all the indebtedness which, as trustee, he had lawfully contracted, and for this his payments were ample. Both on this presumption, and upon the principle that, where no appropriation of payments is directed by the debtor, the payments shall go towards liquidating the debts in the order in which they were contracted, this mortgage, at the time of the assignment, must be held to have been already paid.

Did the purchaser then take a valid title? Notwithstanding what has been said as to the peculiar character of their execution, the bond and mortgage may be fairly conceded to be regular upon their face, and they came directly from the custody of the obligee and mortgagee. But while the transaction was described by the master as a purchase, it was nevertheless as between the trustee who negotiated it, and the present holder to whom it was assigned, a loan to the trustee, and a loan moreover, to him as an individual. Besides the trust bond and mortgage, he gave other securities, including a policy of life insurance, and the purchase was made and the assignment taken in order to relieve him from his personal obligations to the mortgagee. The bond and mortgage had been running eight years. If these circumstances did not put the last holder upon inquiry, it is difficult to imagine what would; and if he refrained from inquiry in order to avoid notice, the law immediately charged him with constructive notice: Babcock *v.* Lisk, 57 Ills. 329; Boxheimer *v.* Gunn, 24 Mich. 379. The corporation purchaser was making a personal loan upon what purported to be a trust security; if it had inquired of the mortgagee, it would have found that double the face value of the pledge had been already loaned to the trustee, and that more than its face value had been repaid. The mortgage was given to secure a trust debt, and it was not only discharged as to the trust estate by the payment of that debt, but it could not be kept alive as a security for the individual debt of the obligors to the mortgagee even as against their personal interests. This was distinctly decided in Thomas' Ap., 6 Cas. 378.

We have discussed the question at this length because the case has been before the Courts, under various aspects, for a decade at least, and we think it is time to end the litigation. The real issue is a narrow one. In the exercise of equitable jurisdiction, which undoubtedly belongs to the Orphans' Court, we may decree the cancellation of the mortgage and its satisfaction of record, because that instrument is dead by reason of its payment. We may also, we think, enjoin against the sale of the mortgaged premises, under the judgment which was entered on the bond. That judgment, although against the trustee in his official character, bound him also as an individual.

He had, it is true, no standing as a trustee to ask that it should be opened, on the ground that it had been paid as to the trust estate, because its opening would have released him from his responsibility as an individual defendant. The Common Pleas therefore properly rejected his application to open; and upon the verdict finding that the trustees were free from fraud, and that the use-plaintiff had no notice, properly allowed the judgment to remain. But a very different question was presented as to the execution. That writ was levied upon premises respecting which the judgment was inoperative; the condemned property belonged to the trust estate, and the debt due by the estate to the plaintiff in the judgment had been paid by the trustee. The substituted trustee thereupon had its choice of remedies; it could apply to the Common Pleas to set aside the execution, or it could petition this Court, as it has done, to enjoin against a sale under the execution. There is no clashing of jurisdictions in granting this prayer. We relieve the trust estate, without impairing the validity of the judgment against the trustee as a personal debtor. Nor is there any hardship to the plaintiff. It dealt with the defendant as an individual, and it placed so little value upon the judgment that it exacted other securities, to which it may now fairly be remitted. The accountability which, at one time, the estate may have been under to the trustee, has lapsed into a matter solely of conscience. The money realized from the mortgage was paid to the estate or expended for its benefit, in 1872, and the mortgage itself was extinguished not later, and probably considerably earlier, than 1876. The interval is too great to permit the trustee, or those standing on his rights, to set up as a valid claim against the estate that he paid the mortgage out of his private funds.

The report of the master is very able; but while we agree in the main with his statement and finding of facts, we are forced to differ respecting some of the technical points upon which he based his conclusions. The prayer of the petition, so far as it asks for the cancelling and satisfaction of the mortgage, and for a perpetual injunction against any sale of the premises under the judgment, is accordingly granted.

W. L. S.

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WEEKLY NOTES OF CASES.

VOL. XXXV.] *FRIDAY, JAN. 4, 1895.* [No. 17.

Supreme Court.

Jan., '94, 177. March 21, 1894.

In re City Avenue and Germantown Bridge.

Appeal of David E. Williams.

Philadelphia—Acts relating to counties—County bridges—Act of May 8, 1876.

The Act of May 8, 1876, P. L. 131, and its supplement of May 3, 1878, P. L. 41, are applicable to the City of Philadelphia, and proceedings under these Acts for the taking of a bridge will be entertained by the Courts.

Appeal of David E. Williams, from the decree of the Court of Quarter Sessions of Philadelphia, setting aside proceedings begun under the Act of May 8, 1876, P. L. 131, for the taking of a bridge.

The facts appear by the opinion of the Court below, BIDDLE, J., which was as follows:—

"It appears by an ordinance passed by the City of Philadelphia, June 8, 1888, permission was granted to 'The City Avenue and Germantown Bridge Co.' to erect a bridge over the river Schuylkill, with a proviso that, when erected, the bridge company should file a sworn statement of the cost of its construction, and that the city should within the period of two years have a right to purchase the same at cost, or to lease the same at the rate of five per cent. on the cost of construction. That the construction was commenced in April, 1889, and the bridge finished and opened to the public on May 30, 1890, and has been therefore in use three years ending on the 30th of May, 1893. The city did not, during the two years, exercise its option to buy it at cost, or to lease it at the rate of five per cent. on the cost of its construction. And now, after a thorough examination by its director of public works and its board of surveys, it has declined to buy it and to appropriate at this time the very large amount of money required to do so.

"The present proceeding is instituted to compel the city to buy it under the provisions of an Act entitled 'An Act to authorize the acquisition by the several counties of this Commonwealth, for the use of the county, of bridges erected over rivers, creeks, and rivulets, and for the abolition of tolls thereon,' approved May 8, 1876, P. L. 131, and its supplement approved May 3, 1878, P. L. 41.

"It is contended on behalf of the city, first, that these Acts do not apply to bridges of municipalities having the right of self-government, and, second, that were the point of jurisdiction otherwise, the present report should be disapproved by the Court in the exercise of that discretion which is vested in it under the terms of the Act.

"The application contemplated by the Act of 1876 and its supplement is to take for public use a bridge erected by a bridge company or other corporation, by the county in which it is situated and by adjoining counties when the bridge spans a stream which divides two counties. The original Act expressly provides for its being taken for a 'county bridge.' This purpose is in several distinct forms of statement repeated a number of times, so often, indeed, that there is no escaping the conclusion that there was no other purpose contemplated except to take such structure out of the possession of the bridge company and make it thereafter a county bridge, free from the collection of toll. The damages are required to be paid out of the county treasury, which damages were authorized to be collected by the counties paying the same, from the tolls taken. This clause was repealed in the Act of 1878. But where the bridge connected two counties, the expense to each was limited at $10,000, subsequently increased to $15,000, so that by no possibility could a bridge between two counties taken under this Act exceed in cost $30,000. The effort here is to make one county take it for $109,807.43. It is upon this manifest purpose contemplated by the original Act, and not changed by its supplement, that the City of Philadelphia rests its first objection.

"For certain purposes the County of Philadelphia still exists as one of the counties of the State. This is declared in the forty-first section of the Act of February 2, 1854. By that Act, known as the 'Consolidation Act,' the entire territory of the County of Philadelphia was incorporated as the City of Philadelphia, and the machinery of county government, so far as it related to the performance of executive and administrative duties, passed into the hands of the enlarged municipality. The reply to whatever objection may be made to the present application on that ground is that the change is one of name rather than of substance; that the county, having a bona fide existence, has only lost the power of doing the various acts of local administration, which were formerly obligatory on it, in the government of the county; that these duties having passed to the municipality, it stands

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in the place of the county, and that what the county may have been able to do and was required to do now, fall on the City of Philadelphia.

"But after all the important fact remains that when the Act of 1876 was passed the City of Philadelphia had been incorporated as it now exists as to extent of territorial boundaries, and possessed substantially like power as a municipal corporation for more than twenty years, and yet in the Act there is nothing from which it can be inferred that it was intended that as a municipality it should be made subject to its provisions.

"If such was the purpose of the Legislature, it could easily have been made to appear. This having been entirely omitted, the inference is reasonable that the municipality of Philadelphia was not intended to be brought under subjection to the provision of the Act or Acts in question.

"If this is a sound construction, it follows that the law is special in its application to counties other than that of Philadelphia.

"Entertaining these views, it is not necessary to consider the second objection urged by the city.

"The rule to set aside the proceedings in this case is made absolute."

David E. Williams, one of the petitioners, took this appeal, assigning as error the finding of the Court.

John G. Johnson, (*John S. Gerhard* with him), for appellant.

The Act of 1876 was passed to meet a case of the kind before the Court. It was the only Act by which within the City and County of Philadelphia a bridge could be taken for public use, and is the only one by which the citizens of the city and county can be relieved from the unjust burden of paying tolls.

The County of Philadelphia is one of the counties of the State.

Act of February 2, 1854, sec. 41, P. L. 21.
Commonwealth *v.* Oellers, 140 Pa. 457.
Taggart *v.* Commonwealth, 102 Id. 354.

If it be held that the Act of May 8, 1876, excludes the County of Philadelphia, we should have a necessarily unconstitutional, because special, law.

E. Spencer Miller, assistant city solicitor, (*Charles F. Warwick*, city solicitor, with him), for appellee.

The question is whether the statute which provides for the acquisition of a bridge to be a *county bridge* by a mode of proceeding involving distinctively *county machinery* alone, was intended to apply to bridges which would be taken for *municipalities* if taken at all.

There are many examples of county laws which are manifestly unsuited to municipal governments, *e. g.* :—

Act of March 24, 1877, P. L. 40.
Act of May 25, 1878. P. L. 150.
Act of June 11, 1879, P. L 146.
Act of April 17, 1866, P. L. 110.
Act of April 9, 1868, P. L. 73.

Though cities had not in 1876 power to *condemn* a bridge for public use (this was given them by the Act of May 26, 1893, P. L. 154), they had power to purchase at volition.

It is submitted that statutes for general application in counties of the State must be excluded from application in Philadelphia County in all cases in which it is palpable from their terms that they belong to a department of county government which was superseded by branches of the city government.

In re Twenty-eighth St., 102 Pa. 140.
Evans *v.* Phillipi, 117 Id. 226.

October 22, 1894. McCollum, J. The learned Judge of the Court of Quarter Sessions thought the Act of May 8, 1876, "authorizing the acquisition by the several counties of this Commonwealth, for the use of the county, of bridges erected over rivers, creeks and rivulets, and for the abolition of tolls thereon," was not applicable to Philadelphia County, because the Legislature did not specifically declare it to be so. This thought appears to have had its origin in a supposition that the Legislature, having knowledge of the change effected by the Consolidation Act, would have said that the Act of May 8, 1876, was applicable to Philadelphia, if it was intended that it should be. But Philadelphia then was, and still is, one of "the several counties of this Commonwealth," and inasmuch as the Act in question relates to the acquisition of bridges by them, there is no room on the face of it for an inference which denies to any county the privileges and powers conferred by it. An intention to exclude Philadelphia County cannot be inferred or implied from the non-exclusion of it, or from anything in the title or body of the Act. What valid reason appeared to the Legislature for withholding from Philadelphia County the power granted to other counties in relation to the acquisition of toll bridges? It was not, by any previous legislation, clothed with this power and the City of Philadelphia was not. It was qualified to exercise the power in conformity with the provisions of the Act. Why, in the presence of these facts, should it be assumed that the Legislature intended to exclude Philadelphia County when it was obvious that such exclusion would materially abridge the powers and privileges of counties adjoining it in respect to the acquisition of bridges over streams constituting boundary lines between counties?

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We cannot find in the legislation or in the conditions then existing any satisfactory answer to this question in accord with the conclusion reached by the learned Judge of the Court below. It is our opinion, therefore, that the Act of May 8, 1876, was intended to apply to all the counties of the Commonwealth. No other view can be taken of it which is consistent with its title or its provisions. In this view of the case we do not deem it necessary to determine whether other Acts in relation to counties, to which the counsel for the appellee have called our attention, are or are not applicable to Philadelphia County, or whether the exclusion of it would have condemned the Act in question as violative of the Constitution.

What we have said in reference to the Act of May 8, 1876, extends and applies to its supplements. It is not claimed that this legislation is in any respect affected by the Act of May 26, 1893, under which it is possible that the City of Philadelphia may condemn a bridge for public use. The system provided by the Act of 1876 and its supplements still remains and is applicable to Philadelphia County. It follows from these views that the learned Court below erred in making absolute the rule to set aside the proceedings in this case. It had jurisdiction of the subject and should have heard and disposed of the application on its merits.

The order setting aside the proceedings is reversed and a procedendo awarded.

J. D. B., Jr.

Oct., '94, 114. October 24, 1894.

Com'th ex rel. Boyle v. Mercer et al. Commissioners.

County Commissioners, Allegheny County—Constitution, Art XIV. § 5—Acts of May 1, 1861, P. L. 450, and April 6, 1871, P. L. 476, considered—Acts Feb. 20. 1873, P. L. 137, March 6, 1872, P. L. 208.

In counties containing more than 150,000 inhabitants county commissioners are salaried officers and the number and pay of the clerks to be employed by them are to be fixed by the salary board of the county.

The county commissioners in a county of over 150,000 inhabitants have no right to let out the work of transcribing registry, treasurer's, tax books, etc.

Appeal of Robert E. Mercer and James G. Weir, two of the county commissioners of the County of Allegheny, respondents, from the decree of the Common Pleas No. 3, of Allegheny County, in an application by Dennis J. Boyle, one of the county commissioners of said county, for a mandamus.

The facts are fully stated in the opinion of the Supreme Court.

N. S. Williams, for appellants.

The question is whether the transcribing of registry books, treasurer's books, tax books, etc., in the commissioners' office of Allegheny County should be done by contract let to the lowest bidder, as provided in the seventeenth section of Act of Assembly approved May 1, 1861, and the twentieth section of the Act of Assembly approved April 15, 1834, or should be done by clerks employed in accordance with the provisions of the Acts of Assembly known as the "Salary Board Acts." Our contention is that the salary of the commissioners being fixed by the amendment to the Act of 1871, (Act of March 6, 1872, P. L. 208,) it has the same force and legal effect as though included in the original Act of April 6, 1871, P. L. 476, relating to fees, etc., in Allegheny County, and therefore, the salary board has jurisdiction "to ascertain and determine the number of clerks or deputies required for the proper dispatch of business as often as required by any of the officers whose salaries are established by this Act," which by virtue of the amendment above referred to, includes the county commissioners. The learned Court in the opinion filed, wholly over-looked the Act of March 6, 1872. The Act of February 20, 1873, P. L. 137, provides, "That from and after the passing of this Act that all salaries payable to the different officers of Allegheny County and their clerks shall be payable monthly, and the salaries of all the clerks in the different county offices shall be fixed in like manner, as is specified in Section 9 of Act approved 6th of April, A. D., 1871, entitled, 'An Act relating to the fees,'" etc., that is, by the salary board. Section 39 of said Act expressly repeals all Acts or parts of Acts not in conformity with this Act. The Salary Board Act of March 31, 1876, P. L. 13, is a mere re-enactment of the former local Act relating to Allegheny County, and has been adjudged to be in force in Allegheny County. (Com'th *v.* Mercer *et al.*, 41 Pitts. Leg. Jour., 377, November 1, 1893.)

McCandless *v.* Bessemer Steel Company, 152 Pa. 146.

Com th *ex rel.* Richards *v.* Grier, Controller. C. P. of Allegheny County, decided in March, 1894.

The Act of 1879, P. L. 72, is an attempt to repeal the Act of 1876. Section 2 of the Act approved July 5, 1883, P. L. 183, is a substantial re-enactment of section 9 of the Act of 1871, and of section 7 of the Act of 1876. The employment of clerks to transcribe the books above mentioned, should be done as provided in these

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Salary Board Acts, and any other method is illegal.

A mandamus will not lie to compel the performance of an unlawful Act, and to warrant a writ against a public officer, the relator must show a clear right.

High on Extra. Rem. Section 32, etc.
The Com'th *v.* Pittsburg, 10 Casey, 496.
Easton *v.* The Water Co., 97 Pa. 560.

And where substantial doubt exists as to the duty whose performance it is sought to coerce or as to the right or power of the officer to perform the duty the relief will be withheld.

State *v.* Grubb, 85 Ind. 213.

Especially when it is apparent that the interests of third parties not before the Court are involved.

Bracken *v.* Wells, 3 Tex., 88.
Tabor *v.* Commissioners of the Land Office, 29 Id. 508.

William J. Brennen, (*William Yost* with him), for appellee.

A general affirmative statute will not repeal a previous particular statute upon the same subject though the provisions of the former be different from the provisions of the latter.

Bell *v.* Allegheny County, 149 Pa. 381.
Com'th *ex rel.* Burleigh *v.* Grier, 152 Id. 176.

To repeal a statute by implication there must be such a positive repugnancy between the provisions of the new law and the old that they cannot stand together or be consistently reconciled.

City of Harrisburg *v.* Sheck, 104 Pa. 57.
Township of Girard *v.* Borough of Girard, 86 Id. 28.
Brown *v.* The Commissioners, 21 Id. 37.

The Act of Assembly, approved the 20th day of February, A. D., 1873, P. L. 137, has no reasonable relation to the question at hand. While it is not admitted that the county commissioners, under what are known as the "Salary Board Acts," are authorized to appoint clerks without limit to perform the duties defined in the twentieth section of the Act of 1834, this question is not material or involved. The 20th section of the Act of 1834, defines the duties of the Commissioner's clerks and that the commissioners are not authorized to employ persons to do writing by the day as was done in this case.

November 12, 1894. DEAN, J. Dennis Boyle, Robert E. Mercer and James G. Weir, compose the board of county commissioners for Allegheny County. On the 9th of January, 1894, by a vote of Mercer and Weir, a majority of the board, (against the protest of Boyle) joined by James A. Grier, county controller, making up what is known as the salary board, the following resolution was passed:

"That they employ clerks when necessary to do the transcribing of registry books, and the treasurer's books, and extending taxes, and writing shelve and school books, at the sum of $2.50 per day. The number not to exceed 40 clerks."

Mr. Boyle, believing that this mode of having the work done was contrary to law, petitioned the Court below for a mandamus directed to the other two commissioners, commanding them to join with him in letting the work to the lowest bidder, which the Court awarded. From that decree the commissioners take this appeal.

There is but a single question in the case. Are the commissioners to have this work done under the Act of May 1, 1861, or under the Act of April 6, 1871, and its supplements?

The Act of 1861, provides that all contracts made by the commissioners, involving an expenditure of more than twenty dollars, shall be in writing, and that all contracts involving an expenditure of more than one hundred dollars shall be made with the lowest and best bidder, after due notice to be published.

The 9th section of the Act of 1871, enacts that "the county controller and the county commissioners, shall be and they are hereby construed a board, whose duty it shall be to meet together from time to time, as they may be required by any of the officers whose salaries are established by this Act, for the purpose of ascertaining and determining the number of clerks and deputies required for the proper dispatch of business by each such officer, and also for fixing the salary of each said clerk and deputy."

The Act further provided that if either of said officers alleged the number of clerks fixed for his office was too few, or their compensation too small, he should have an appeal from the decision of the salary board to the Court of Common Pleas.

This was followed by the supplement of the 6th of March, 1872, in section 6 of which, it is provided, that the county commissioners shall each receive in lieu of all other compensation an annual salary of $2,000. Then followed another supplement, that of 20th of February, 1873, which enacted that all salaries payable to the different officers of Allegheny County and their clerks, should be payable monthly, and the salaries of clerks should be fixed as provided by the 9th section of Act of 1871.

It seems to us clear, that the Act of 1871 directed that the salary board should fix the number of clerks to be employed by all salaried officers, and their compensation; that the Act of

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1872 declared the office of the county commissioner a salaried office, and the Act of 1873, in effect, declared the number of clerks in that office and their compensation should be determined by the salary board as provided in section 9 of the Act of 1871. Then came the general Act of 1876, and supplements, which, in substance, carried into effect section 5, Article XIV. of the Constitution, by extending over the whole State the provisions of the local Acts for Allegheny County. And the general Act of 1883, is a re-enactment of the material provisions of these Acts so far as relates to clerks and their compensation.

The Act of 20th of February, 1873, by directing that all salaries should be paid monthly and all clerk's salaries should be fixed as specified in section 9 of the Act of 1871, after the office of county commissioner had been constituted a salaried office by section 6 of the Act of 1872, took the clerks of this office out of the provisions of the Act of 1861, and placed them as to number and compensation under the decision of the salary board.

From the facts established by the petition and answer, it is very doubtful if the kind of work to be done by these clerks was intended to be let out by contract under the 17th section of the Act of 1861, even if subsequent legislation had not clearly taken it out the class of "other writing or work" therein specified. In many of the counties of the State now, where the population is less than 150,000, without being directed by law so to do, the county commissioners let out by contract, writing. Transcribing worn-out and illegible dockets, records and papers can be let out advantageously by contract. But the character of this work in question, which must be done within a limited time, its uncertainty as to quantity; the necessity of constant supervision while in progress, all point to the necessity of doing it by clerks appointed for that special duty. A banker might as well let out to the lowest bidder the keeping of journals and ledgers. He would doubtless get lower bids than the aggregate salaries of his clerks amounted to, but he would hardly find there was much of a saving in the end. But whether the Act of 1861 could be held to include this work or not, subsequent legislation has, in distinct, positive terms, made other provisions for it, and to this extent that Act is not operative.

The learned Judge of the Court below, in his opinion, has not noticed the Acts of March 6, 1872, and 20th of February, 1873. They were not probably brought to his attention. They are conclusive against the construction and effect given by him to the Act of 1861. Therefore, the decree is reversed and petition dismissed at costs of the County of Allegheny. W. C. S.

Oct. '94, 4. October 1, 1894.

Craft's Estate.
Martin's Appeal.

Will—Revocation by subsequent marriage—Effect of probate—Ante-nuptial agreement by husband binds himself only.

A woman's will is revoked by her subsequent marriage, absolutely, for all testamentary purposes.

While an ante-nuptial agreement by the man whom she marries may in equity be given effect to sustain the provisions of the will as to him, such an agreement has no effect whatever upon the question of revocation by marriage in regard to the rights of third parties. The invalidity of such an instrument is not cured by its admission to probate.

On a question of distribution the validity of testamentary provisions depending on facts *dehors* the record may be inquired into, notwithstanding probate.

Appeal of H. H. Martin, guardian of Florence Mildred Craft, from the decree of the Orphans' Court of Venango County, making distribution upon a partial account of the administrator c. t. a. of the estate of Florence Hopkins Craft.

Before C. A. Myers, Esq., auditor, it appeared that Mrs. Florence Hopkins, a widow, being about to marry, on September 27, 1886, made a will in which, after the payment of certain legacies, she bequeathed her estate to her three children. At the foot of this paper was a written agreement signed and sealed by James N. Craft, stating that in pursuance of agreements made with the testatrix, and in consideration of a contemplated marriage between them, the writer gave his full and free consent to the making of the foregoing will. The parties were married October 6, 1886. On September 15, 1887, a child, Florence Mildred Craft, was born to them, and on October 12, 1887, Mrs. Craft died, leaving to survive her, beside the child last named, her husband, James N. Craft, and three children by her former husband.

On October 27, 1887, the will of Mrs. Craft was admitted to probate. James N. Craft acknowledged the agreement thereon, and W. J. Bleakley was appointed administrator c. t. a. on December 28, 1887. On December 27, 1889, a first and partial account was filed by the administrator, showing a balance in his hands of $43,472.28, which formed the subject of the audit. On April 15, 1892, James N. Craft filed with the auditor a disclaimer, renouncing and releasing any and all claim and interest in the estate of Florence Hopkins Craft as her surviving husband.

The auditor found that the will had been revoked by the subsequent marriage of the testatrix, and was not republished, and reported distribution among the four children as in case of

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intestacy. Exceptions to the report were sustained by the Court, and the entire balance then in the hands of the accountant awarded to the three children of the decedent by her first marriage.

The guardian of Florence Mildred Craft took this appeal, assigning as error the action of the Court in sustaining the exceptions to the auditor's report and the decree entered.

Robert F. Glenn and *J. H. Osmer*, for appellant.

The consent of James N. Craft, executed at the time of the making of the will, affected himself only.

Lant's Appeal, 95 Pa. 279.

The will was revoked by the subsequent marriage.

Act of April 8, 1833, sec. 16, Purd. Dig. 1712.

"Probating does not create a will. It cannot make a will out of a writing which was not a will before."

Bowlby *v.* Thunder, 105 Pa. 173.

To the argument that the alleged will cannot be attacked collaterally, we reply that want of jurisdiction of the subject matter can be taken advantage of at any time.

Wall *v.* Wall, 123 Pa. 545.
Shoenberger's Estate, 139 Id. 132.
Fowler *v.* Eddy, 110 Id. 117.

C. Heydrick (*Carl I. Heydrick* with him), for appellee.

The presumption invoked by the counsel for the appellant that parties know the law, from which it is argued that these particular parties knew that a will executed by a single woman would be revoked by her subsequent marriage, is never permitted to defeat lawful intentions. It was not deemed worthy of attention in Lant's Appeal, 95 Pa. 279, and this is a much stronger case in favor of an ante-nuptial settlement.

Under the Act of 1833 a man's will was not revoked by a marriage or birth of children (sec. 15); a woman's will was so revoked by subsequent marriage (sec. 16).

This being the law, the disability of married women to make wills was removed by the Act of April 11, 1848, P. L. 537. If then the instrument under consideration be deemed a will it seems to follow:—

1. That it was revoked by the subsequent marriage.

2. That republication after that marriage was necessary to give it validity under the Act of 1848 and entitle it to probate.

3. That the decree of the register is in this proceeding conclusive evidence that such republication was made.

4. That the instrument having been determined by the decree of the register to be the will of Florence Hopkins Craft, and disposing of her whole estate, she did not die intestate as to any part of that estate.

This is plainly the doctrine of

Broe *v.* Boyle, 108 Pa. 76.

November 5, 1894. MITCHELL, J. The will of Mrs. Hopkins was absolutely inoperative as a will, her marriage to Craft having revoked it under the express language of section 16 of the Act of 8th April, 1833, P. L. 250, that "a will executed by a single woman shall be deemed revoked by her subsequent marriage." Nor is this effect defeated as to the appellant, by the probate. In Hegarty's Appeal, 75 Pa. 503, it was held that on a question of distribution the validity of testamentary provisions depending on facts *dehors* the record may be inquired into notwithstanding probate. And in Robeno *v.* Marlatt, 136 Pa. 35, the will devised testator's whole estate to his widow absolutely, and was duly probated, yet after-born children were held entitled to recover in ejectment as if their father had died intestate. If an after-born child can thus claim against a will revoked *pro tanto* only, there should be no difficulty in his recovery against a will revoked altogether.

The learned Court below considered that the will and the written consent of the husband must be construed as one instrument, and upheld as an ante-nuptial agreement. As against the husband this would be clearly so upon the principles of equity, and was expressly decided in Lant's Appeal, 95 Pa. 279, but the question in that case was between the husband and those claiming under the will. Here the husband is making no claim and the question before us is different. The will is not in form a marriage settlement at all. It is only treated as such, in connection with the husband's written assent, by equitable construction, and equity will never carry construction beyond the exact purpose for which it is needed. As to Mrs. Hopkins it was not an irrevocable settlement, nor is there any reason to suppose that she regarded or intended it as a settlement at all. Its sole purpose was to bar the husband from the marital rights which he would otherwise acquire in her property by the contemplated marriage. She might have made a deed of settlement under which her children by her first marriage would have acquired rights even against herself, but she did not do so. She chose a revocable instrument, effective for her purpose to bar her intended husband, but otherwise leaving her in free control of her property. She might at any time have made a later will, and her children would have no standing to object. The instrument she did make was revoked

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as matter of express statutory law by her marriage, and equity is not called upon to enforce it for a purpose for which it was never intended. The Act of 1833 does not revoke it merely as to the husband, but absolutely for all testamentary purposes, as is shown by the provision that it "shall not be revived by the death of her husband." As a will therefore the paper executed by Mrs. Craft was void at the time of her death, and it is only as a will that her children it provides for have any concern with it. As to the appellant in right of his ward, Mrs. Craft must be treated as dying intestate, and the distribution reported by the auditor was correct.

Decree reversed, and record remitted for distribution in accordance with this opinion.

J. D. B., Jr.

Oct. '94, 85. October 2, 1894.

Hart v. Stoyer.

Wills—Construction of—Repugnancy—To be removed where practicable by consideration of the whole will.

Where two clauses in a will are absolutely repugnant, the latter must prevail even to the total exclusion of the first; but exclusion for repugnance is a principle of construction only to be invoked as a last resort, after all efforts to reconcile and give harmonious meaning to both have failed.

S. by his will made provision for the support of his wife and, *inter alia*, devised to her "the dwelling house in which we are now living, and all there is therein, to have and to hold the same until her death, when it shall go to my two daughters M. and F., with the exception of the organ, which shall go to my son C." He then divided his farm between his sons P. and G., charging the portions in their hands with specified sums in favor of his other children. With the portion of the farm given to P. he devised "the adjoining dwelling house in which my son G. is now living." The balance of the farm devised to G covered the dwelling house previously given to his wife as above. After the death of the widow, M., one of the daughters of S., brought an action of ejectment against her brother G. to recover her interest in the dwelling house devised to the widow for life:

Held, that the bequest over to the daughters was only of the contents of the house.

Held, also, that the house was devised to G. after the life estate of the widow.

Appeal of Mary Etta Hart, plaintiff, from the judgment of the Common Pleas of Venango County, in an action of ejectment, brought by Mary Etta Hart against George W. Stoyer, to recover a dwelling house, with the curtilage belonging thereto, situate in the township of Canal, Venango County.

Upon the trial, before TAYLOR, P. J., the following facts appeared: Peter Stoyer, being seized of certain lands in Venango County, of which the premises in question formed a part, made his will, of which the following clauses only are material:—

"Item 1. I give, devise, and bequeath to my beloved wife Susannah, the dwelling house in which we are now living and all there is therein, to have and to hold the same until her death, when it shall go to my two daughters Marietta and Frances, with the exception of the organ, which shall go to my son Charles Irwin. I also give to her two cows and one horse, to have and to hold the same forever. I further give and bequeath to her one-fourth of all the grain and fruit raised upon the farm on which I am now living and also a garden, the product of which she is to have; the said portion of grain and fruit and garden stuff to be held and possessed by her, until she shall no longer be able to take care of herself, and must be kept, cared for and boarded by my son George Washington as hereinafter stated.

"Item 2. I give and bequeath to my son Peter Augustus forty acres from the east end of my farm which is situated in Canal Township, Venango County, Pa., and is bounded as follows: . . . . Said Peter Augustus to give to his mother as already mentioned, the one-fourth in the bushel, of all the grain and fruit raised on the above forty acres until the time herein already stated. I further give and bequeath to the said Peter Augustus, the adjoining dwelling house, in which my son George Washington is now living; also a flock of sheep, should I possess such at the time of my decease, to have and to hold the same to him, his heirs, executors and administrators and assigns forever, provided he pay to my daughter Marietta five hundred dollars one year after my death.

"Item 3. I give and bequeath to my son George Washington the remainder of my farm, herein already described, after the forty acres are cut off; also all machinery, farming utensils, wagons, buggies, etc., etc., that may be here at my decease, to have and to hold the same to him, his heirs, executors and administrators and assigns forever—provided the said George Washington pay to my son Charles Irwin five hundred dollars; to my son William Henry five hundred dollars, and to my daughter Frances Christiana two hundred dollars, to be paid to them respectively one year after my death; and be it further provided that the said George Washington give to his mother one-fourth of all the grain and fruit in the bushel raised on the above mentioned portion of the farm as long as already herein stated; and that he keep and take care of her cows and horse, and that he take care of and provide all things needed for the comfort of his mother during her lifetime.

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"Item 4. I give and bequeath to my daughter Frances Christiana, in addition to the two hundred dollars she is to receive from my son George Washington, the small tract of land situated in Wayne Township, Crawford Co., Pa."

Peter Stoyer died shortly after making this will, leaving a widow, since deceased, and six children, George W., the defendant, Peter Augustus, Charles, William, Frances and Mary Etta, the plaintiff. Frances died shortly after the death of her father. Upon the death of her mother, Mary Etta brought this action of ejectment to recover her interest in the house as devised to her by the first clause of the will, and also the interest devised as an heir of her sister Frances. George W. Stoyer, the defendant, claimed the house and curtilage as passing to him by the devise of the farm in the third clause of the will.

On motion of the defendant the Court granted a compulsory non-suit, which it afterwards refused to take off, on the ground that the third item in the will, relating to the farm, revoked the former devise of the house to the widow, with remainder to the plaintiff and her sister, as being repugnant. Whereupon the plaintiff took this appeal, assigning for error this action of the Court.

B. H Osborne and *John O. McCalmont*, for appellant, cited

Sheetz's Appeal, 82 Pa. 213.
Newbold *v.* Boone, 52 Id. 167.
Jones' Appeal, 3 Grant, 169.
Finney's Appeal, 17 WEEKLY NOTES, 494.
McFarland's Appeal, 37 Pa. 300.
Wilson *v.* McKeehan, 53 Id. 79.

George S. Criswell, for appellee.

The cardinal rule for the construction of a will is that the intent of the testator is to be gathered from the four corners of the will taken as a whole, and considered in the light of all the surrounding circumstances of the testator, his family, and the amount and character of the property devised or bequeathed in the will.

Postlewait's Appeal, 68 Pa. 479.
Thompson's Appeal, 89 Id. 36.
Koppenhaffer's Appeal, 87 Id. 196.
Miller's Appeal, 113 Id. 459.
Baker's Appeal, 115 Id. 590.
Markley's Estate, 132 Id. 354.
Blackmore *v.* Hickman, 32 Smith, 288.
Thompson's Appeal, 39 Leg. Int. 328.
Ferry's Appeal, 105 Pa. 207.
Middleswarth *v.* Blackmore, 74 Id. 414.

The will clearly shows an intention to distribute the testator's property equally among his children, each receiving either in land or money, about $500.

The grammatical construction of the first clause in the will shows that it was only household effects which were to go to the daughters upon the death of their mother.

November 5, 1894. MITCHELL, J. The language of the will in items one and three taken literally is inconsistent, as the first gives the dwelling house expressly to the widow for life, followed by the gift to the daughters, whatever may be its extent, while the other gives it by description, necessarily inclusive, to his son George. But it is manifest that no such inconsistency was in the mind of the testator, and hence we must seek his intent by an examination of the whole will. It is true that if two clauses in a will are absolutely repugnant, the latter must prevail, even to the total exclusion of the first. But exclusion for repugnance is a principle of construction only to be invoked as a last resort, after all efforts to reconcile and give harmonious meaning to both have failed.

Taking the whole will of Peter Stoyer together, it is clear that his first purpose was to make provision for his wife, by giving her the house in which they had been living, and everything therein, for her life, with a horse, cows, and a share of the grain, fruit and garden stuff for her support. After this first purpose it is reasonably certain that his general intent was to divide his farm between his sons Peter and George, charging the portions in their hands with specified sums in favor of his other children. In carrying out this scheme, he gives forty acres from the east end of the farm to Peter, together with "the adjoining dwelling house in which my son George Washington is now living," and "the remainder . . . . after the forty acres are cut off" to George. This last devise covers the dwelling house previously given by the first item, in these words, "to my beloved wife the dwelling house in which we are now living, and all there is therein, to have and to hold the same until her death, when it shall go to my two daughters, Marietta and Frances, with the exception of the organ, which shall go to my son Charles." So far as the gift to the widow is concerned, there would be little difficulty in reconciling the two devises by construing the later one to be the remainder in fee after the life estate previously given to the widow. But what did the testator mean by "it" which is to go to the daughters on the mother's death? Grammatically "it" would seem to refer to the house; but the testator certainly did not mean the house alone, for he excepts the organ, which can only go as part of the contents. If he meant the house and its contents, then "it" was an incorrect word to express his meaning. Did he intend to include the house at all? "It" is not a correct word to describe the contents of the house, but it is no worse for that purpose

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than to describe both house and contents. The grammar is faulty, whichever meaning we give it. Returning to the general intent we observe that there were two houses on the farm, one in which testator lived and the other in which George lived. Both were upon the part devised to George, but the one in which he was living is specifically given to Peter. If the other is given to the daughters after the mother's death, then George is left in the position of having no house, though he is given a farm which has two houses upon it. But the objection to this view does not rest solely on the improbability of such a division of the estate. By item one the widow is expressly to have the dwelling house for life, and a share of the crops, etc., "until she shall no longer be able to take care of herself, and must be kept, cared for, and boarded by my son George as hereinafter stated," and by item three George is to give his mother her share of the crops "as long as already stated, and keep and take care of her cows and horse, and take care of and provide all things needed for the comfort of his mother during her lifetime." Where is he to keep, care for, and board his mother, except in the house which she is to have for life, but which is on his farm, and is included in the devise to him by item three?

There is no construction of this will which is entirely free from objection. The one which would make the word "it" in item first refer correctly to the house alone, is rendered impossible by the next clause, which by express mention of the organ shows conclusively that the testator did not mean the house alone; the next, which refers "it" to both house and contents, is opposed to the clear general intent to divide the farm between Peter and George, and makes no better grammar than the third, which refers "it" to the contents of the house only, and is supported by the general intent and also by the specific provisions in regard to the widow and George's care of her. We are of opinion that this last presents the least difficulty, and must be adopted. The house was the widow's for life, and at her death it went to George in fee, while its contents went to the daughters.

Judgment affirmed. S. H. T.

Oct., '94, 139. October 4, 1894.

Estate of Lot Gardner.

Lost Will—Proof of—Issue—Revocation.

Where a will, which is shown to have been executed by the testator, cannot be found, and it is sought to obtain probate thereof by the production of a copy, the burden is upon the proponents to overcome the presumption of revocation, and not only the testator's character, condition, acts and declarations, but the conduct and interests of those around him from and after the date of the will, are legitimate subjects of inquiry.

Where a will has disappeared before probate thereof, and it is alleged to have been concealed or destroyed by persons other than the testator, an issue, whether or not it had been revoked, is of right, unless the evidence of the fact be so doubtful and unsatisfactory that a verdict in favor of the will would not be permitted to stand.

Appeal of Boston Gardner from the decree of the Orphans' Court of Clarion County, dismissing his petition for the probate of the will of Lot Gardner, deceased.

Lot Gardner, of West Monterey, Perry township, Clarion County, Pa., aged about 70 years, died early on the morning of November 20, 1889.

On the 3d day of December, 1889, letters of administration on his estate were granted by the register of said county to Jesse F. Gardner, who soon thereafter entered upon his duties in the premises.

On June 20, 1890, Boston Gardner presented a petition to the register, setting forth, *inter alia*, that he was a brother and heir of Lot Gardner, and interested in his estate; that prior to his death the decedent had made his last will and testament, dated about November 6, 1889, which, after diligent search, cannot be found, and appears to be lost; that the writing attached to the petition, written on three pages of paper, had been made by one J. A. Summerville, Esq., as a true copy of decedent's will, he being the scrivener who wrote and witnessed it, and praying the register that this writing, alleged to be a copy thereof, might be admitted to probate as the last will and testament of Lot Gardner, deceased, and that the letters of administration granted to Jesse F. Gardner be revoked.

A citation was issued to the administrator and other next of kin to the decedent, who filed answers demanding an issue, and the register certified the case to the Orphans' Court, who referred the matter to David Lawson, Esq., standing auditor, to report the facts, law and form of an issue, if any, to be certified to the Common Pleas. The auditor found the facts, as appears by the following extract from his report:

"In the fall of 1889, Lot Gardner, the deceased, was living in the village of West Monterey, in Perry township, Clarion County. He was at that time about 70 years of age, and unmarried. He had lived in West Monterey for more than twenty years, and was engaged in the mercantile business a great part of that time. For some time prior to his death he was a stockholder in the Miners' Supply Company store at that place, and business manager for the company. Mrs. Isabella Crow lived in a house be-

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longing to him for about a year and eight months prior to his death, and he lived in the same house and boarded with her. Mrs. Crow was his niece, being a daughter of a deceased sister. The family consisted of Mrs. Crow, her daughter, Nancy Crow, and Lot Gardner, and part of the time his sister, Mrs. Nancy Fulton. Mrs. Fulton was there during the last month of his life.

"On the 6th day of November, 1889, J. A. Summerville went to his house in Monterey for the purpose of writing a will for him, in answer to a letter he had received. He found him down stairs in the kitchen, and after speaking to him and making himself known, Gardner invited him to his room upstairs. They were but slightly acquainted, and after they went to the room Gardner requested him to keep their business secret, saying that he had never made a confidant of anyone, and that he did not want it known what disposition he had made of his property until after he was gone. He then opened his trunk and took out his papers and notes, and he and Summerville looked over them. He had among his papers what represented $27,400, and he said he did not want to dispose of all of it by will; that he wanted to keep enough to set Elmer Gardner up in business, and that he had some gifts about Monterey that he wanted to make, and he thought he would be able to make them personally before he died; and he thought he would have strength to do it himself. He wanted to dispose of $18,000 by will. He first told Summerville the names of the different persons and objects that he intended to make bequests to, and Summerville made a list of the names. He then had him put down the amount he intended to give to each one; when the amounts were footed up it fell short of the amount he wished to bequeath. Then they made another list of the same names, and increased the amounts intended to be given to some of them. The total amount still fell short of the amount he intended to bequeath. He continued to increase the amounts until they had four or five lists, and had the amounts they wanted. The last time he only added to the amounts given to Boston Gardner, Lot E. Gardner and Curtis Armstrong.

"Summerville then prepared a will from this memorandum, putting in the names of the legatees and the amounts bequeathed to each as on the list or memorandum. Summerville testifies that he wrote it just as Gardner dictated it.

"After he had completed the writing Gardner read it and signed it. P. H. Bailey was sent for, and when he came in he and Summerville witnessed the will. After the will was signed and witnessed Lot Gardner put it among a package of deeds that was in his trunk and put a gum band around them, and placed them in the upper part or tray of his trunk which was in the room.

"There was no person in the room when the will was written, except the testator and Summerville; and no other person when it was executed but Bailey, who was called in to sign as witness.

"At this time Gardner was in failing health, though able to go round the house. He continued to get weaker, until the morning of Wednesday, the 20th day of November, 1889, when he died. He had not been able to leave his room for several days, and for some three or four days was confined to his bed. On the following Friday J. A. Summerville was called on to go to the house of the deceased and read this will, but was unable to find it. The papers in the trunk in which it had been put had the appearance of having been rummaged among, and the will could not be found, and has never been found.

"After it was ascertained that the will could not be found, Jesse F. Gardner asked Summerville if he had any memorandum of the contents of the will, and was informed that he had not. But after some time—probably a month after the death of Lot Gardner—Summerville found in his coat pocket the memorandum made at the time the will was written. He then informed Jesse Gardner that he had found the memorandum, and at the request of James Craig, Esq., he made the copy offered for probate. He testified that the wording of the copy is the same in substance as the original will; that he reproduced that from memory; but that the names of the legatees and the amounts bequeathed to each was taken from the memorandum made when the will was written. He says that W. A. Hindman, Esq., requested him, about a week after the death of Lot Gardner, to furnish a copy of the will, but at that time he had not found the memorandum—and could not do it. That without the memorandum he could not have remembered the names of all the legatees or the amounts given to each of them.

"Respondents in their answers aver that if any such paper or writing was ever executed by Lot Gardner the execution thereof was procured by duress, fraud and imposition, and undue influence exercised over the mind of said Gardner, but they have offered no evidence in support of this position. None of the beneficiaries in the will were present when it was written or executed, and so far as appears by the evidence, they had no knowledge of his intention to make a will. The scrivener was the only person present when it was written; he was but slightly acquainted with Gardner, and wholly disinterested; and he says he wrote it just as Gardner dictated it, and that Gardner said he had ful-

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ly matured in his mind whom he wanted to give to.

"Respondents also charge that at the time of the execution of the alleged will, 'the said Lot Gardner, deceased, was not of sound mind and disposing mind and memory.' A large amount of the testimony taken is on this branch of the case, but the evidence is not such as would justify a jury in finding a want of testamentary capacity. . . . .

"It is contended that there is no certainty that the memorandum from which Summerville made the copy is the one from which the original will was written; that he had no recollection of preserving it, and that having made several in which the amounts of the legacies were different, he might have found one of the others, and if so, the paper offered is not a correct copy. He would have no difficulty, however, in determining that, from the aggregate amount of the legacies, as no two of them were the same in that respect; and if the same evidence that is ordinarily required to prove the contents of a lost paper is sufficient to prove the contents of a lost will, the testimony in this case is sufficient; and, there being no conflicting testimony, if sent to a jury the Court would control its finding.

"Counsel for petitioners cite the case of Eshelman *v.* Eshelman, 9 L. Bar, 1, to show that one witness is sufficient; but that case only rules that one witness is sufficient to prove that the testator knew the contents of the will. *Vide* 3 Brightly's Digest, part 2, page 5000. And counsel for respondents refer to Jones *v.* Hartley, 2 Wharton, 110, and Todd *v.* Rennick, American Digest, 3854. Jones *v.* Hartley is as to proof of re-publication of a will, and the decision in Todd *v.* Rennick is under a statute of Colorado which provides that a lost or destroyed will may be admitted to probate when its execution is established, and the contents thereof shown by the testimony of two or more witnesses.

"Your auditor is unable to find any Pennsylvania case ruling this question, but is of opinion that the execution of the will having been proven by two witnesses as required by the Act of Assembly, the contents are sufficiently proven by one witness. If, however, the Court should be of a different opinion, then the contents of the will are not proven so as to entitle the copy to be admitted to probate, and there is nothing to refer to a jury.

"Respondents further claim that any and all wills made by the said decedent were by him revoked, cancelled and destroyed before his death. The will having been left in the possession of the decedent, the presumption is that he destroyed it *animo revocandi*, but this presumption may be rebutted by competent evidence.

"Petitioners have offered testimony for the purpose of proving that the decedent thought the will was in existence until after he was so feeble that he could not have destroyed it, and that it must have been destroyed by his brother, Dr. James Gardner, or his sister, Mrs. Nancy Fulton. There is, however, no direct evidence of this. They depend on a number of circumstances which they say sustains their position. Some four or five days before his death he expressed a desire to have Mr. Summerville come; he said he had some business he would like to have fixed, or changes made in his business or will; and, on the witness offering to go for him, he said the roads were muddy, and he thought his brother James would be there that night and he would have him write. James Gardner did come that night, and the next morning asked him if he had his business finished, and if he wanted Mr. Summerville. He replied that he did, and on that day James Gardner wrote to Summerville to come up. He says he wrote to "come and finish Lot's will business," and Summerville says he wrote to "come and finish the unfinished portion of brother Lot's business which you have already commenced."

"Summerville did not receive the letter until after the death of Lot Gardner, and the letter cannot be found. On the second evening before he died he said he did wish Summerville would come. On the Saturday before his death L. T. Baker went to his house for the purpose of lifting a note, and Dr. James Gardner got the key of his trunk to get the note, but the trunk was not opened. The key remained in the possession of James Gardner and Mrs. Nancy Fulton from that time until the day after the funeral, when the search was made for the will. When the undertaker was there to lay out the body, Dr. Gardner had some one help take the trunk to another room to look for clothes to dress him in, and Mrs. Fulton opened the trunk and took out a suit of clothes. On the same morning P. H. Bailey and another witness saw Dr. Gardner standing by the window in the room to which the trunk was carried, reading a paper; the paper was about the size of a sheet of foolscap; he was there five or ten minutes; and could have seen the persons who saw him if he had looked. Part of the time there was an old lady standing beside him. One witness says it was not a newspaper he was reading; the other says he cannot tell whether it was a newspaper or writing paper.

"On the same morning another witness says he went into the house and heard some persons in the room overhead, in the room in which James Gardner was seen standing by the window reading a paper; he heard their voices, but could not tell who they were, and does not know

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whether it was the voice of man or woman that he heard; he also says that he heard them rummaging among papers.

"Another witness says that before the death of Lot Gardner, Dr. Gardner intimated that there were some of the people Lot had forgotten in his will. On the day after the funeral, when they were searching for the will, Mrs. Fulton said she had heard many stories about wills being lost and destroyed, and that she almost knew that her poor brother's will was lost; she said that if it should not be found she did not want them to blame her.

"From the testimony of Summerville it would appear that this was before they looked for the will; he also says that she did not want to open the trunk because she felt positive that the will was not there; she was afraid that everything would be disturbed in the trunk.

"Jesse F. Gardner also testifies that she spoke of having heard of wills being destroyed; but he says that she also said she had the key of his trunk and would open it, and if the will was there they could have it. When they opened the trunk Summerville picked up a note or check and Mrs. Fulton said she had seen that paper. Mrs. Fulton had said that she had never been in the trunk; but in her testimony she says she opened the trunk to get a suit of clothes, and that she then saw a check for $1,000.

"There is some testimony that Mrs. Crow told a witness that Dr. James Gardner had said that he had a notion to burn the will, but Mrs. Crow denies having said so or that she ever heard Dr. Gardner say anything of the kind; and, if she did tell the witness, it is only hearsay and entitled to no weight. There is also some evidence that Mrs. Fulton saw some one have a paper which was said to be Lot Gardner's will. This is too indefinite to be taken into consideration, and besides, it is contradicted by Mrs. Fulton.

"This is a pretty full synopsis of the testimony relied upon by the petitioner to prove that the will was destroyed by Dr. Gardner and Mrs. Fulton; and in reply both Dr. Gardner and Mrs. Fulton deny having lost or destroyed the will. Dr. Gardner testifies that he 'never saw any will made by Lot Gardner;' that he 'never destroyed Lot Gardner's will,' and that he has 'no knowledge of any other person having destroyed it.' He further says, 'I never knew of the existence of Lot Gardner's will except by report.'

"Mrs. Fulton says she 'never saw a letter of a will about the house; if it was in the trunk when she took the clothes out she did not see it.' She further says 'I never destroyed a will that Lot Gardner made, either before or after his death.' She says that she did not know that he had made a will, but that she knew Summerville was there, and she did not know but that was what he was doing.

"Dr. Gardner also denies that he told anyone before the death of Lot Gardner that he had forgotten some of the people.

"If the evidence on part of petitioners, uncontradicted by the testimony of respondents, is sufficient to rebut the presumption that Lot Gardner destroyed his will, with the intention of revoking it, the denial of Dr. Gardner and Mrs. Fulton, the only persons who had access to his papers, raises an issue that should be referred to a jury. 'How' is that? They are brother and sister to the decedent and would receive more of his estate under the intestate laws than under the alleged will; but that being the case, and the fact that they had the key of his trunk, unless followed by evidence going to show that they, or one of them, destroyed the will, is of but little or no weight.

"That Lot Gardner was anxious to have Mr. Summerville may be explained by the fact that he was not strong enough to make the gifts that he intended to make, and that he may have wished to provide for them in his will; and does not prove that he may not have destroyed the will himself. Neither is the fact that Dr. Gardner inquired who should read the will of any weight, unless it would go to prove that he thought there was a will.

"That Dr. Gardner was seen reading a paper, and that a witness heard persons talking, and a noise as of some one rummaging among papers in the room where the trunk was taken to, are not evidence on which a jury could determine anything. Mrs. Fulton's conversation when looking for the key might be construed to indicate that she knew more than she was willing to admit; but, unconnected with other circumstances, it was too vague and unsatisfactory to mean anything definite. She was at that time an old lady, and was evidently nervous and somewhat excited."

The auditor reported that there was no such evidence as should be submitted to a jury, and that under all the testimony in the case the presumption was that Lot Gardner destroyed his will *animo revocandi*, and that the petition should be dismissed.

Exceptions were filed, which, after argument, were dismissed by the Court, CLARK, P. J., in the course of his opinion, saying:

"In the consideration of the questions of fact raised by the petition and answer, and of the law applicable thereto, the learned auditor has sustained the petitioner and found against the respondents every issue of fact except his finding, 'that under all the testimony in the case the

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presumption is that Lot Gardner destroyed his will *animo revocandi*,' and that there is not such evidence as should be submitted to a jury, and that the petition should be dismissed. Down to this point the petitioner was sustained, and all other averments in respondents' answers were found against them.

"It is therefore unnecessary to discuss the auditor's findings of facts, and his application of the law, except those bearing upon the destruction or concealment of the will. The respondents say, that any and all wills made by the said Lot Gardner were by him revoked, cancelled or destroyed before his death. On this the auditor finds against the petitioner, and reports the facts very fully. We will consider the three exceptions together.

"The first inquiry is whether, in all the evidence, there are disclosed any disputed facts material to the issue, which render it necessary to certify the case to the Court of Common Pleas to obtain the finding of a jury as auxiliary to this Court in passing upon the questions presented by the petition and answers.

"It is clearly established and uncontroverted that the will in question, on the day it was written and executed, was put by the testator in a package of deeds and placed in the upper part or tray of his trunk in the room in which it was written; thus showing that at its execution the will was left in his possession. A few days after his death a diligent search was made for the will by J. A. Summerville and others, especially in the trunk where it had been deposited, but no will was found. From these facts a presumption arises that the testator destroyed his will, *animo revocandi*. This principle is fully settled by a long line of cases, among which are these: Foster's Appeal, 87 Pa. 67; Baptist Church *v.* Robbarts, 2 Id. 110; Deaves's Estate, 140 Id. 242; 1st Redfield on Wills, 331, and 2d American Leading Cases, 510.

"The burden of proof is upon the petitioner to rebut this presumption by such evidence as will produce a moral conviction to the contrary.

"The counsel for the petitioner contend that this presumption is only slight; that it is not a *de jure*, but merely a natural one, making a *prima facie* case, and must give way to stronger evidence of the continued existence of the will and the testator's reliance upon it as the disposition he had made of his property; citing Foster's Appeal, *supra*, and Deave's Estate, *supra*. We agree with their contention if the evidence shows any disputed facts material to the matter in issue, and if sufficient to warrant us, as a Judge of the Court of Common Pleas, in submitting the case to a jury.

"They further contend that the acts and declarations of the testator from the time he executed the will down to within a day or two of his death, together with other statements made by some of his near relatives (whose interests would be adverse to the will and who would receive more money if he had died intestate than they would under it), within a few days before and after his death, would be competent evidence to rebut the presumption claimed by the respondents. There can be no doubt that the acts and declarations of a testator are admissible to repel this presumption. This principle of law is fully established in Youndt *v.* Youndt, 3 Grant, 140; Havard *v.* Davis, 2 Binn. 406; Jones *v.* Murphy, 8 W. & S. 275, and Foster's Appeal, *supra*.

"In contests over lost wills, when it is clearly established by the evidence that the will was duly executed, and the contents are satisfactorily proven, the acts and declarations of a testator tending to show and showing his conviction, belief or understanding that he has a will in existence, at the time of his decease, or up to a certain point of time immediately before he became unconscious and loses his mind, or is otherwise rendered so feeble (and so continued to remain up to the time of his death) that he could not have destroyed it, would under my view of the law, be competent and relevant to repel the presumption that he destroyed his will *animo revocandi*, even if there was no sufficient evidence to show that some other particular person or persons destroyed, cancelled or secreted it.

"It is well settled that if a will is lost or destroyed without the agency of the testator, it does not cease to be his will if its contents can be sufficiently proven, unless he afterwards acquired knowledge of such loss or destruction in a reasonable time before his death, and declined or neglected to reproduce and republish its contents: Deave's Estate, *supra*.

"There can be no doubt that if a will duly executed is destroyed after the death of the testator, or without his authority during his lifetime, it may be established upon satisfactory proof of its having been so destroyed and of its contents: Foster's Appeal, *supra*.

"The will in controversy here is, under the evidence, traced into the possession of the testator on the day of its execution, and there is no evidence tracing it out of his possession after that time; therefore the presumption is that it was revoked by him by destruction. There is no allegation on part of counsel for petitioner that the alleged will was lost or destroyed in the testator's lifetime by the testator himself through accident or mistake; but they do contend that if the will was destroyed by the testator during his lifetime, when mentally incompetent to make or revoke a will, it would still be a valid will after his death. We agree with them in the

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latter proposition as a matter of law, but the facts are wanting. There is no testimony to show when the will was destroyed, if destroyed by the testator. There is nothing to show that the will was in existence at the time he became mentally incompetent to make or revoke a will, or that it was in existence at the time he became so weak and feeble that he could not have destroyed it himself. Again there is no testimony showing that any other person or persons destroyed the will during his lifetime under his directions and out of his presence; nor is there any sufficient testimony to show that any other person or persons (other than the testator himself) destroyed or cancelled the will.

"It is not enough to show that some other person or persons than the testator had the opportunity to destroy it, even though there may have been a motive on the part of the person suspected: Stewart's Estate, 140 Pa. 124.

"In the latter case there was no question as to the execution of the codicil, and that it was placed in the safe of the testator to which one David Canning had access; he, Canning, testifying that he never saw the will before it was found, and did not know its contents; and it was held that an issue to determine whether or not the codicil had been cancelled by the testator was properly refused. Mere circumstances of a suspicious character alone are certainly not sufficient to rebut the presumption that the testator himself destroyed the will.

"In Youndt *v.* Youndt, *supra*, the learned Justice says, 'Thus it became necessary to show that the testator himself did not destroy the will of 1859, and for this purpose his conduct and declarations concerning it, up to near the day of his death, were direct evidence in establishing the negative. And the positive allegations of who did destroy it were very properly made out by the evidence of the acts and declarations of the parties charged with the deed. Each of these lines of proof was important in strengthening the other, and both together seem necessary to constitute full proof that the second will had not been revoked;' but the facts shown from the evidence in the latter case to negative the presumption that the testator himself did not destroy or revoke the second will are of a much clearer and satisfactory character than is shown by the testimony in the case in hand. So in Foster's Appeal, *supra*, which rules that such a presumption may be removed by sufficient evidence; but how different was the evidence in that case from the evidence in this.

"In Foster's Appeal it was clearly established by the evidence of a number of witnesses who had conversations with the testator about the will in controversy for a considerable period of time on different occasions up to the last day that he was conscious, (after which he could not have legally revoked his will,) showing that the testator died with the full conviction and belief that he had a will that would be operative after his death, and rendered it highly improbable that he should have destroyed it, and thereby removing or negativing the presumption of destruction of the will by the testator himself *animo revocandi.*

"Under the evidence which is fully referred to by the learned auditor, and which we have carefully read over from the notes of testimony, we think the finding of the auditor should be sustained.

"It is true, there were a few circumstances occurred that might be viewed with suspicion. But with all that, we could not, under all the evidence, submit the case to a jury; or, in other words, if the same evidence was given on a trial of the matter in controversy before a jury, we feel that it would be our duty to instruct the jury that their verdict should be for the respondent and against the validity of the will.

"We give this as our view of the evidence and of the law in support of the order and decree we have heretofore made dismissing the appeal, and confirming the report of the auditor."

Boston Gardner took this appeal.

B. J. Reid, (with him *F. J. Maffett* and *James Craig*), for the appellant.

J. E. Wood and *John W. Reed*, (with them *Harry R. Wilson*, *Frank R. Hindman* and *J. A. F. Hoy*), for appellees.

October 22, 1894. STERRETT, C. J. The burden having been on the proponents in this case to overcome the presumption of revocation which sprang out of the fact that the will, which Lot Gardner admittedly executed, could not be found at his death, made not only testator's character, condition, acts and declarations, but the conduct and interests of those who were around him, from and after the date of his will, legitimate subjects of inquiry. "Each of these lines of proof was important in strengthening the other, and both together seem necessary to constitute full proof:" Youndt *v.* Youndt, 3 Grant, 140.

The theory of proponents being that of concealment or destruction, the latitude of proof must have been necessarily wide. Fraud is rarely capable of proof in a direct way. "It is the chain of less direct circumstances," all pointing in the same way until there seems no other reasonable mode of reconciling them, that must usually be depended on in reaching a conclusion: Eichenlaub *v.* Hall, 163 Pa. 201.

The issue demanded here was whether or not there had been a revocation of the will of Lot

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Gardner, and was of right unless the whole evidence of the fact alleged was so doubtful and unsatisfactory, that a verdict in favor of the validity of the will would not be permitted to stand. The question was one of sufficiency of evidence.

The facts that Lot Gardner's long settled plan of testamentary disposition was expressed in this will; that he was a man of strong character and tenacity of purpose; that so short a time elapsed from the date of the will until he died; that after he found he would be unable to distribute the rest of his estate as he had intended during his lifetime, and up to the point of time when his physical condition rebutted any presumption of access to the trunk in which he had placed his will, he repeatedly expressed a wish that the scrivener who had drawn, would come and make "changes" in his "will," and the suspicious conduct of those who surrounded him and whose interests would plainly be subserved by intestacy would, standing unexplained and uncontradicted, have amply justified submission to the jury. Against these facts stand the presumption of revocation arising from non-production of the will, and the testimony of the witnesses whose suspicious conduct had put them on the defensive, and whose explanation was for the jury. No one claimed to have seen or heard the testator speak of the cancellation; it rests solely upon the rebuttable presumption arising from non-production.

The whole evidence was such as plainly required an issue, and the case must be sent back for that purpose.

The decree refusing the issue, etc., is reversed and set aside at the appellees' costs, and it is now ordered that the record be remitted to the Court below, with instructions to direct an issue to the Court of Common Pleas, in due form, for the purpose of determining the disputed questions of fact.

H. B.

Jan., '94, 37. May 9, 1894.

Packer, Admin'r d. b. n. c. t. a., v. Owens, Exe'r, et al.

Executors—Survivor—Power of—Grant of letters of administration d. b. n. c. t. a.—Effect of—Practice—Appeal, when it lies—Terre tenants, when proper parties.

Either one of two co-executors has the right to receive and give a discharge of a debt due to the testator and that right is not impaired by the death of his co-executor.

Nor does the grant by the register of letters of administration d. b. n. c. t. a. to another in place of the deceased executor affect the grant to the original executors or the right of the survivor thereunder.

A residuary bequest of "all bonds, mortgages, judgments, single bills, or other evidences of debt in the Counties of Union and Northumberland," is not a specific bequest of a particular mortgage on land in such counties.

A decree refusing to set aside a levari facias is a final decree and an appeal lies therefrom. The terre tenants of the mortgaged premises are proper parties to such appeal, although the judgment is *in rem* and they are not parties to the mortgage or judgment. Their right, however, to resist the sale upon showing that they had paid the amount of the mortgage to one of the executors is undoubted.

Appeal of John A. Owens, executor of Adam Gundy, and Abraham Gundy *et al.*, terre tenants, from the decree of the Common Pleas of Union County, overruling the motion of Owens, to strike off the substitution of James C. Packer as administrator d. b. n. c. t. a. of William Cameron, deceased, as plaintiff in a sci. fa. and a lev. fa., issued against said Owens, as executor of Adam Gundy, deceased, and in discharging his rule to quash and strike off the lev. fa. issued at the instance of said James C. Packer.

The facts of the case, as they appeared before McClure, P. J., are fully stated in the opinion of the Supreme Court, *infra*.

The Court was of opinion that James C. Packer, as administrator d. b. n. c. t. a., was the only person entitled to receipt for the money due on the judgment obtained on the mortgage and hence refused to strike off his substitution as plaintiff and discharged the rule to strike off the levari facias issued by him.

Defendants thereupon appealed, assigning for error this action of the Court.

Andrew A. Leiser, for appellants.

There was no evidence of the grant of letters to James C. Packer and profert of same was essential to any action brought as administrator.

McDonald *v.* Browning, 4 Phila. 21.
2 Trou. & H. Practice sec. 2156.
Lewis *v.* Ewing, 3 S. & R. 44.

Upon the death of his co-executor the sole right to administer upon the estate was cast upon the survivor.

2 Woerner's Law of Adm., 733.
1 Lewin on Trusts & Trustees, 251.

The survivorship of executors is recognized by the Acts of March 12, 1800, § 1, and February 24, 1834, § 14.

Zebach *v.* Smith, 3 Bin., 72.
Miller *v.* Meetch, 8 Pa. 417.
Gallagher *v.* Gallagher, 6 Watts, 473.
7 Am. & Eng. Ency Law, 200.

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Harrison having qualified, his renunciation must be by matter of record.

1 Lewin on Trusts, 251.
Miller *v.* Meetch, 8 Pa 417.
Heron *v.* Hoffner, 3 Rawle, 393.
Bowman's App., 62 Pa. 166.
Beeber's App., 99 Id. 596.

A removal can only be made in the Orphans' Court by direct proceeding and for cause shown.

Webb *v.* Dietrich, 7 W. & S., 401.
3 Rhones' O C. Practice, sec. 346.
Cohen's App., 2 Watts, 175.

The executor gets his authority from the will and not from the register, hence the latter could not remove him.

Miller *v.* Meetch, 8 Pa. 417.
Bowman s App., 62 Id. 166.
To ler's Law of Ex'rs., 41.
Williams' Ex'rs., 160.
Miles *v.* Cook, 1 Grant, (Pa.) 58.

The register having once issued letters had no power to revoke them.

Shomo's App., 57 Pa. 356.
Brubaker's App., 98 Id. 21.
Hostetter's App., 6 Watts, 244.

The power of removal after grant of letters is in the Orphans' Court alone.

3 Rhones' O. C. Practice, sec. 40, and cases cited.

There being no vacancy the register had no power to make a second appointment.

Woerner's Law of Adm., sec. 179, and cases cited.

When there is no vacancy in the administration, evidence is admissible, even in a collateral proceeding, to show the fact, and in such event the second grant is void.

Matthews *v.* Donthitt, 27 Ala. 233.
Gray *v* Cruise, 36 Id. 559.
Coltart *v.* Allen, 40 Id. 155.
Nelson *v* Boynton, 54 Id. 358.
Quidort's Admin'r *v.* Pergeaux, 18 N. J. Eq., 477.
Ryno's Exe'r *v.* Ryno's Adm r, 27 N. J. Eq., 522.

James Scarlet, (with him *Wm. A. Sober*, *E. M. Beale*, *J. M. Linn*, *P. B. Linn* and *J. C. Bucher*), for appellees.

The terre tenants being strangers to the record have no standing in Court.

The judgment was regular and the writ of levari followed and was warranted by it.

Kneib *v.* Graves, 72 Pa. 104.
Day *v.* Sharp, 4 Wh. 338
Barr and Dougherty *v.* Boyles, 96 Pa. 31.

The execution was *in rem*, and the terre tenants were not parties.

Presby. Cong. *v.* Johnson, 1 W. &. S. 9.
Kennedy *v.* Fury, 1 Dal., 72

The practice of substituting the adm'r d. b. n. c. t. a. is authorized by Act of March 24, 1818, § 7.

Lea *v.* Hopkins, 7 Pa. 385.
Reist *v.* Heilbrenner, 11 S. & R., 131.
Gemmill *v.* Butler, 4 Pa. 232.

The writ cannot be attacked collaterally.

Chew's Est., 2 Parsons, 155.
Schoulers' Exe'rs & Adms., (2 Ed.) sec. 160.
Carpenter *v.* Cameron, 7 Watts, 51.
Loy *v.* Kennedy, 1 W. & S.. 396.
Van Fleet on Collateral Attack, sec. 799.

The payment of the debt to Harrison was an improper payment and therefore did not discharge it.

Meiser *v.* Eckhart, 19 Pa. 201.
Baer *v.* Kistler, 4 Rawle, 364.

By the terms of the will the mortgage in question passed directly to the residuary legatee and the executors had no right of control or power over it.

Holman's App., 24 Pa. 174.
Sheets' Estate, 52 Id. 257.
Wheatley *v.* Badger, 7 Id. 459.
Carlisle's App., 9 Watts, 333.
Kay *v.* Scates, 37 Pa. 40.
Rush *v.* Lewis, 21 Id. 72.
Schouler on Exe'rs, sec. 153.

The presumption is that the grant to the administrator c. t. a. was correct.

Bain *v.* Funk, 61 Pa. 187.

The refusal to strike off the writ of lev. fa. was not error.

Nicholas *v.* Wolfserberger, 5 S. & R., 172.
Brown, Adm'r *v.* Thompson, 156 Pa. 297.

Where the interests of an executor or administrator are opposed to those of other parties in interest and it is manifest that he is obstructing their steps in the pursuit of their rights, nothing but some controlling necessity will justify his retention.

Scott on Int.. Law, 268.
Kellberg's Appeal, 86 Pa. 129.
Hassinger's Appeal, 10 Id. 454.
Ellmaker's Estate, 4 Watts, 34.

Andrew A. Leiser, in reply.

An appeal lies in this case.

Com'th *v.* Judges, 3 Bin., 273.
Cassell *v.* Duncan, 2 S. & R. 57.
Harger *v.* Comm'rs, 12 Pa. 251.
Mackaness *v.* Long, 85 Id. 158.

The terre tenants have a right to be heard on the appeal.

Wickersham *v.* Fetrow, 5 Pa. 260.
Reiger *v.* Ellmaker, 6 S & R. 44.
Roberts *v.* Williams, 5 Wh. 170.
Mevey's App., 4 Pa. 80.
Fraley *v.* Steinmetz, 22 Id. 437.
Cadmus *v.* Jackson, 52 Id. 295.

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Read *v.* Husulton, 27 Leg. Int., 198.
Williams *v.* Morgan, 111 U. S., 684.

The residuary legatee's right to her legacy can only be worked out through the executor.

Guthrie *v.* Kerr, 85 Pa. 303.

October 1, 1894. DEAN, J. On the 8th of November, 1866, Adam Gundy delivered to William Cameron a mortgage on a tract of improved land containing about 92 acres in East Buffalo Township, Union County. The mortgage was to secure to Cameron a debt of $2,000, which Gundy owed to him. Both mortgagor and mortgagee died before payment, leaving last wills; Cameron appointed John B. Packer and F. C. Harrison, executors of his will, and Gundy, John A. Owens, executor of his, and letters testamentary were duly issued to them. On September 5, 1888, Packer and Harrison, executors of Cameron, had sci. fa. issued on the mortgage, to which Owens, executor of Gundy, appeared, and confessed judgment to John B. Packer and F. C. Harrison, executors of William Cameron, in the sum of $2,882.30, debt and interest. On August 3, 1893, the death of John B. Packer, one of the executors of Cameron, was suggested, and James C. Packer, administrator, with the will of Cameron annexed, was substituted. The same day, James C. Packer, without being joined by Harrison, the surviving executor of Cameron, directed the issuing of lev. fa. on the mortgage. On September 4, Abraham V. Gundy and Elizabeth V. Gundy, representing themselves as terre tenants of the land bound by the mortgage, and that they had paid the full amount of the debt, interest and costs of the judgment thereon, to F. C. Harrison, the surviving executor of Cameron, who had duly receipted to them for the same, and agreed to satisfy the mortgage of record, prayed the Court to quash or set aside the writ of lev. fa. Thereupon, the Court granted a rule on James C. Packer to show cause why decree should not be made as prayed for, returnable 18th September, 1893. On the 9th of September, F. C. Harrison, as surviving executor, formally satisfied the judgment of record. On the return day of the rule to show cause, Owens, executor of Gundy, asked and was granted leave to be made a party, and to join in the prayer to set aside the writ. Packer, the substituted executor, denied: 1. The right of Harrison to receive the money. 2. Averred an exclusive authority in himself to receive it. 3. Denied the jurisdiction of the Common Pleas to inquire into the validity of the letters testamentary issued to him on the will.

The Court, after hearing, discharged the rule to set aside the writ, and further, afterwards, on motion of Packer, struck off the satisfaction of record entered by Harrison, surviving executor. Separate appeals were taken from these decrees by Owens, executor, and the terre tenants. The questions raised on each appeal, are so blended, that we consider them together.

The contention turns on Harrison's authority to receive the money and satisfy the record. It was Cameron's debt; he had the sole right in his lifetime to collect and receive; by his will, he delegated this right to his executors, John B. Packer and Harrison, to be exercised after his death; for they were named executors, and there is not a word in the will which restricts their authority or responsibility in the office. Certain trusts were created, of which John B. Packer was appointed trustee, and specific directions were given as to beneficiaries under the will, but the responsibility of the executors was general and unlimited in the collection, receipt and management of the funds, that they might reach the objects of the testator's bounty. Packer's responsibility as to certain funds was greater than that of an executor, but Harrison's was not less. No specific directions were given as to this particular mortgage. The 15th item of the will is not a specific bequest of it to Mary M. Packer, as argued by appellee. That item only designates her, as a residuary legatee of all bonds, mortgages, judgments, single bills, or other evidences of debt in the Counties of Union and Northumberland. The duty of the executor remained; and all parties so understood it, for this mortgage was not assigned to the residuary legatee; John B. Packer, in his lifetime, along with Harrison, obtained judgment upon it; James C. Packer, since his death, has undertaken to collect it. Of course, the money, if it be residuary, after carrying out the other directions of the will, goes eventually to Mary M. Packer, but this affects not the right of the plaintiff executor, in this particular judgment, to receive it. The duty of the executors then as to this, was to collect and account for it as part of the general funds of the estate; therefore, they jointly brought suit on the mortgage, and judgment was confessed to John B. Packer and F. C. Harrison, executors of Cameron. Whatever conflict there may be in the authorities, as to the liability of co-executors for money received by one of them, the law is settled, that one of them has a right to receive and give a discharge of the debt: 2nd Kent's Com., 519; De Haven *v.* Williams, 80 Pa. 480; Wood *v.* Smith, 92 Pa. 379. So that, even in the lifetime of John B. Packer, Harrison, his co-executor and co-plaintiff, had a right to receive this money and satisfy the record. His authority, certainly, was not impaired or extinguished by Packer's death. He had the legal title to the judgment, of which he could not be divested ex-

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cept by death, renunciation or removal from office. He did not die, and did not renounce; he could not be removed from office but for the statutory causes, and then only by the Orphans' Court, on notice to him, and due proof of mismanagement, intemperance or dishonesty.

He did not get his appointment from any Court, but from the testator; he qualified before the register of wills, but was not appointed by him; the oath administered by the register, to perform his duty, and account faithfully, was no more an appointment than the register's oath to perform the duties of his office with fidelity was his appointment. With, then, an appointment by the will of the owner of the mortgage; a suit brought upon it, and judgment confessed to him and his co-executor; by the death of his co-executor, a survivorship to him of the title to the judgment, how is his authority to collect the money and satisfy the mortgage denied?

It is answered, James C. Packer was substituted, with the will annexed, for the dead executor. It is argued, that the grant of letters by the register to James C., vacated the letters to Harrison, and this being a judicial act, the Court of Common Pleas cannot, in a collateral proceeding, inquire into the regularity of it. But it is clear, the register has no such power as is claimed here. We do not undertake to say that James C. Packer has no authority under the grant of letters to him; a decision of that question is not necessary to a decision of this, therefore we do not pass upon it. But we do hold, that there could be no appointment to Harrison's place until he was legally ousted. As we have seen, he did not die or renounce, and he was not removed by the Orphans' Court under any statutory proceeding. While for causes existing before the grant of letters, the register may revoke, and issue others, that is not the case here. The executors took out letters, and for years administered; then, on account of the death of John B. Packer, letters testamentary were issued to James C. If there was a vacancy, it was occasioned by the death of John B., long after the letters issued; there was no vacancy as to Harrison, and the register had no jurisdiction to oust him, even in a proceeding directly against him. The Orphans' Court alone could take cognizance of such proceedings. If he could not vacate the letters to Harrison by a direct proceeding against him, his decree appointing James C., cannot have the same effect by implication. The error pervading the entire proceeding, is the unwarranted assumption, that a vacancy in the office of executor was created by the mere qualification of James C. Packer; such a method of ousting an executor, and giving his place to another, is wholly unknown to statute or practice; it is a bald usurpation of power, lacking every element of judicial procedure, and the register being wholly without jurisdiction to perform such an act, in so far as it attempts to oust Harrison, it is not entitled to recognition as the judgment of another Court, which cannot be inquired into collaterally.

We do not certainly know that the register intended to go so far as this, for his decree does not say so; inferentially, appellees' counsel argues, it must have that effect, and on this inference rests the whole case of James C. Packer; but for the reasons stated, it must fail. The fact, if it be a fact, that during the lifetime of John B. Packer, he was the acting executor, and performed all, or nearly all the duties of the office, is not important. It is generally the case, where there are two or more executors, that the active management is entrusted to one of them; and not seldom, this is intended by the testator. It may also be presumed, he intended, by the very appointment of more than one, to provide by a survivorship for the contingency of death or removal. But being passive in the management does not create a vacancy, or even wholly shield from responsibility.

As to argument of appellee, that an appeal does not lie, we need only say, that the decree of the 18th of September, 1893, refusing to set aside the lev. fa. was a final decree; it was equivalent to that of a chancellor, that the judgment was due and unpaid, and directing the sale of the land subject to the lien of it. A writ of error lies in all cases in which a Court of record has given a final judgment, or made an award in the nature of a judgment, or has awarded execution: Pontius *v.* Nesbit *et al.*, 40 Pa. 309. "There can be no doubt that error lies on an award of execution": Harger *v.* Commissioners, 12 Pa. 251.

And the terre tenants were proper parties to the appeal. They were aggrieved by the final decree, for they had paid the amount of the mortgage to Harrison, yet the decree of the Court still held their land bound for its payment. The judgment being *in rem*, although not parties to the mortgage or judgment, their right to intervene as parties, to resist the sale of this particular tract of land, cannot be doubted: Mevey's Appeal, 4 Pa. 80; Fraley *v.* Steinmetz, 22 Pa. 437. In Mevey's Appeal, decided as early as 1846, Judge GRIER, whose opinion was approved by this Court says: "Where a terre tenant has not been noticed in the proceedings (on a mortgage), the practice has been to permit him to make himself a party *pro interesse suo*, and to have the benefit of any equitable or legal defence, to which he may be entitled." And such has been the settled practice for more than fifty years.

The decree of the 18th September, 1893, dis-

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charging the rule to strike off the levari facias, is reversed, and it is now directed that said rule be made absolute. Costs to be paid by appellee.

W. M. S., Jr.

(NOTE:—*Quaere:* Where did the register of Union County get jurisdiction to grant letters of administration d. b. n. c. t. a. in the above case? The Act of March 15, 1832, secs. 18 and 19, seems to give such jurisdiction only when *all* the executors shall refuse or renounce or "whenever the sole executor or the survivor of several executors shall die, leaving goods," etc. REP.)

July, '94, 24. May 10, 1894.

Packer, Admin'r, d. b. n. c. t. a., v. Owens, Exe'r, et al., terre tenants.

Surviving executor—Power of—Practice.

A surviving executor, who has full authority to receive money due to decedent's estate, can have formal satisfaction entered of record.

Quaere. Whether the lower Court has power to strike off a formal entry of satisfaction, entered by an executor, on the ground that it had been decided that his appointment as executor was superseded by a subsequent appointment of an administrator d. b. n. c. t. a., when there is an appeal pending from this decision.

Appeal of John A. Owens *et al.*, from the decree of the Common Pleas of Union County, striking from the record a formal entry of satisfaction made by Harrison, executor.

For the facts see preceding case.

Andrew A. Leiser, for appellants.

J. C. Bucher and *Wm. A. Sober*, (with them *James Scarlet*, *E. M. Beale* and *J. M.* and *P. B. Linn*), for appellees.

October 1, 1894. DEAN, J. It is not necessary to discuss the regularity of the proceedings resulting in the decree of March 19, 1894, strik- from the record the formal entry of satisfaction made by F. C. Harrison, executor. Whether the proceeding was regular because of the appeal pending in this Court in 37, January term, 1894, is at least doubtful. But, as we have decided in that case, Harrison, the executor, had full authority to receive the money, it follows he had authority to enter formal satisfaction of record. For the reasons in that case given, the decree of 19th of March, 1894, striking off the entry of satisfaction, is reversed, at costs of appellee.

W. M. S., Jr.

Orphans' Court.

April, 1881, 187.

Bradley's Estate.

Act of April 8, 1833—Act of May 6, 1844—Devise to lineal descendant—When devisee dies in testator's lifetime—Vested or contingent interest.

Where a bequest is made for life and over to "all" testator's grandchildren, the grandchildren take a vested interest subject to being opened to let in after-born grandchildren.

Under such a will the child of a grandchild would take though its parent died in testator's lifetime.

Gross's Estate, 10 Pa. 360, distinguished.

Sur exceptions to adjudication.

The facts as they appeared at the adjudication were as follows: Patrick Bradley died testate, leaving issue. He bequeathed $10,000 to his executors in trust for his daughter for life, and provided: "Should the said Annie E. Deehan die leaving lawful issue surviving, then" part of the $10,000 to be divided among such issue. "All the rest, residue and remainder of the said principal sum . . . . shall be equally divided among all my grandchildren, ... share and share alike." One of testator's grandchildren died in testator's lifetime, leaving issue. The auditing Judge excluded this child from sharing in her great-grandfather's estate, to which the child excepted.

Peirce Archer and *John T. Greene*, for exceptions.

Charles T. Quin, contra.

June 9, 1894. FERGUSON, J. The testator bequeathed to his executors $10,000 *in trust* to pay the income to his daughter, Annie E. Deehan, free from her debts and for her separate use for life, and he further provided that "should the said Annie E. Deehan die leaving lawful issue surviving, then the said principal sum of $10,000 shall be divided from and immediately after her decease, as follows: $3,000 to such child or children or issue of deceased child or children of the said Annie E. Deehan as shall survive her share and share alike. All the rest, residue and remainder of the said principal sum of $10,000 shall be equally divided among all my grandchildren, including the children of the said Annie E. Deehan, share and share alike; should, however, the said Annie E. Deehan die leaving no lawful issue surviving then, and in such case

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the said principal sum of $10,000 shall from and immediately after the decease of the said Annie E. Deehan be equally divided among all my grandchildren, share and share alike."

We fully agree with the auditing Judge that the grandchildren took a vested estate from the time of the death of the testator, subject to being opened to let in after born grandchildren, and if this were the only question raised by the exceptions they might well be dismissed; but it appeared that one of the testator's grandchildren died in his lifetime, leaving a child, and the question was raised whether this child took its parent's share.

After the death of the life tenant the bequest was to "all" the grandchildren.

In Gross's Est., 10 Pa. 360, it was held that under a bequest to children as a class only those who are in being at the time of testator's death can take, and this decision was followed, apparently reluctantly, in Guenther's Ap., 4 W. N. C. 41, where the Supreme Court say that Gross's Estate had been a rule of property for so many years that they did not like to disturb it, and that if it operated unjustly and disappointed the intention of testator, the remedy must be found in the Legislature. In Diemer's Est., 2 District Reps. 543, and in other cases, the doctrine of Gross's Estate has been applied by this Court, but it will be observed that in all these cases the bequest was to collaterals and not to lineals, to brother's or sister's children, and not to the children or grandchildren of the testator, and therefore the question was not considered or passed upon, whether the rights of lineals, notwithstanding the bequest may be to them as a class, are not preserved by the Act of April 8, 1833. This Act provides that "no devise or legacy in favor of a child or other lineal descendant of any testator shall be deemed or held to lapse or become void by reason of the death of such devisee or legatee in the lifetime of the testator if such devisee or legatee shall leave issue, etc.," but shall be good and available for the issue of such devisee or legatee. And the Act of May 6, 1844, which extended the provisions of this Act to brothers and sisters and their children, expressly provided that it was to apply only in cases where the testator left no lineal descendants. Thus is shown a clear intention to preserve the rights of lineal descendants to their ancestor's property, whether the bequest was to them as a class or by name. Why should there be a difference in the result, because one testator gives his estate to be divided equally among all his *children*, and another gives it to them by *name*, or, why should a grandchild be excluded from participation in its grandfather's estate because its father happened to die in his grandfather's lifetime, while all the other grandchildren take their shares? In a recent case in this Court the testator left his whole estate to his wife for life, and after her death to be equally divided among his children. One of the children died in his lifetime and another during the life tenancy, both leaving children. If Gross's Estate is to be followed in a case like this, one set of grandchildren take their parent's share and the others take nothing, simply because their father happened to die a few months sooner than the father of their cousins. Such a result is manifestly unjust and inequitable, and while we must follow Gross's Estate in cases like it, we do not feel obliged to do so in cases from which it can be distinguished. The Act of Legislature before referred to provides that "no" devise or legacy to a lineal descendant in the case mentioned shall lapse, and makes no exception even where the gift is to a class.

The case as presented to us does not appear to have ever been passed upon by the Supreme Court. It was fully considered by Judge GIBSON, of York County, in Shetter's Est., 2 District Reps. 284, and in an able opinion he concludes that the doctrine laid down in Gross's Estate and Guenther's Appeal, has no application in a devise or bequest "in favor of a child or other lineal descendant," a conclusion which ought to receive general approval.

But it is to be observed in the present case that the gift is not simply to a class composed of grandchildren, but to "*all* my grandchildren," thus individualizing them quite as much as if each had been named, and taking the case altogether out of the principle of Gross's Estate.

The exception to the decision of the auditing Judge excluding Mary Ritchie from her mother's share is sustained; all others are dismissed.

F. B. N.

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WEEKLY NOTES OF CASES.

VOL. XXXV.] *FRIDAY, JAN. 11, 1895.* [No. 18.

Supreme Court.

Jan. '94, 284. March 29, 1894.

Ferguson, Assignee, etc., v. Yard et al.

Decedent's estates—Orphans' Court—Jurisdiction of—Decree of distribution—Effect of upon subsequent judgment creditor of decedent—Notice.

Where it is sought to have property, conveyed by A. to a trustee to be held for her and others, declared applicable to a judgment recovered against her as executrix, it should appear on the face of the bill that the property so sought to be applied was, *prima facie* at least, an asset of the estate and liable for its debts.

B. died in 1876. An action was brought in 1886 against his executrix upon which judgment was obtained: *Held*, that under sec. 24 of Act of February 24, 1834, plaintiff had lost all lien against the real estate of B.

The claim not being founded upon a mortgage or secured by judgment, the lien was lost nearly five years before action was brought.

Where there is an award under an absolute decree of the Orphans' Court, a payment in conformity with the decree protects the executor and also the distributees, although no refunding bond is given by the latter.

A creditor who obtains judgment some six years after the distribution has no right to have the assets of the estate which have been distributed applied to his judgment.

The jurisdiction of the Orphans' Court is exclusive to ascertain the amount of a decedent's property and to make distribution among those entitled, and its decrees are conclusive until reversed on appeal or opened by it.

An allegation of want of actual notice of the settlement of an account or of a decree of distribution is unavailing where it appears that notice has been given by publication as required by the Act of Assembly, and a decree founded upon such notice is not *ex parte* nor made null by the omission to exact a refunding bond from the distributees.

Appeal of Joseph C. Ferguson, assignee of the Shackamaxon Bank for the benefit of creditors, from the decree of the Common Pleas No. 2, of Philadelphia County, sustaining demurrer to his bill to subject the property to liability to a judgment obtained against a decedent after the same had been awarded to a distributee by decree of the Orphans' Court.

The following is a copy of the bill:—

"Joseph C. Ferguson brings this his bill of complaint against Benjamin H. Yard and Mary E. Yard and the Guarantee Trust and Safe Deposit Company and Alma H. Murphy, and thereupon your orator avers:—

"I. He is the surviving assignee of the Shackamaxon Bank under an assignment made for the benefit of the creditors of the bank in the month of May, 1885.

"II. On the 30th January, 1886, your orator and his then co-assignee brought an action in this Court, December Term, 1885, No. 703, against the defendants, Mary E. Yard and her husband Benjamin H. Yard, executors of the will of one Charles S. Murphy. In this action a judgment was recovered by the plaintiffs on the 5th of October, 1891, in the Supreme Court of this State upon appeal and certiorari.

"III. This action was brought upon a bond given by said Murphy for the faithful performance of duty by one Huggard. The bond was dated May 1, 1873, and the breach was unknown saving to the parties to a fraud upon the bank until the assignment of the bank above mentioned. The amount recovered was $5000.

"IV. Charles S. Murphy (who was a surety) died June 8, 1876. His will was proved before the register of Philadelphia. The defendant, Mary E. Murphy, settled an account as executrix of this will in the Orphans' Court of Philadelphia, and the personal estate was awarded to her as the legatee by a decree absolute November 8, 1879. The amount thus awarded consisted of securities and cash of the value of $37,809.-11.

"V. In 1883 the said defendant, then bearing the name Mary E. Murphy, being about to marry with the defendant Benjamin H. Yard, joined with him in conveying by three several indentures all her real and personal property to the defendants, the Guarantee Trust and Safe Deposit Company, in trust as to the personal property for herself, the said Mary, for life, remainder to Alma H. Murphy, her daughter, for life, remainder to the children, issue of the said daughter, and if there is no issue, to the persons entitled to the estate of the daughter under the intestate laws, with power to the trustee to change the investments. The trusts as to the real estate were the customary trusts in a marriage settlement.

"VI. By one of these deeds, dated November 6, 1883, personal property to the value of $18,-000 was thus conveyed. By other deeds of the same date real property of great value was conveyed on similar trusts. In one there is a power of revocation given to the said M. E. Murphy, and in the other a power to sell is given the trustee. The value of the personal property thus conveyed far exceeds the amount recovered against the defendants by the judgment above recited as executors of Charles S. Murphy, and inasmuch as the defendant, Mary E., had re-

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ceived assets which were and are liable, and more than sufficient to pay this debt and the costs of the suit, the conveyance by her to the Guarantee Trust and Safe Deposit Company was a legal fraud on your orator as a creditor of Charles S. Murphy, the testator. The settlement on Alma H. Murphy and her issue was voluntary. At no time did Mary E. Yard give a refunding bond, as required by the Act of Assembly.

"VII. Inasmuch as the legal title to the assets has been, as your orator is advised, transferred to the Guarantee Trust and Safe Deposit Company, and as the securities have all been changed your orator is advised and avers that he requires the aid of a Court of equity to compel an application of so much of the property received from the said Mary E. Murphy, now Mary E. Yard, by the said Guarantee Trust and Safe Deposit Company to the payment of the debt due by her testator, Charles S. Murphy, and to the costs of the action.

"VIII. Your orator therefore requires the defendants, as directed by the memorandum agreement, to answer specifically:—

"1. Whether in an action on a bond of Charles S. Murphy, deceased, your orator recovered a judgment for $5000 and costs in the Supreme Court upon a writ of error to the judgment of this Court in the action brought in December Term, 1885, No. 703.

"2. Whether Mary E. Yard, then being Mary E. Murphy, and the executrix and legatee of Charles S. Murphy, did, on the 8th of November, 1879, obtain a final decree of the Orphans' Court for the City and County of Philadelphia, awarding the balance in her hands as executor on the final settlement of her account as executrix of the said Charles S. Murphy to herself as the widow and sole legatee of the said Charles S. Murphy.

"3. Whether the assets thus awarded and received or retained did not consist of cash and personal securities of the value of $37,809.11. If the value was different, what was the value of the said securities.

"4. Whether the said Mary E. Yard, then being Mary E. Murphy, did not join in three deeds conveying her real and personal estate, or the bulk of said estates, to the Guarantee Trust and Safe Deposit Company in trust for herself upon her intended marriage with Benjamin H. Yard, the defendant.

"5. Whether by the said conveyance of the personal estate the trusts declared of the property so conveyed were as stated in the bill, and, if not, in what respect do they differ from that statement, and what were the trusts that were declared.

"6. Whether the property thus conveyed consisted in whole or in part of property derived by her under the said adjudication either specifically, or was the proceeds of property so derived, or was purchased with said proceeds.

"7. Whether the said Mary at the time of conveying the property awarded by the said decree, or at any time, entered into any and what bond for refunding the property awarded her in case debts of the testator should be made to appear.

"8. What was the age of Alma H. Murphy in November, 1883, and what value or consideration was given by her for the settlement on her in the deed of that date mentioned in the bill.

"And that the defendant may answer the premises, and especially the specific interrogatories above mentioned as required by the memorandum annexed, and that your orator may be declared to be entitled to be paid the debt, interest and costs of the judgment recovered by him out of the assets of the said Charles S. Murphy.

"2. That the funds held by the Guarantee Trust and Safe Deposit Company under the indentures above recited, and which were received from the said Mary E. Murphy may be declared applicable to pay the said debt, interest and costs.

"3. That the said trust company be directed to sell so much thereof as may be required for this purpose and apply the proceeds to the payment of the said debt, interest and costs.

"4. And that your orator may have such further and other relief as to your honorable Court shall seem meet.

"5. And that process may issue to compel the defendants to appear and answer the premises."

Defendants demurred to the whole bill for the following reasons:—

First. Because Benjamin H. Yard is improperly joined as a party to said suit, inasmuch as he is not interested in any way in this litigation, nor is any relief sought as against him.

Second. Because said bill is drawn in direct violation of section 17 and 39 in the equity rules.

Third. Because it does not appear that judgment has been recovered against any of the defendants individually, and, therefore, plaintiff has no standing to ask that he be decreed to have a lien upon the property referred to in the bill.

Fourth. Because it does not appear that the judgment recovered against said Mary E. Yard, as executrix, cannot be paid out of the undistributed assets of the estate of said Charles S. Murphy, deceased.

Fifth. Because there is no averment that any of the assets conveyed to the Guarantee Trust and Safe Deposit Company were, or ever had been, assets of the estate of Charles S. Murphy, deceased.

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Sixth. Because the real estate conveyed to said Guarantee Trust and Safe Deposit Company, even if, at one time, it had been part of the assets of the estate of Charles S. Murphy, deceased, was at the time it was conveyed, and is now, freed and discharged from all claims upon the part of said Shackamaxon Bank, or on the part of plaintiff as its assignee.

Seventh. Because the personal estate conveyed to said Guarantee Trust and Safe Deposit Company, even if, at one time, it had been part of the assets of the estate of Charles S. Murphy, deceased, was at the time it was conveyed, and is now, freed and discharged from all claims upon the part of said Shackamaxon Bank, or on the part of plaintiff as its assignee.

Eighth. Because a distributee who has personally received assets under an absolute decree of the Orphans' Court is not required to repay the same because of a judgment recovered against the estate of the decedent.

Ninth. Because no refunding bond is required on a decree absolute on a distribution by the Orphans' Court.

The Court, PENNYPACKER, J., after argument on bill and demurrer, entered the following decree :—

"And now, January 8, 1894, this cause came on to be heard at this term, and was argued by counsel, and the Court being of opinion that under section 24 of the Act of 24th February, 1834, all claim of plaintiff against the real estate of said Charles S. Murphy, deceased, has been lost by lapse of time; and that the distribution actually made of the personal estate of said decedent, under and by virtue of the absolute decree of the Orphans' Court, dated November 8, 1879, which said decree to this day stands unappealed from and unreversed, protects the personal property now in the hands of the Guarantee Trust and Safe Deposit Company, as trustee, no part whereof ever belonged to said decedent, from any claim thereon by plaintiff in this proceeding. It is ordered and decreed that the demurrer be sustained, and that plaintiff's bill be and the same is hereby dismissed at his costs."

Plaintiff thereupon appealed, assigning for error :—

1. Because the Court erred in sustaining the demurrer.

2. Because the Court erred in deciding that the decree of the Orphans' Court, awarding personal property to a legatee without exacting a refunding bond, discharged that property in the hands of the legatee, or of volunteers under him, from liability to a creditor in the situation of this creditor at the time of the distribution.

3. Because the Court erred in declaring that the property sought to be subjected to liability to debts was at no time the property of the decedent.

4. Because the Court ought to have overruled the demurrer.

5. Because the Court should have decreed that the property in the hands of the Guarantee Company, whether belonging to Murphy in his lifetime, or being the proceeds of such property while owned by Mrs. Murphy, or by the trustee for her, were liable for the debts of the testator due the appellant.

Richard C. McMurtrie, for appellant.

A decree awarding a fund to a distributee is not *res judicata* as to a creditor who subsequently obtains judgment against the decedent. Such decrees are of necessity *ex parte*, the persons in interest being unknown service of process is impossible. See opinion of NELSON, J., in

Williams *v.* Gibbes, 17 How. (U. S.) 254.

The creditor has his right to sue (Hammett's Estate, 83 Pa. 392), and if such a decree were *res judicata*, the creditor would have his constitutional right of suit yet within a year from the date of the contract, and while the creditor may be kept quiet by the payment of interest, voluntary distributees may secure the whole fund and set creditors at defiance.

A proceeding to settle an executor's account is not *in rem*, nor does an order to sell carry any other title than that of decedent.

Braman's Appeal, 89 Pa. 78.

There can be no *res judicata* except as to parties to the record.

Williams *v.* Gibbes, 17 How. 256.
David *v.* Frowd, 1 My. & K. 200.

Until 1832 distribution was made under the direction of the Court and all known claims were retained by the executor, and others secured by a refunding bond.

See Act 1794. 3 Sm. Laws, 143.

This has not been changed by subsequent legislation. Sec. 19, of Act of 1832, P. L. 194, simply authorizes the appointment of auditors to apportion the assets among creditors of an insolvent. This excludes creditors from dividends after failure to appear on twelve months' notice. Section 34 of same Act (P. L. 200) authorizes auditors to ascertain the debts on application to sell real estate. Section 1 of Act of 1835 authorizes a reference to auditors of accounts when excepted to if requested. This, however, does not apply to Philadelphia County. All these Acts refer to insolvent estates.

In 1840 the Court was authorized to appoint auditors to make distribution in such cases on behalf of creditors or heirs or other persons interested. There is nothing in this Act to war-

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rant the inference that distributees were thus exempt from giving refunding bonds. The Acts of 1842 and 1843 impose the duty of giving refunding bonds upon all who take a legatee's share, as a creditor by attachment or execution, and it is absurd to say that a creditor who takes the share of a legatee must give bond while the legatee can take without giving bond.

It is impossible to assert such an intention, or such an effect, except by paying no attention to the statute which changed the jurisdiction only in respect of the suitors, leaving it in both instances to be exercised in the same way, and leaving in full force the forty-first section of the Act of 1834, P. D., 553, section 222, providing that before any one shall receive his share in distribution, he shall give security to refund *if any debt or demand shall afterwards be recovered against the estate.*

The remark in the opinion filed in Shaeffer's Appeal, 119 Pa. 640, that refunding bonds were not required was an unnecessary dictum, the case did not call for it.

A legatee must refund to a creditor or another legatee, and though the executor cannot compel this, the creditor or legatee can, but in equity only.

Noell *v.* Robinson, 2 Ventres, 358.
Hodges *v.* Waddington, 2 Vent. 360.
Anon, 1 Vern. 162.

This is the common law rule and has never been changed by statute.

It is only necessary to refer to the American cases, as there can be no dispute about the equity rule.

Davis *v.* Newman, 2 Robb. Va. 664.
Gallego *v.* Atty. General, 3 Leigh, 450.
McLure *v.* Askew, 5 Richard, 162.
Walker *v.* Hill, 17 Mass. 384–5.
Alexander *v.* Fox, 2 Jones Eq. 106.
Stuart *v.* Kissam, 2 Barb. 493.
Tripp *v.* Talberd, 1 Hill, Ch. 142.
McMullen *v.* Brown, 2 Id. 457.
Lupton *v.* Lupton, 2 Johns., Ch. 614–26–27 (see the note).
Demere *v.* Scranton, 8 Geo. 43.
Stephenson *v.* Axson, 1 Bailey Eq. 274.
McKinzey *v.* Smith, 2 Murphy, N. C. 92.

Alexander Simpson, Jr. (*Arthur W. Horton* with him), for appellee.

The decedent having died more than five years prior to the beginning of the suit, the real estate was not subject to any lien.

Act of Feb. 24, 1834, sec. 24.
Kerper *v.* Hoch, 1 Watts, 9.
Oliver's Appeal, 101 Pa. 299.

The cash and securities awarded to the legatee by decree of Court are not subject to such lien because—

1. They were awarded to her by an absolute decree of the Court which has exclusive jurisdiction.

Hammett's App., 83 Pa. 392.
Shindel's App., 57 Id. 45.
Lex's Appeal, 97 Id. 289.
Otterson *v.* Gallagher, 88 Id. 357.
App *v.* Dreisbach, 2 Rawle, 305.
Priestley's App., 127 Pa. 420.
Act March 29, 1832, sec. 2.
Report of Commrs. on Civil Code, at page 64.
Miller *v.* Hulme, 126 Pa. 277.
Carson *v.* McFarland, 2 Rawle, 119.
Edgar *v.* Shields, 1 Grant, 361.
Montgomery's App., 92 Pa. 206.

2. The statute of limitations is also a bar.

Montgomery's App., 92 Pa. 206.
Act of Oct. 13, 1840.
Act June 30, 1885.
Ashhurst's Appeal. 60 Pa. 290.
Neely's Appeal, 85 Id. 387.

3. The Orphans' Court alone has jurisdiction.

Kettera's Estate, 17 Pa 422.
Weiting *v.* Nissley, 6 Id. 142.
Whiteside *v.* Whiteside, 20 Id. 473.
Ashford *v.* Ewing, 25 Id. 213.
Mussleman's App., 65 Id. 480.

In England a creditor can in equity compel a distributee to refund, but the jurisdiction of our Orphans' Court is governed by Acts of Assembly, and no refunding bond is required where the fund is distributed under an absolute decree of the Orphans' Court.

This question of the right to compel a distributee to refund has twice been decided against such claim.

Carson *v.* McFarland, 2 Rawle, 119.
Hoban's App., 102 Pa. 405.

That no refunding bond is required in such cases has been many times decided by the various Orphans' Courts.

Moorhead's Estate, 1 Chest. Co. Rep. 435.
Woodward's Estate, 2 Id. 9.
Gunkel's Estate, 6 Lanc. L. Rev. 217.
Altinger's Estate, 18 Phila. 666.
Clark's Estate, 1 Kulp, 32.
Barlet's Estate, 3 Id. 242.

An examination of all the Acts will clearly show that in such a case no refunding bond is necessary.

The property upon which the bill seeks to obtain a lien has been conveyed for a valuable consideration, and this will prevail against creditors.

Frank's Appeal, 59 Pa. 190.

The bill is defective because drawn in direct violation of sections 17 and 39 of the equity rules.

November 12, 1894. McCollum, J. Whilst the bill in this case was prepared and filed for the purpose of having the real and personal pro-

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perty which Mrs. Yard conveyed to the Guarantee Trust and Safe Deposit Company declared applicable to a judgment recovered against her as executrix of the estate of Charles S. Murphy, deceased, there was no averment in it that any portion of such property formerly belonged to his estate, or was derived directly or indirectly from it or from the proceeds of it. The complainant did not even allege that he was informed and believed and expected to be able to prove that the property thus sought to be charged with the judgment constituted legal or equitable assets of the estate in the hands of the executrix or her trustee under the conveyances mentioned in the bill. As the whole purpose of the proceeding was to apply to the judgment against Murphy's estate the property which the Guarantee Trust and Safe Deposit Company held for Mrs. Yard and her daughter under deeds from the former, it was of the first importance that it should appear on the face of the bill that the property sought to be so applied was, *prima facie* at least, an asset of the estate and liable for its debts. The learned Judge of the Court below was therefore fully justified in saying in substance as he did in the decree dismissing the bill, that there was nothing on this record showing that the trust property ever belonged to Murphy's estate. He was also clearly right in his conclusion that under section 24 of the Act of February 24, 1834, the claim of plaintiff against the real estate of Charles Murphy, deceased, was lost by lapse of time. Murphy died on the 8th of June, 1876, and the suit in which the judgment was obtained was commenced on the 30th of January, 1886. As the claim was not founded upon or secured by a mortgage or judgment the lien of it was lost nearly five years before suit was brought for the recovery of it: Bindley's Appeal, 69 Pa. 297, and Oliver's Appeal, 101 Id. 299. The Act referred to and the cases cited relate to debts not secured by mortgage or judgment, and to the lien of such debts on the real estate of a decedent.

Assuming what was not alleged in the bill, to wit, that all or part of the fund held by the Guarantee Company in trust as aforesaid, represented cash and securities which Mrs. Yard received as distributee under the will of Charles S. Murphy, deceased, was it an asset of his estate and applicable to the judgment in question? The cash and securities mentioned were awarded to her by an absolute decree of the Orphans' Court more than six years before suit was brought upon the claim and more than twelve years before this bill was filed. This decree remains unreversed, it has never been directly assailed, and it cannot be successfully attacked collaterally. An executor or administrator who makes payments in conformity with such a decree is unquestionably protected by it: Stewart's Appeal, 86 Pa. 149, and Charlton's Appeal, 88 Pa. 476. But it is contended that the decree affords no protection to the distributee because a refunding bond was not required by it. We cannot assent to this proposition. A voluntary payment by an administrator to a distributee cannot be recovered back in the absence of fraud or an agreement to refund in case it should prove to be an over-payment or it should be needed to satisfy after discovered claims against the estate; and further, the statute of limitations runs against the payment from the time it was made: Montgomery's Appeal, 92 Pa. 202, and Miller *v.* Hulme, Exr., 126 Id. 277. That a distributee who receives money from an administrator under and in pursuance of an absolute decree of the Orphans' Court is in a worse position than one who receives it without the sanction of such a decree is a proposition which has neither reason nor authority to support it. Nothing is better settled than that the Orphans' Court has exclusive jurisdiction to ascertain the amount of a decedent's property and to order its distribution among those entitled to it: Whiteside *v.* Whiteside, 20 Pa. 473. Its decrees until reversed on appeal or opened by the tribunal in which they were entered are conclusive: Lex's Appeal, 97 Pa. 289. An allegation of want of actual notice of the settlement of the account of an administrator, or of the decree of distribution, is unavailing where it appears that the notice provided by the Act of Assembly has been given. App *v.* Dreisbach, 2 Rawle, 305; Priestley's Appeal, 127 Pa. 420. At all events such allegation will not be considered in a collateral attack upon the decree. We think it is clear from the Acts relating to distribution and from the decisions under them that the absolute decree of the Orphans' Court founded upon the notice prescribed by the statute is not made null by the omission to exact a refunding bond. In Schaeffer's Appeal, 119 Pa. 640, CLARK, J., in referring to distribution under the Act of 13th April, 1840, said: "In this form of distribution, notice to creditors being provided for, refunding bonds are not required." It is true that in that case this question was not squarely raised, inasmuch as refunding bonds had been given, but it is also true that the statement was in accord with the construction placed on the Act in Scott on the Intestate Law, p. 431, and with the decision of this Court in Hoban's Appeal, 102 Pa. 405. In view of the principles stated and the cases cited we concur in the conclusion reached by the learned Court below and approve the reasons assigned for it in the decree. This renders it unnecessary to consider other objections to the bill which are in their nature technical. We may add that in the con-

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sideration of the case we have received material assistance from the carefully prepared and exhaustive brief presented by the learned counsel for the appellee.

The specifications of error are overruled.

Decree affirmed and appeal dismissed at the costs of the appellant. W. M. S., Jr.

Oct., '94, 109. October 3, 1894.

Fullerton's Appeal.

Judgment—Priority of lien—Distribution.

F., a judgment creditor of one R. McC., as for his part of a transaction satisfied of record his judgments; the transaction failing of completion his satisfaction was on rule taken, stricken off. C. McC. entered judgment against the same defendant pending the disposition of the rule to strike off satisfaction. Execution was had against R. McC.'s realty upon a judgment junior to F.'s but senior to McC.'s, and in distributing the fund the sheriff applied it first to the satisfaction of F.'s judgments, the fund not being sufficient to cover F.'s judgments and certain judgments entered before F.'s judgments were satisfied but junior thereto.

Held, that as F.'s judgments were entitled to precedence over all the judgments except C.'s; C. had no equity against any judgment except that of F., and C.'s only claim would be in case he was prevented from sharing in the fund by reason of the appropriation to F.'s judgments.

Appeal of John Fullerton, administrator of William Fullerton, deceased, from the judgment and decree of the Court of Common Pleas of Westmoreland County, dismissing exceptions to and confirming the report of an auditor appointed to determine exceptions to the schedule of distribution of the sheriff of a fund arising from the sale of real estate of Robert McCune, defendant, in a judgment wherein John McCune was plaintiff.

The facts of the case seem to be sufficiently set forth in the opinion of the Supreme Court.

John Latta, for appellant.

The entry of satisfaction of Fullerton's judgments did not postpone his right to participate in this fund.

The other judgment creditors were not harmed.

Nor were they entitled to notice of the rule to strike off the satisfactions.

Harner's Appeal, 94 Pa. 489.

Denna C. Ogden (*S. A. Kline* and *A. Eicher* with him), for appellees.

November 12, 1894. Williams, J. Fullerton, the appellant, was the holder in April, 1889, of three judgments against the defendant which were at that time the only liens upon the real estate sold by the sheriff in this case. Afterwards and before the thirteenth day of March, 1893, five other judgments were entered against the same defendant amounting together to about eighteen hundred dollars. The judgment of John McCune on which the real estate was sold was one of these. On the thirteenth day of March, 1893, as part of an arrangement for the sale of the real estate to Baker, the appellant made an entry of satisfaction on the record of each of his judgments. The arrangement for the sale was not consummated and nothing was paid to Fullerton on his judgments. He afterwards obtained a rule on the defendant to show cause why the entry of satisfaction should not be stricken off, and on the fourth day of November, 1893, the rule was made absolute, with a proviso "that the rights of other lien creditors should not be impaired." Pending this rule Charles McCune, a son of the defendant, entered a judgment against his father for two hundred and sixty-eight dollars. The sale by the sheriff took place on the 18th of November, 1893, and realized seven hundred and thirty dollars. This is the fund for distribution.

The general rule is that liens are entitled to payment in the order of their priority, but it is alleged that this rule has been modified in this case by the erroneous entry of satisfaction by Fullerton on his judgments.

We are to inquire therefore into the effect of that entry and the order of the Court by which it was stricken off, upon the rights of the holders of junior judgments, and upon the rights of Charles McCune, whose judgment was entered after the entry of satisfaction and before the order of the Court striking it off. It should be borne in mind that distribution requires an adjustment of the equities between the claimants and must be made "according to law and equity": Tindle's Appeal, 77 Pa. 201; Landell's Appeal, 105 Pa. 152. A prior lien will be postponed to a junior when this is necessary to do justice to the holder of the junior lien, otherwise the order of priority will be followed. The five lien creditors whose judgments were entered while the judgments of the appellant were standing in full force, and before the entry of satisfaction was made upon them, have not been misled by the appellant's mistake in entering satisfaction upon them. They have not suggested any reason for supposing that they have been prejudiced in any manner by his act or by the order of the Court relieving him from it. They show no intervening rights acquired while the judgments appeared on the record to be satisfied. They have therefore no equity to set up against the appellant that ought in good conscience to deprive him of the benefit of the correction of his mistake in making the entry of satisfaction

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in advance of payment. His judgments were in full life when theirs were obtained, and when the sheriff's sale was made, and we can see no reason why he is not entitled to the benefit of his priority of lien.

The case of Charles McCune stands on somewhat different ground. His judgment was entered pending the rule to strike off the entry of satisfaction, and if it should appear that he was misled by the entry, and had advanced money or given credit to the defendant upon the state of the record, then an equitable right to priority over the satisfied judgment might be asserted. But if the existence of such a right be shown it could not affect the intermediate judgments. They were in full force, and Charles McCune had notice by the record of their priority, and amount, when his own judgment was entered. He cannot be paid out of the fund until these judgments are first satisfied. How then can his equitable right against Fullerton be enforced? It cannot be unless the fund is large enough to pay the judgments that have priority over him; and in that case as Fullerton is entitled to priority over these intermediate judgments, the fund must be distributed to the liens in their order beginning with those of Fullerton. But if the fund is large enough to pay the intermediate judgments and leave a surplus that would have gone to McCune if Fullerton's judgments had been actually paid, as they appeared to be, McCune may ask the application of the surplus to his lien as against Fullerton.

Let us suppose for purposes of illustration that the fund was two thousand dollars, and the liens were twenty-two hundred, divided as follows: Fullerton, three hundred dollars; intermediate liens, sixteen hundred dollars; McCune, three hundred dollars. The order of appropriation, following the order of the liens would give Fullerton three hundred dollars, the intermediate judgments sixteen hundred, leaving one hundred dollars only for McCune. But as between McCune and Fullerton, the former, if his equitable right of priority be established, is entitled to take from the latter so much of the money awarded to him as may be necessary to pay the balance of his judgment. The result would be that two hundred dollars of the money appropriated to Fullerton would be transferred to McCune and his judgments would be paid in full, and that but one hundred dollars would remain applicable to Fullerton's judgments. If we suppose the fund to be sixteen hundred dollars or less, this would all be required to pay the intermediate judgments of which McCune had notice, and he would have no claim on the fund; while Fullerton having priority over these creditors would have a right as against them to the benefit of his position as the holder of the first liens, and the money so awarded to him would not be affected by McCune's equity.

The decree of the Court below is reversed, and the record remitted that distribution may be made in accordance with this opinion. The costs to be paid by the appellees.

W. D. N.

Oct. '94, 16. October 22, 1894.

Wilson v. Black.

Partnership—Assets—Articles of Agreement.

Where articles of partnership provide that on a dissolution certain personal property shall become the property of the party of the first part; and that the interest of the party of the second part shall be ascertained by taking the gross receipts of a certain department of the partnership business for the twelve months prior to dissolution, the property specified does not, on dissolution, become partnership assets for the purpose of settlement, and the case is not changed by the fact that more than twelve months before dissolution, the partners sold the department whose receipts were to determine the interest of the party of the second part.

Appeal of Samuel W. Black, defendant, from the decree of the Common Pleas No. 2, of Allegheny County, in a suit in equity brought by H. C. Wilson.

The bill in this case was filed to settle accounts between two partners. After answer filed, the case was referred to R. B. Petty, Esq., as master, before whom the facts appeared as follows:—

S. W. Black and H. C. Wilson, on July 1, 1889, entered into a partnership for the carrying on of a real estate business in the city of Pittsburgh, which had previously been conducted by Black, under the name of Samuel W. Black & Co., which name was retained by the firm. The agreement provided that the partnership should continue until dissolved at the request of either party; that Black's interest should be two-thirds and that of Wilson one-third; that Black contributed all unexecuted orders in his hands, including his rent-collection business, and also all maps, plans, papers, office furniture, and buggy used by him in the business; that Wilson should pay to Black eight thousand dollars with interest for his one-third of the partnership, this not to be a personal liability, but to be paid out of his share of the profits; that each party should receive a salary, to be considered part of the expenses of the office, Black's salary to be three thousand dollars, and Wilson's salary two thousand dollars; that in the event of a dissolution, all personal property, books, papers, maps, plans, and unexecuted orders of firm should become property of Black, for the purpose of enabling him to continue the business, previously done by

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the partnership, in his own name and for his own benefit; in the event of a dissolution, the value of the interest of Wilson at that time to be ascertained as follows, to wit: "The interest is considered as valued at $8,000, based on annual gross receipts from the rent-collecting department of $8,000. At the time of dissolution, therefore, the said interest shall be valued by the gross receipts from said department for the twelve months previous to the dissolution. If the gross receipts, therefore, are greater than eight thousand dollars for that period, the valuation of the second party's interest is to be increased accordingly; if the gross receipts therefrom are less than eight thousand dollars for that period, the valuation is to be decreased accordingly. When the valuation is ascertained in the foregoing manner, then from said valuation is to be deducted the amount still owing by Wilson on account of his interest and the balance, if any, paid to him."

After the partnership had lasted about six months the partners sold the rent-collecting department of their business, with the good-will thereof, to the firm of Black & Baird, for the sum of $20,000, and bound themselves not to engage in the renting business for five years. The proceeds of this sale were treated as profits, and divided by Black and Wilson according to their interests in the firm. The parties continued the business of buying and selling real estate until August 31, 1891, when the plaintiff withdrew and opened an office of his own for the purpose of carrying on the same character of business in his own name. The defendant continued in business as Samuel W. Black & Co. The plaintiff claimed before the master one-third part of the value of the assets of the firm at the time of the dissolution, which consisted of the books, plans, office furniture, etc., the lease of the office building on Fourth avenue, and two other leases, the bills receivable, and the good-will.

The master sustained the claim, but held that the good-will was of no value. He valued the books, papers, plans, etc., at $700, and the leaseholds at $1,500; and as to the bills receivable, that the defendant had already paid $105.89 in excess of their value, and was entitled to credit for that amount. He accordingly made a decree in favor of the plaintiff for $698. Both sides filed exceptions, which, after argument, were dismissed by the Court, and a decree entered for the amount found by the master, and that defendant pay the costs.

The defendant took this appeal, and filed, *inter alia*, the following assignments of error:

1. The Court erred in not sustaining the defendant's third exception to the master's report, as follows: "3. The master erred in finding that the plaintiff had a one-third interest, and should be paid their fair value for the other assets of the partnership, to wit, books, papers, maps, plans, office furniture, etc."

2. The Court erred in its decree that the defendant pay to the plaintiff the sum of $698, and pay the costs.

James C. Doty, (with him *P. C. Knox*, *James H. Reed* and *Edwin W. Smith*,) for appellant.

A. M. Brown, (*John D. Brown* with him,) for appellee.

November 5, 1894. STERRETT, C. J. One of the items constituting "the sum of $2,094.11," found by the learned master "as the net value of the firm assets received by the defendant," is seven hundred dollars for books, papers, maps, plans, office furniture, etc., mentioned in the first specification of error. We are unable to see how, upon a proper construction of the co-partnership agreement of July 1, 1889, these articles can be regarded as firm assets. As to them, the agreement provides thus: "In the event of the dissolution of the firm, from any cause, all the personal property, books, papers, maps, plans and unexecuted orders, belonging to or in the possession of such partnership, shall become the property of the said first party, for the purpose of enabling said first party to continue the business, previously done by said partnership, in his own name and for his own benefit." In the next succeeding clause of said agreement, provision is made for ascertaining the second party's interest in the partnership, in the event of a dissolution thereof, by taking as a basis "the gross receipts from" the rent-collecting "department for the twelve months previous to dissolution," etc., as therein specified. When the firm business had been prosecuted for about six months, both partners united in effecting a sale of their rent-collecting department for $20,000; which sum they treated as profits and divided according to their respective interests in the firm, plaintiff receiving one-third and defendant the ressdue. They thenceforth confined their efforts to buying and selling real estate. While the effect of disposing of the rent-collecting department of their business was to render inoperative the provision aforesaid for ascertaining plaintiff's interest in the firm, it did not in any manner interfere with defendant's right to the books, papers, maps, plans, etc., which, under the clause above quoted, were to become his "property" "in the event of a dissolution of the firm, from any cause." That provision was not altered or annulled by the sale aforesaid. It was never contemplated that defendant should account for the value of the books, papers, maps, plans, etc., specified in the clause referred to. Those articles were to be used in the prosecution of the firm's business until a dissolution took place; and thereupon they reverted to

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defendant, for the purpose of enabling him "to continue the business . . . in his own name and for his own benefit." We are therefore of opinion that there was error in treating said articles, valued by the master at $700, as partnership assets; and the decree should be modified accordingly. As to the other items of assets, we are not prepared to say there was any error. We are also of opinion that defendant should not be required to pay more than two-thirds of the costs. The proceedings appear to have been necessary to the settlement of matters in dispute between the parties respectively, and each should therefore bear his proportionate share of the costs, etc.

Decree reversed, and it is now adjudged and decreed that, in lieu of the sum specified in said decree, the defendant pay to the plaintiff the sum of four hundred and sixty-four dollars and sixty-seven cents ($464.67), with interest from September 16, 1893; and it is further ordered that the costs, including the master's fee, ($200), stenographer's bill, ($125), and costs of this appeal, be paid, one-third by plaintiff, and remaining two-thirds by the defendant. H. B.

July, '94, 58. May 21, 1894.

Patterson et al., v. Graham et al.

Trespass—Cutting timber—Contract—Rescission of—Assertion of right within reasonable time.

In a contract for the sale of timber where the parties intend a severance and no time is fixed within which the timber is to be removed, the law implies that the vendee is to remove it within a reasonable time, and if, after notice from the vendor, the vendee neglects, for an unreasonable time, to remove the timber, he loses his right under the contract.

What is a reasonable time for the exercise of a right to cut timber, after notice, depends upon circumstances, such as quantity of timber, character of it, facilities for manufacturing and marketing it.

Boults *v.* Mitchell, 15 Pa. 371, distinguished.

Where an interval of eleven years elapses between ceasing to cut and remove timber, and a return to prosecute the work, it must be concluded that the grantee had relinquished his rights under the contract, and he became a trespasser when he entered upon the land for the purpose of removing the timber.

Appeal of R. H. Patterson *et al.*, plaintiffs, from the judgment of the Common Pleas of Juniata County, in an action of trespass against G. M. Graham *et al.*

The facts of this case are fully stated in the opinion of the Court, *infra*.

Atkinson, (*Pennell* with him), for appellant.

There being no time limited in the agreement, within which the timber was to have been removed, Graham was bound to remove it within a reasonable time, as the agreement to sell the timber contemplates that it shall be taken off by the purchaser. When an agreement to do a thing is made and no time is fixed for its performance, the law annexes a reasonable time.

19 Am. & Eng. Ency. of Law, 1090, & note.
2 Parsons on Contracts, 535, sec. 8, and 660, sec. 2.
Saltonstall *v.* Little, 90 Pa. 425.
Andrew *v.* Wade, 4 Central Rep., 689.
Boults *et al.* *v.* Mitchell, 15 Pa. 371.
Andrew *v.* Wade, 4 Cent. Rep. 689.
Hillard on Sales, (3rd Edition) Chapter XI., sec. 2, page 217.
Shepler *v.* Scott, 85 Pa. 329.
Wagenseller *v.* Simmers, 97 Id. 465.
Nunan *v.* Bourquin, 7 Phila. 239.

What is a reasonable time is a question of law for the Court when the facts are undisputed. In this case there is no dispute about the facts.

Muney Sch. Dist. *v.* Com'th, 84 Id. 471.
Hockman *v.* Shimp, 109 Id. 20.
19 Am. & Eng. Ency. of Law, 64.

Notice does not change the ordinary rule of law that reasonable time is allowed in all contracts where no time is fixed.

2 Parsons on Contracts, 671.

J. Howard Neely, (*B. F. Junkin* with him), for appellees.

A sale of standing timber not to be immediately cut and removed is an interest in the land itself and can only be created by writing, because it is within the Statute of Frauds. A contract for standing timber to be taken off at discretion as to time is an interest in land, and is within the Statute of Frauds and must be in writing.

Pattison's Appeal, 61 Pa. 294.
McClintock's Appeal, 71 Id. 365.
Huff *v.* McCauley, 53 Id. 206.

A recorded paper title to land cannot be lost by abandonment nor by non-user; nothing less than an adverse possession hostile to the paper title for twenty-one years can impair or overthrow the *prima facies* of ownership.

Putman *v.* Tyler, 117 Pa. 570.

The purchase of the timber growing upon land without limitation as to time of removal does not differ from the purchase of the soil itself, except in this, that the fee or ultimate reversion is in the vendor and as it would be unreasonable for the owner of the timber to hold his right indefinitely, the reasonable rule has been adopted that the vendor shall have

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the right to quicken the vendee by requiring him to remove the timber in a reasonable time.

Boults *v.* Mitchell, 15 Pa. 371.
Shiffer *v.* Broadhead, 126 Id. 260.
Dexter *v.* Lathrop, 136 Id. 565.

Here no notice to remove was ever given by the appellants and the appellees could remove the timber as they wished until quickened by the peremptory order of the appellants to close the business in a reasonable time.

October 1, 1894. DEAN, J. The plaintiffs sued defendants in trespass for cutting timber on their land. The land, in quantity about 750 acres, some years before was owned by Ellen V. Patterson, who devised it to her husband, John Patterson, for his own and their children's use, during his life, with power to him of testamentary disposition. At the death of testatrix in 1865, he took possession under the will. On the 3rd of August, 1872, for himself, and as trustee for his children, he made an agreement with G. M. Graham, one of defendants, to sell to him all the white oak and pine timber on the land; Graham agreed to pay therefor the sum of $3,000, in three equal annual payments, commencing on 1st of April, 1873. It was further agreed, that if there was built within eight miles of the land, a railroad station, before Graham commenced sawing, or during the time he was sawing, then he was to pay fifty per cent. additional to the contract price, either for the whole or that portion delivered to the station; Graham to have all needful privileges on the land for successful operations in the lumber business. It was further stipulated that the contract was not to prevent Patterson from selling the land, subject to Graham's rights. No time was fixed for the removal of the timber. Graham paid the full amount of the purchase money on and before March 1, 1876. About the fall of 1878, he put up a saw-mill on the land, and commenced cutting the timber, and continued until the spring of 1881, when, having manufactured about all the saw timber, he moved his mill away and ceased operations. In 1886, John Patterson died, and by his will and sundry conveyances by and among his children, the title to the land became vested in these plaintiffs. In the summer of 1892, about twenty years after the agreement was made, and eleven years after he had stopped cutting and had taken away his mill, G. M. Graham, with his son Joseph, again put their mill on the land, and cut and manufactured about 350,000 feet of oak and pine. For this, the plaintiffs brought suit. They claimed, that under the agreement and evidence, there was a sale of the timber with a reasonable time for removal; that after abandoning the land in 1881, defendants' right to cut and remove timber ceased within a reasonable time; that eleven years was not an assertion of right within a reasonable time, and this was a question for the Court to decide. The defendants contended that the rule, that where there is a grant of the land, reserving timber, the grantor must remove the timber within a reasonable time, upon notice, does not apply where there is an absolute sale of the timber without limit as to time. That in case of such absolute sale, the right to remove is indefinite as to time.

The Court submitted the evidence to the jury, instructing them, that if they found that Graham had not abandoned the land when he removed his mill, but nevertheless on his return, had cut and removed oak and pine timber, not of sufficient size for sawing in 1872, when the agreement was made, plaintiffs were entitled to recover the value of this timber, but were not entitled to recover for that which was sawn timber in 1872. And further, that it was the duty of Patterson to notify Graham to remove the timber within a reasonable time if he desired to terminate his right, and as no such notice had been given, Graham had a right to re-enter and cut such timber as was fit for sawing at the date of the agreement in 1872. The verdict was for plaintiff for $157.32. As plaintiffs' evidence tended to show the timber was worth from $2 to $4 per thousand stumpage, the jury evidently found that only a small part of that taken, was of a growth which had become large enough for sawing after the agreement was made in 1872.

From the judgment entered on the verdict, the plaintiffs appeal, assigning for error the instruction of the Court in the general charge and answers to points.

No time was expressly fixed in the agreement, within which the timber was to be cut and removed. But the intention of the parties may be ascertained from other stipulations in the agreement and facts *dehors* the agreement, such as the situation of the parties, and the circumstances surrounding them at the time they entered into it. Patterson was a farmer, Graham was a lumber manufacturer and dealer in lumber. No provision is made as to payment of taxes by the purchaser on any interest in the land; provision is made for increased price, should a railroad station be built within eight miles of the land, either before Graham commenced sawing, or before he had finished. Patterson grants privileges on his land to Graham necessary to carrying on the lumber manufacturing business. It is very clear, that Patterson sold and Graham bought, with the intention on part of both, that the timber was to be manufactured into lumber. That is, it was not bought as land to be held indefinitely, or to be sold as land when it suited the purchaser. A purchaser may buy growing

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timber, with no intention of manufacturing it into lumber, and hold it, just as he might buy and hold the land, if he so frame his contract. In such case, he could remove it when he chose, and the vendor would have no right to quicken him by notice. But here the parties intended, not a sale and purchase of the timber, to be held as land, but a sale for purpose of manufacture within a reasonable time; not an immediate severance, but not one indefinitely remote; and this is evidenced by the agreement and their surroundings. That they so understood it, is also shown by their subsequent conduct. In about five years, Graham moved his saw-mill upon the land, and commenced cutting and removing the timber; he continued manufacturing nearly three years, severing nearly all then suitable for lumber; then removed his mill, and for eleven years did not go back or exercise a single act indicating any claim to the timber. Undoubtedly, in a contract for the sale of timber, where the parties intend a severance, and no time is fixed within which it is to be removed, the law implies that the grantee will remove it within a reasonable time. And the grantor can quicken action by notice. If, after such notice, the grantee neglects for an unreasonable time to exercise his right, he loses it. The question then, of what is a reasonable time, is not determined by the will of the grantor, or alone by the fact of notice, but by all the circumstances. The attention of the grantee having been directed to the right and claim of the grantor, the grantee is the one to move; and if he be indifferent and passive then, for an unreasonable time, the entire interest in the land revests in the grantor.

What is a reasonable time for the exercise of the right, after notice, depends on circumstances, such as quantity of timber, character of it, facilities for manufacturing and marketing it; and in case of dispute, this becomes a question for adjudication by the Court. To this effect are Boults *v.* Mitchell, 15 Pa. 371; Shiffer *v.* Broadhead, 126 Pa. 260, and all the authorities. But the facts of this case are, in an essential particular, different from those in the cases cited. If, after the purchase in 1872, Graham had made no move to cut and take away the timber, and Patterson had notified him to remove it, and Graham had delayed in commencing work, or had been slow in finishing it, the question of "reasonable time" would have become one for determination, under the authorities, by the Court, or by the Court and jury at the trial.

But no such question arises here; for there will not be implied two reasonable distinct times, eleven years apart. The timber was sold to be removed within a reasonable time; between five and six years after the sale, and three after the last payment, Graham moved his mill upon the land, and commenced manufacturing and removing the timber; he continued his operations for three years. Both parties, by their conduct, deemed this a reasonable time in which to commence operations, as it evidently was. Then Graham, after cutting, apparently, all worth cutting under his purchase, stopped, took away his mill, and nothing is heard of any claim by him for eleven years. In the meantime, there has grown into merchantable lumber, trees, which were valueless when he made his contract; these, with others that he had neglected to fell in his first operation, he cuts and removes, claiming the right to do so under his contract made twenty years before. At the date of this second entry, the grantor has been in his grave for several years; the land has passed to his children and their grantees. This second entry of Graham, under the undisputed facts, was clearly a trespass. Within a reasonable time, in 1878, he entered upon the land, and exercised the right granted him under the agreement; at the end of three years, by a distinct, unequivocal act, stopping operations and removing his mill, he relinquished to the grantor the full possession of his land; and this intention is emphasized by his silence for eleven years. Nothing less than distinct notice to the grantor, when he removed his mill, that he intended to return within a reasonable time to remove timber still standing, could have served to weaken the significance of this act, and it is doubtful if that would have been sufficient, in view of his long inaction. But no notice by the grantor to him, after such conduct, was required. He had a right to assume that Graham had taken all the timber that passed to him as the consideration of the contract, and that he had no further claim. After he is through with his present operation, he has as much right to return, when another eleven years' growth has made more timber valuable, as to return now after an abandonment eleven years ago.

We think, on the undisputed facts, the plaintiffs were entitled to recover the value of the timber cut. The measure of damages, in view of the circumstances, was correctly stated by the Court.

The plaintiffs' second point should have been affirmed without qualification, and the assignment of error in this particular is sustained. This, and the opinion herewith filed, necessarily disposes of the whole case. The judgment is reversed, and a venire facias de novo awarded.

W. C. S.

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May, '94, 17. May 29, 1894.

Citizens' P. R. Co. v. East Harrisburg P. R. Co.

Railways, laying of rails—Crossing at grade diagonally—Act of Assembly 14th May, 1889.

Both a diagonal and a transverse crossing are expressly allowed by the 18th section of the Act of 1889, and there is nothing therein contained which prohibits such a reasonable elongation of the connecting track as is essential to reach the opposite point of the crossing.

Appeal of the East Harrisburg Passenger Railway Company, defendant, from the decree of the Common Pleas of Dauphin County, in a suit wherein the Citizens' Passenger Railway Company was plaintiff.

The bill stated that the Citizens' Passenger Railway Company was a corporation created under the Act of Assembly of 14th May, 1889, and authorized to build and operate by electricity a street railway on and over certain streets in the City of Harrisburg and the Borough of Steelton; that the said borough had, on the 17th day of March, 1892, given it permission to construct and operate its railway on certain of its streets, including Front street from Adams to Trewick; that it had already built its line of road to Adams street on the one side of Front street and to Trewick street on the other side of said street; that the East Harrisburg Passenger Railway Company had a double track of railway running along and over said Front street, between Adams street and Trewick street; that the Citizens' Passenger Railway Company desired to make a diagonal crossing of the double line of tracks of that company for the distance of 240 feet on Front street, between Adams and Trewick streets, and that it believed this to be the best, safest, most convenient and only practicable way of crossing that street. The prayer of the bill was for a decree to permit this diagonal crossing to be made and for an injunction to prevent the East Harrisburg Passenger Railway Company from interfering with the construction of that crossing and for general relief.

The answer of the East Harrisburg Railway Company averred that Front street between Adams and Trewick streets belonged to the Middletown and Harrisburg Turnpike Road Company; that it was a narrow street occupied by two parallel lines of track of the East Harrisburg Railway Company, upon which nearly two hundred cars, propelled by electricity, passed daily, and that this number of cars was greatly increased on the holidays and on special occasions; that it had constructed a switch or cross-over on Front street, between Adams and Trewick streets to enable its cars going from Harrisburg to Steelton to pass from one track to the other and thus return to Harrisburg; that to obtain the right to lay down, construct and operate said line of double track, and said switch or cross-over, the East Harrisburg Passenger Railway Company had been compelled to pay the Borough of Steelton and the Middletown and Harrisburg Turnpike Road Company the sum of $15,000; that the proposed approach by the Citizens' Passenger Railway Company to Front street upon both Adams and Trewick streets was at such grades as would make the crossing dangerous to the lives and limbs of passengers and employés of the East Harrisburg Passenger Railway Company, and would interfere with the safe and convenient operation of the lines of the latter company; that the proposed crossing was not necessary, safe or practicable and that it was possible and practicable for the Citizens' Passenger Railway Company to complete its line of road by other methods and routes.

The following decree was entered by the Court:

"[1. That the plaintiff, the Citizens' Passenger Railway Company be, and hereby is, authorized and empowered to construct and operate at its own expense a single track railway at grade crossing the roadway and tracks of the East Harrisburg Railway Company, defendant, from the intersection of Adams and Front streets to the intersection of Front and Trewick streets in the Borough of Steelton, in the manner proposed and shown in the plan filed in this case; with overhead electrical trolley wires to be constructed and arranged in the manner proposed and shown in the paper filed herein and marked "Plan." And the defendant, its officers and agents, is enjoined from interfering with the construction or operation of said crossing.]

"2. It is further ordered, adjudged and decreed that said plaintiff shall keep and employ at its own expense a watchman at said crossing at Adams and Front streets, whose duty it shall be to guard said crossing, keep the rails and frogs of the track of both plaintiff and defendant at said crossing free from obstructions of every kind, and enforce the regulations herein prescribed as to the manner in which said crossing is to be operated.

"3. The cars of the East Harrisburg Passenger Railway Company shall have the right of way at said crossing, and all cars of the Citizens' Passenger Railway Company shall come to a full stop before entering on Front street from Adams street or from Trewick street; and, when the proper signal is given by the watchman in charge, shall proceed at a speed not exceeding four miles an hour, without stopping to set down or take up passengers between Adams and Trewick street.

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"[It is further ordered, adjudged and decreed that the costs of this suit be paid one-half by said plaintiff and the other by said defendant.]"

The defendant took this appeal and assigned as error the portions of the decree above enclosed in brackets.

Louis W. Hall and *Lyman D. Gilbert* (with them *Wolfe, Bailey, John H. Weiss* and *Francis Jordan*), for appellant.

"The time for grade crossings in this State has passed. They ought not to be permitted except in cases of imperious necessity."

Perry Co. Extension Co. *v.* Railroad Co., 150 Pa 193.
Pa. R. R. Co. *v.* Braddock Electric Ry. Co., 152 Id. 116.
P. & C. R. R. Co. *v.* S. W. Ry. Pa. Co., 77 Id. 173.
Appeal of Cornwall & Lebanon R. R. Co., 125 Id. 232.
Commonwealth *v.* Erie & North-East R. R. Co., 27 Id. 350.

Priority in time gives priority of right as between licensees seeking to occupy the same streets for the same purpose. When two or more companies are authorized to lay tracks over a particular route, the one which first begins and diligently prosecutes the work of construction acquires the right of occupation on the line occupied by it to the exclusion of the others.

Booth on Street Railways, sec. 122, p. 179.
Railway Co. *v.* Railway Co., 3 Mont. 199.
Omnibus R. R. Co. *v.* Baldwin, 57 Cal. 160.
Indianapolis Cable Street Ry. Co. *v.* Citizens' Street Ry. Co., 127 Ind. 369.
Pittsburgh & Connellsville R. R. Co. *v.* The S. West Pa. Ry. Co., 77 Pa. 173.

The law of 1889 was intended to prohibit, and does prohibit rival street car companies from occupying the same street. The same section of the Act which thus limits the power of the second company, previously confined such company to streets and highways distinctly named. They were not authorized to extend their tracks or increase their business by occupying streets already occupied by other companies. And there was everything in this case as shown by the undenied facts in defendant's answer, why the statutory prohibitions should be enforced here. We submit that the necessity for the occupation of this part of Front street by the plaintiff, is not only not apparent from existing facts, but that the reason for enforcing the statutory prohibition is plain and evident. The right to cross as a matter of right, simply because of the words in section 18 of the Act of 1889, as argued by the learned Judge of the Court below, is not sound. There should be (he says) "an end of controversy when it arises between two companies, both of whom derive their existence from the Act in question; and we are unable to see how the defendant, claiming to exist by virtue of the Act of 1889, can be heard to say that it is not bound by the provision of this Act."

A sufficient answer to this is to quote from the opinion of this Court in the Braddock case, cited *supra*: "We have no doubt that electric railways are within the purview of the Act of 1871." The distinction drawn by the learned Judge between this case and the Braddock case, we submit, is not warranted. If this were a grade crossing, properly so called and in fact, under the facts here, the plaintiff company should not be permitted to cross the tracks of the defendant company at grade, for such crossings are only permitted when justified by the circumstances as prescribed by the Act. Then it is the duty of a Court of equity to first ascertain and define "the mode of such crossing which will inflict the least practical injury upon the rights of the company owning the road intended to be crossed," and to avoid a grade crossing if practicable. Nothing of that kind was "ascertained or defined;" nor was any effort made to avoid a grade crossing. While it is not a grade crossing alone, it is that in its most offensive sense, coupled with a power to lay a track along the turnpike close to and parallel with the tracks of the defendant already there, from Adams to Trewick street, a power not only not given, but prohibited by the plainest provisions of the statute.

J. C. Durbin and *C. H. Bergner*, for appellee.

The *locus in quo* is the only place where a grade crossing or in fact any kind of a crossing can be effected in order to connect and complete ready for operation the line of appellee's railway. Without a crossing our railway is doomed, and it being admitted that the *locus in quo* is the only point where such crossing can be made, because of the conformation of the ground, it follows that without a crossing at the point approved by the Court below the railway line of appellee will be a failure and the capital invested in the enterprise will be lost.

There are only two material questions involved in this controversy:

1. Has the Citizens' Passenger Railway Company the right to build its railway across appellant's railway tracks on Front street, Steelton, between Adams and Trewick street, so as to connect its railway system and to reach its power house, car shops and terminus by means of a diagonal crossing?

2. Did the Court err in ascertaining and defining by its decree the mode of such crossing so as to inflict the least practical injury upon the rights of the company owning the road which is intended to be crossed?

The eighteenth section of the Act of May 14, 1889, P. L. 217, (under which Act both com-

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panies are incorporated) provides that "any company incorporated under the provisions of this Act shall have the right in its construction to cross at grade diagonally or transversely any railroad operated by steam or otherwise now or hereafter built."

This Court said in Pittsburgh Junction R. R. Co.'s Appeal, 122 Pa. 529: "The right of a railroad company to corporate rights being established or admitted, the right to cross if necessary or convenient in reaching its terminus is absolute."

Again, this Court has decided that it was proper to restrain by injunction a railroad from preventing a railway from crossing it at grade.

Buffalo Passenger Ry. Co. *v.* Dubois Traction Co., 149 Pa. 1.

It was decided in the case of Braddock and Turtle Creek Ry. Co. *v.* Braddock Ry. Co., 49 Leg. Intel. 25, that one street railway can cross another diagonally in a case like this where the opposite streets to be connected were 165 feet apart, and that it was not a question of priority of right.

Booth's Street Railway Law, 161, sec. 110 and notes.

The appellee could not build an overhead structure, but must keep upon the streets.

Quaker City Road Co. and the North Eastern Co, 34 WEEKLY NOTES, 261 and 267.

If the proviso as to infliction of injury is construed literally, either it or the grant must yield and the rule is that a proviso or exception contrary to the grant is void.

Ensworth *v.* Commonwealth, 52 Pa. 323.

The law must have such a construction as will make it consistent and beneficial to the public.

Newbold *v.* Mead, 57 Pa. 491.

The Act of 1889 does not contemplate that a crossing shall inflict no injury upon the company crossed. The Court shall define by its decree the mode that shall inflict the least practicable injury. This the Court did and the appellant ought not to complain.

October 1, 1894. GREEN, J. The master in this case found that the proposed crossing of the plaintiff over the tracks of the defendant was practicable and safe and without danger, if it was properly constructed and was kept in reasonably good order. The learned Court below after having made a visit to the place of the crossing, and after considering the testimony on both sides upon this subject, concurred with the master and confirmed his finding. There was conflicting testimony, the witnesses for the plaintiff testifying there was no danger and the witnesses for the defendant testifying to the contrary, but there was ample testimony to sustain the finding of the master, and we therefore treat the finding of this controverted fact as the verdict of a jury. Moreover we are satisfied that upon the merits of the contention the finding was correct.

We also agree with the Court below in finding that the piece of track proposed to be laid on Front street between Adams and Trewick streets, is not an "extension or branch constructed on any street or highway upon which a track is laid, or authorized under any existing charter," and is a bona fide crossing at grade diagonally or transversely, and proposed to be built for that purpose, under the express authority of the 18th section of the Act of May 14, 1889, P. L. 211. The plaintiffs were obliged to build, and did build, their power plant at Ewington, under the ordinance granting permission to use the streets. In order to reach this plant it was necessary that the plaintiff should build a crossing from the end of its line at the end of Adams street where it connects with Front street. Adams street extended no farther in that direction and the connection could only be made by traversing on Front street the short distance of 220 feet from Adams street to Trewick street. The original proposition of the plaintiff was to make this connection by a diagonal line extending across the tracks of the defendant's road on Front street, but the Court below thought the same purpose would be subserved with much less inconvenience to the defendant by crossing the defendant's tracks in a curved line from the end of Adams street, and then running along Front street parallel with the defendant's tracks until the connection at Trewick street was reached. We see no objection to this. It is a crossing of defendant's tracks, somewhat elongated, it is true, owing to the physical condition of the grade surface, but none the less a crossing. We cannot discover that it works any harm to the defendant to construct the crossing in this way. It certainly is far less prejudicial to the defendant, than would be a long diagonal crossing track from the foot of Adams street to Trewick street. Both a diagonal and a transverse crossing are expressly allowed by the 18th section of the Act of 1889, and there is nothing therein contained which prohibits such a reasonable elongation of the connecting track as is essential to reach the opposite point of the crossing. The decree made by the Court below is most carefully drawn with special reference to the protection of the cars of the defendant company from any possible collision. We do not see how it could be improved in this respect. If it is obeyed any collision is impossible, and if it is not obeyed the remedy available to the defend-

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ant is short and sharp. We are of opinion that the assignments of error are not sustained and they are therefore dismissed.

Decree affirmed and appeal dismissed at the cost of the appellant.

W. C. S.

May, '94, 19. May 29, 1894.

Commonwealth v. Wilkesbarre & Scranton Railway Co.

Taxation of corporate loans—Loan held by Pennsylvania corporations—Loan held by non-residents—Act of June 8, 1891, not unconstitutional—Act of June 30, 1885, section 4, still in force—Duties of treasurer of corporation.

So much of the indebtedness of a corporation as is held in their own right by Pennsylvania corporations, and so much as is held by non-residents of this Commonwealth, is not taxable.

The Act of June 8, 1891, P. L. 229, is not unconstitutional because of defect in its title, or for any other reason.

The fourth section of the Act of June 30, 1885, P. L. 194, was not repealed by the Act of June 8, 1891, but is still in force and unrepealed.

This section makes it the duty of the treasurer of a corporation to assess and retain and pay over to the State the tax imposed by the first section of the Act of June 8, 1891, on so much of its indebtedness as is held and owned by residents of Pennsylvania, and the corporation is liable for his failure to do so.

Appeal of the Wilkesbarre & Scranton Railway Company, defendant, from the judgment of the Common Pleas of Dauphin County, in favor of the Commonwealth, plaintiff.

The facts are stated in the opinion of the Court below, SIMONTON, P. J., which was as follows:—

"This is an appeal by the corporation defendant from the settlement of an account against it by the auditor-general and State treasurer for tax on loans for the year 1892, and it was tried by the Court without a jury under the Act of April 22, 1874.

"FINDINGS OF FACT.

"1. Defendant is a corporation of and doing business within the State of Pennsylvania. Its treasurer, on November 15, 1892, reported to the auditor-general that its total indebtedness was $500,000; that $316,000 of this amount was due to corporations of this State and 'supposed to be held in their own right;' $91,000 was due to and held by individual residents of this State, or by Pennsylvania corporations as trustees; and $93,000 was due to and held by persons whose residence could not be ascertained.

"2. Thereupon the auditor-general and State treasurer settled an account against defendant for the four mills tax on loans imposed by the Act of June 8, 1891, section 1, on all of said indebtedness except the $93,000 held by persons whose residence could not be ascertained; and defendant appealed from said settlement to this Court.

"3. We find from the evidence produced on the trial that of the $316,000 reported to be held by corporations as above, $86,000 was held and owned by the Pennsylvania Company for Insurance on Lives and Granting Annuities; $130,000 by the Fidelity Insurance, Trust and Safe Deposit Company, both corporations of this State, and $100,000 by a citizen and resident of New Jersey; and that $10,000 of the $91,000 reported to be owned and held in this State was in fact owned by a resident of Italy, and that no tax was deducted by defendant's treasurer when the interest, which accrued on all of said indebtedness during the year 1892, was paid.

"The amount of defendant's indebtedness held and owned by Pennsylvania corporations in their own right is not taxable. See third proviso to section 21, Act of June 1, 1889 (P. L. 430); neither are the amounts held and owned by a resident of New Jersey, or of Italy. This excludes from taxation all of defendant's indebtedness, except the $81,000 held and owned by residents of this State. Defendant's treasurer, as we have found, did not deduct the tax due when he paid the interest on this indebtedness, and we must therefore decide whether defendant can be required to account to the Commonwealth for the tax which its treasurer thus failed or refused to collect.

"One of the objections filed with the appeal is that 'The title of the Act of June 8, 1891, containing no expression of a purpose to increase the rate of taxation for State purposes on bonds, mortgages, etc., nor to compel corporations or their officers to deduct from interest paid thereon four mills or any other rate for State taxation, the said Act, and particularly the first section thereof, is void, because in conflict with section 3 of Article III. of the Constitution of Pennsylvania;' and it is contended by defendant's counsel in his brief, that 'Nowhere in the title nor in the preamble is there any expression of, or reference to, a purpose to increase the State tax on moneyed capital; and nowhere, either in the title or in the preamble or in the body of the Act is there the slightest indication of a purpose to make corporations responsible for the collection of any State tax whatever on

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bonds issued by them;' and by counsel for another corporation, having an appeal pending on the same subject that 'The title to the Act of 1891 is clearly misleading. It gives notice that the capital stock tax is to be raised to five mills, but no notice whatever that the personal property tax is to be raised to four mills, and especially no notice to corporations that, under the provisions of the Act of 1885 they are to be responsible for the four mills tax on their bonded indebtedness.'

"We do not understand the language and effect of the title to the Act of 1891 to be as thus claimed. The title in full is as follows: 'An Act to provide increased revenues for the purpose of relieving the burden of local taxation, being supplementary to the Act entitled an Act to provide revenue by taxation, approved June 7, 1879, amending the 1st, 14th, 16th, 20th, 21st, 25th and 26th sections of an Act supplementary thereto, which became a law on the first day of June, 1889, entitled "A further supplement to an Act to provide revenue by taxation, approved June 7, 1879," and providing for greater uniformity of taxation by taxing all the property of corporations, limited partnerships and joint stock associations having capital stock at the rate of five mills on each dollar of its actual value.'

"It will be seen that this title expressly declares that the Act amends the first section of the Act of June 1, 1889. But it was this first section which imposed the tax on loans at the rate of three mills on the dollar on their nominal value; therefore, when the title declared that this section was amended, it clearly gave notice that the rate of the tax on loans might be changed by the Act. We are therefore unable to see that the constitutional provision above referred to has been violated.

"It is true there is no reference in the title to section 4 of the Act of 1885, which requires the treasurer of the corporation to deduct the tax. But the Act of 1891 does not deal with the subject of the collection of the tax, and therefore there was no necessity for such reference. It simply fixes the rate of the tax on loans, leaving the method for its collection provided by the Act of 1885 in full force. This method is that the treasurer of the corporation is required 'to assess the tax imposed and provided for State purposes upon the nominal value' of all the indebtedness of the corporation, due to and owned by residents of the State; and it is 'his further duty to deduct three mills on every dollar of the interest paid,' and 'return the same into the treasury.'

"When the Act of 1885 was passed the tax on loans was imposed by its first section. This section was repealed and supplied by the first section of the Act of 1889, which continued the tax at the same rate; but the fourth section of the Act of 1885 was left in full force and unchanged, and the tax imposed by the first section of the Act of 1889 was collected under it without question until this first section was repealed by the first section of the Act of 1891, which changed the rate of taxation from three mills to four; and if this change had not been made we do not think it would have been questioned that the tax is still to be collected under the fourth section of the Act of 1885. But it is now contended that the fourth section of the Act of 1885 is repealed by this change of rate; or that if not repealed, it does not require or authorize the treasurer of the corporation to assess, retain, and pay over to the State treasurer more than a three mills tax.

"The section in question is certainly not expressly repealed by the Act of 1891, for it is not even referred to therein. And on well understood principles it cannot be repealed by implication unless the two Acts are so inconsistent with each other that they cannot stand together. We fail to find any such inconsistency. The subject of the Act of 1885 is the collection of the tax. But the Act of 1891 does not touch this subject; therefore, as we view it, it does not affect the former Act. It is true, there is an apparent inconsistency between the tax rate of four mills in the Act of 1891, and the direction to retain and pay to the State treasurer three mills in the Act of 1885. But this is rather a discrepancy between different parts of a system of legislation on the general subject of taxation of corporations, than a conflict between different Acts on the same specific subject; and it is to be dealt with as a matter for construction and reconciliation, rather than as a question of repeal.

"Passing to the question of construction, it is contended on behalf of defendant that the Act of 1885 does not require or authorize its treasurer to assess, or retain from the interest paid, and pay to the State treasurer a tax of four mills.

"We do not see how there can be any serious question with respect to the assessment. The treasurer is required by the Act 'upon the payment of any interest on any scrip, bond or certificate of indebtedness issued by said corporation to residents of this Commonwealth and held by them, to assess the tax imposed and provided for State purposes upon the nominal value of each and every said evidence of debt.' This language is certainly comprehensive and flexible enough to apply to the tax imposed from time to time under any existing law, and it was, as we have already said, held to apply to the tax imposed by the Act of 1889, during all the time it was in force.

"The only real difficulty arises when we come

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to the next clause of the section, which requires the treasurer to deduct the tax on the payment of interest. By the letter of the section it is made 'his further duty to deduct three mills on every dollar of the interest paid as aforesaid, and return the same into the State treasury.' But the tax under the Act of 1891 is four mills, and it is therefore contended that this cannot be construed to require, or even authorize, the treasurer to deduct this tax.

"The question thus raised is certainly not free from doubt, and it would have been well if the Legislature, when it changed the rate of the tax, had made a corresponding change in section 4 of the Act of 1885; or if it had, when exacting it, made its language so general as to apply to any rate existing for the time being.

"We are, however, unable to convince ourselves that the Legislature intended by permitting this discrepancy to occur either to abolish altogether the mode of collecting the tax provided in the Act of 1885, or to so legislate that part of the tax is to be collected under it and another part through the local assessors and collectors; we cannot doubt that its general intent was that the four mills should be collected under the Act of 1885; and we think the only question is whether this intent can prevail over the letter of the Act.

"When the Act of 1885 was passed the Legislature undoubtedly intended in section 4 to require the treasurer to deduct the tax imposed by section 1; and three mills was named simply because that was the rate at that time; and we see no sufficient reason why we may not understand the clause according to its practical effect, which was that it required the treasurer to deduct the tax imposed by law.

"If we do so understand it we shall be taking it in the sense which was put upon it by judicial decision soon after it was enacted. For it is to be noted that the words are: 'It shall be his further duty to deduct three mills on every dollar of the interest paid.' But the tax imposed by the first section was 'three mills on the dollar of the value' of the indebtedness, or in other words, three mills per cent. on the principal, and not on the interest. Hence, if the words had been taken literally, they would not have authorized the retention of the tax imposed by the first section, and by the first clause of section four required to be assessed when interest was paid. But it was plain that the Legislature intended that the same tax which was assessed should be retained and paid to the State, and therefore, in Del. Div. Canal Co. *v.* Commonwealth, 123 Pa. 594, the Court decided that the words must be so construed as to reach this result.

"The way in which this was done, it is true, was apparently so simple as hardly to amount to a question of construction. Mr. Justice CLARK, adverting to the fact that deducting three mills on the dollar of interest paid would not collect the tax, said at page 625: 'The word of (on) in the 4th section was doubtless intended for off; this is a manifest blunder, and cannot be permitted to change the plain meaning of the Legislature.' But this reading would not correct the 'manifest blunder,' for three mills off every dollar of the interest paid would not realize a tax of three mills on the principal. Therefore, while this is given by the learned Justice as the mode of reaching the decision that the spirit of this language and the 'plain meaning of the Legislature' was to authorize and require the treasurer to deduct the three mills tax upon the principal, it was really reached by reading into the Act that the treasurer was authorized and required to deduct 'the tax imposed by law;' and we need not read anything more into it now to make it apply to the tax imposed by the Act of 1891. In other words, the letter of the law required the treasurer to deduct three mills on every dollar of interest paid; the tax imposed by law and required to be assessed was a tax of three mills on every dollar of the principal, and the Court decided that the treasurer was bound to deduct the tax imposed. The principle of the decision is, that he must deduct the amount of 'the tax imposed and provided for State purposes,' which he is required in the same section to assess on the nominal value of each evidence of debt.

"We are therefore of the opinion that, while the Act of 1891 changes the rate of taxation from three to four mills, it neither repeals nor supplies section 4 of the Act of 1885, relative to the collection of the tax from the holders of corporation bonds within the State. The language of the section as to the amount of tax to be deducted on payment of interest by the treasurer, cannot be taken literally as applied to the Act of 1891, but neither could it be as applied to the Act of 1885, or the subsequent Act of 1889; and meeting this difficulty, under the Act of 1885, the Supreme Court, in the case above cited, in effect decided that the spirit of the Act was to require the treasurer to deduct the same amount which he was required to assess, which was and still is, 'the tax imposed and provided for State purposes.' The only change that has been made is that now, by the Act of 1891 the tax so 'imposed and provided' is a tax of four mills instead of three, as it was by the Act of 1885 and the Act of 1889; and we think the principle of this decision as well as the necessity of preserving the symmetry of the taxing statutes warrant us in holding that the Act of 1885 authorizes and requires this tax to be assessed, retained from the interest, and paid to the State by defendant's treasurer.

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"But it is contended on behalf of defendant, 'that the Act of 1885 does not impose any tax upon corporations in respect of their bonds; it simply requires the corporate treasurer to act as the agent of the Commonwealth in the assessment and collection of the tax. The liability of the corporation is in the nature of a penalty for refusing to permit or compel its treasurer to withhold the tax;' and that the Act is therefore penal in its character, and must be strictly construed.

"We think a distinction must be taken here. The part of the Act which requires the treasurer to assess and collect the tax is certainly not penal, but simply provides a method of collecting the tax on corporation indebtedness. The only part of the Act which is penal is the clause which provides that 'for every failure to assess and pay said tax, and make report as aforesaid, the auditor-general shall add ten per centum as a penalty to the amount of the tax.' There is no ambiguity in the language of this clause, and therefore no question of construction arises on it; and, as part of the section which it has become necessary to construe is not penal in its character, we see no room for the application of the principle invoked by counsel.

"It has frequently been decided, whatever may be the ground on which the decisions are based, that the corporation can be held for the payment of the tax where its treasurer neglects or refuses to assess, or collect, or pay it over to the State. This was held in Commonwealth *v.* Delaware Div. Canal Co., *supra*, where it is said, 'The Act constitutes the company, or its treasurer as such, the collector of the tax, and upon failure to discharge the duty imposed by law, the settlement is properly made against the company whose servant he is, as in case of the default of any other officer of the government upon whom a like duty is imposed. The obligation rests upon the company, but as the company can only act through its officers, the default of the officer is esteemed the default of the company, and the penalty is visited upon them.'

"The liability of the corporation is, indeed, in the nature of a penalty, but it is a penalty for neglect of duty on the part of its treasurer, with which, as the findings of facts show, he is clearly chargeable.

"CONCLUSIONS OF LAW.

"1. The corporation defendant is not liable for tax on so much of its indebtedness as is held and owned by Pennsylvania corporations in their own right, or by persons not citizens of or residing in Pennsylvania.

"2. The Act of June 8, 1891, is not in conflict with the Constitution of Pennsylvania because of defect in its title, or for any other reason.

"3. The fourth section of the Act of 1885 was not repealed by the Act of June 8, 1891, but is still in force and unrepealed.

"4. It was made the duty of the treasurer of defendant, by the fourth section of the Act of 1885, to assess and retain and pay over to the State the tax imposed by the first section of the Act of June 8, 1891, on so much of its indebtedness as was held and owned by residents of Pennsylvania, and defendant is liable for his failure or neglect so to do.

"5. The Commonwealth is entitled to recover from defendant the amount of said tax, as follows:—

Tax on $81,000, at 4 mills, . . .	$324 00
Interest April 24th to Dec. 22d, at 12 per cent. per annum, ...	25 70
Attorney-general's commission, 5 per cent, ...	16 20
Total, ...	$365 90

"For which amount judgment is directed to be entered in favor of plaintiff and against defendant, if exceptions be not filed according to law."

Defendant appealed, assigning as error the findings of the Court.

M. E. Olmsted, for appellant.

W. U. Hensel, attorney-general (*James A. Stranahan*, deputy attorney-general, with him), for appellee.

July 11, 1894. PER CURIAM. This case was tried by the Court below without the intervention of a jury, under the provisions of the Act of April 22, 1874.

In the opinion sent up with the record we have a clear and concise statement of the facts found by the learned Court, together with a full discussion and satisfactory disposition of the legal questions arising thereon. A careful consideration of the record has satisfied us that there is no error therein of which the defendant has any just reason to complain. The Court was clearly right in holding (1) that the Act of June 8, 1891, under which the Commonwealth claims, is not unconstitutional because of alleged defects in its title, or for any other reason; (2) that section 4 of the Act of June 30, 1885, is still in full force; and (3) that by virtue of said last mentioned section, it was the duty of defendant company's treasurer to assess, retain and pay over to the Commonwealth the tax imposed by the first section of the Act of June 8, 1891, on so much of its indebtedness as was held and owned by residents of Pennsylvania; and, for his failure or neglect to do so, said company is liable.

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The Act of June 8, 1891, was rightly construed, and judgment is affirmed on the opinion of the learned President of the Court below.

J. D. B., Jr.

Orphans' Court.

April, 1894, 442.

Lare's Estate.

Wills—Interpretation of—Gift altered by subsequent words—Intention must be clear.

It is an elementary rule in the interpretation of wills that a clear gift will not be cut down or altered by any subsequent words unless they show an equally clear intention.

A testator gave to his wife, for life or during widowhood, "all the rents, issues, and incomes" of his "estate, real and personal," . . . "she paying thereout all the ground rents and taxes charged or chargeable thereon and the expenses of keeping the said real estate in good order and repair":

Held, equivalent to a gift of the property itself during the period mentioned.

And afterwards the testator provided, *inter alia*, as follows: ". . . . and in case it should become desirable or necessary to change any investments that I have made or that I may hereafter make or that any ground rent which I now hold or that I may hereafter acquire should be released or extinguished, I do hereby give and grant unto my said executrix and executor, and the survivors of them, power and authority to make such change of such investments or release or extinguish such ground rent and for that purpose to make, execute and acknowledge such deed or deeds or instrument or instruments of writing as may be necessary and requisite in the premises, without any liability or responsibility on the part of the purchaser or purchasers to see to the application of the purchase or extinguishment money, and re-invest the money arising therefrom for the same object and purpose as aforesaid to be secured upon good real estate security or securities":

Held, to give executor no color of right to collect rents during continuance of widow's estate.

[NOTE: The widow, this petitioner, was named executrix, but renounced.]

Petition and answer.

The petition of Catharine F. Lare, the widow of George A. Lare, Sr., sets out the portions of the latter's will quoted above, avers that a controversy has arisen as to whether, under the said will the executor or the petitioner is entitled to collect the rents of the real estate, that the executor claims the right, and has exercised the right and that he intends to continue. The prayer is that the Court determine the matter, and if favorable to the petitioner, enjoin and restrain the said executor, etc. In his answer the executor expresses his willingness to submit to the determination of the Court.

The question as to whether the Orphans' Court had jurisdiction to interfere by injunction, in such a case was, therefore, not considered.

Richard P. White, for petitioner.

There is a gift of a vested remainder to the executor for conversion, but this remainder is perfectly consistent with a life estate in the widow clear of the trust.

There is a power given to the executor to change investment during the life estate of the widow, but even supposing real estate would be included in the term "investments" the power is merely discretionary and not peremptory, and the legal estate of the wife will run on until the exercise of the power.

Blight *v.* Wright, 1 Phila. Rep., 549.
Est. John Myers, 9 Phila. Rep., 310.

An executor merely collects the personal estate and has no right to collect rents of real estate without some trust for the purpose.

Isaac Gerhart, contra.

October 27, 1894. PENROSE, J. It is frankly conceded in this case that if any authority on the part of the executor to collect rents of real estate during the life or widowhood of the testator's wife can be found, it must arise by implication from the power given to change investments or to extinguish ground rents and re-invest the money thus arising: but if this power embraces real estate other than ground rents—which is far from clear—it gives no right in the meantime to collect rents (Blight *v.* Wright, 1 Phila., 549; Watt's Est., 51 Leg. Intell., 153); besides which, as was said by Judge THOMPSON, in Parker's Ap., 11 Smith, 485, "implications often yield to counter implications, and always to positive and clear directions." Here the testator has, in the most express and unequivocal language, excluded all possibility of implication. He gives to his wife, for life or during widowhood, "all the rents, issues, and income" of his "estate, real and personal," subject to a legacy of $500; "she paying thereout all the ground rents and taxes charged or chargeable thereon and the expenses of keeping the said real estate in good order and repair." This is equivalent to a gift of the property itself during the period mentioned (France's Ap , 25 Smith, 220; Cooper *v.* Pogue, 11 Norris, 254; Parker's Ap., *supra*); and there is no suggestion of a trust to be performed by any third person. On the contrary, the gift is of "*all* the rents," etc., and "*she*" (the tenant for life) is to pay the annual charges and see to "keeping the said real estate in good order and repair."

It is an elementary rule in the interpretation

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of wills that a clear gift will not be cut down or altered by any subsequent words unless they show an equally clear intention: (Kiver *v.* Oldfield, 4 De G. & J., 30; Sheetz's Ap., 1 Norris, 213, etc., etc., etc.) Here there are no such words. So far as the real estate is concerned—and this is all that at present we have to do with—a trust was wholly unnecessary. There are no future interests which can be affected by any disposition within the power of the tenant for life, and the only consequence of requiring or permitting a trustee to collect the rents would be to give him commissions at the expense of the principal object of the testator's bounty. Something more than implication would be required to accomplish such a result, even if the will did not, as it does, exclude it in the clearest terms. The case is much stronger even than Parker's Appeal, where the trust asserted was with regard to personalty.

We are of opinion that the respondent has no color of right to interfere with the collection of rents so long as the estate given to the widow continues: whether we have jurisdiction to restrain such interference by injunction is a question we are relieved from considering by the assurance given by his counsel at the argument.

F. B. N.

October, 1892, 238.

Carr's Estate.

Rights of a decedent's creditors—Widow's exemption—Decree fixing, may not be attacked collaterally.

The right of a creditor of a decedent is fixed by the amount unpaid at the time of the decedent's death; and it cannot be reduced by what he may have received from a fund appropriated as collateral.

Where a decree has fixed a widow's right to her exemption in cash, such decree cannot be attacked collaterally in a subsequent proceeding.

Exceptions to re-adjudication.

The account of John P. McCoy, administrator, showed that the estate of John Carr was insolvent. In the appraisement, *inter alia*, appeared a debt from one Guinand, amounting to $210.49, which, through inadvertence, the administrator included in the estate as having been actually paid to him. In point of fact it never was. An effort was made to surcharge him with this item. The auditing Judge was led to believe that this money was due by said Guinand to the decedent, and might have been collected by the administrator. Upon re-audit, however, it appeared that the debt was not due to decedent, but was due to one Manning. It is unnecessary to go further into the somewhat intricate facts.

The exceptions can be summarized and briefly stated as being objections to the following:

First. To the failure to surcharge the administrator with the money in the hands of Henry Guinand.

Second. To the refusal to surcharge the administrator with the money paid out for the repairs to real estate.

Third. To the giving of a preference to Michael Manning in the distribution and to the finding that the money in the hands of Henry Guinand was the property of some one other than John Carr.

Lincoln L. Eyre, for accountant.

J. W. Logue and *A. H. Gangewer*, for certain creditors, and the exceptions.

October 27, 1894. PENROSE, J. The exceptions in this case relate purely to questions of fact, and it has not been shown that the findings of the auditing Judge are erroneous. It seems very clear that Guinand was insolvent, and that the accountant could not with propriety have been held responsible for the non-recovery of the moneys in his hands, even if they had belonged to the decedent: but they appear to have been given by him to Guinand for the express purpose of making payment to Manning. The amount, therefore, ceased in the lifetime of the decedent to belong to him, and its subsequent payment by Guinand to Manning relates back to the date of its receipt, so far as concerns the question of ownership. We need not consider whether Manning was a competent witness to prove that his debt, originally, was larger, by what was so paid, than the sum upon which he has been awarded a dividend. His right was fixed by the amount unpaid at the time of the decedent's death (Nice's Ap., 4 Smith, 202; Kater *v.* Steinrook, 4 Wright, 501), and was not reduced by what he may subsequently have received from a fund appropriated as collateral (Shunk's Ap., 2 Barr, 304; Miller's Ap., 11 Casey, 481; Hess's Est., 19 Smith, 272; Cairnes's Est., 13 Phila., 350). His testimony was not permitted to increase the original award.

The widow's right to her exemption in cash was fixed by the decree upon her petition for its allowance. Proof that she had in her possession furniture or specific articles belonging to the estate was, therefore, inadmissible in the present proceeding. The decree could not be attacked collaterally. There was no allegation that this property ever came into the hands of the accountant: on the contrary, it appeared to have been retained by the widow claiming it as owner.

The exceptions are dismissed. F. B. N.

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WEEKLY NOTES OF CASES.

VOL. XXXV.] *FRIDAY, JAN. 18, 1895.* [No. 19.

Supreme Court.

Oct., '94, 99. October 2, 1894.

Spencer v. Reese et ux.

Married woman—Defective acknowledgment of deed—Act of May 25, 1878, P. L. 149—Certificate—Evidence.

To render the acknowledgment of a deed by a married woman sufficient, she must have been separately examined by the officer taking the acknowledgment, must have full knowledge of the contents of the deed and voluntarily consent to the execution of it, and these facts must appear by the certificate of the officer.

Where an acknowledgment has been in fact made as required by law, but the certificate thereof is defective, the certificate may be cured by proceedings under the Act of May 25, 1878, P. L. 149, but where the acknowledgment itself is defective no life can be given to it by subsequent proceedings.

A certificate is evidence only of what it contains and gives rise to no presumption that any thing else took place before the officer.

When upon proceedings under the Act of 1878, the plaintiff testifies that the acknowledgment was made in due form of law, and the defendants, the married woman whose acknowledgment it is sought to establish and her husband, deny the same, a decree for reformation is properly refused.

Appeal of George W. Spencer, plaintiff, from the decree of the Common Pleas of Clarion County, dismissing his bill against Isaiah Reese and M. C. Reese, his wife, praying for a reformation of the certificate of acknowledgment of a mortgage executed by the defendants.

The bill in this case set up that on February 15, 1886, the defendants, Isaiah Reese and M. C. Reese, his wife, executed and delivered to the plaintiff a mortgage upon the separate property of the wife to secure a loan; that the certificate of acknowledgment appended to the mortgage was as follows:

State of Pennsylvania, County of Clarion, SS: Be it remembered, that on the 15th day of February, A. D., 1886, before me, a Justice of the Peace, in and for said county, came the above-named Isaiah Reese and M. C. Reese, his wife, and acknowledged the foregoing indenture of mortgage to be their act and deed, and desired that the same might be recorded as such. She, the said M. C Reese, being examined separate and apart from her said husband, declared that she signed the indenture without any coercion or compulsion from her said husband. Witness my hand and seal, the day and year aforesaid.

[Seal.] R. LAUGHLIN, J. P.

That said acknowledgment was defective in not setting out that the full contents of the deed had been made known by the Justice to M. C. Reese; that the mortgage was, in fact, really and properly acknowledged, in due form of law, by the said defendants, but the said Justice, through inadvertence or otherwise, neglected or omitted to so certify the same.

The bill prayed a decree reforming said certificate of acknowledgment in accordance with the actual facts.

The answer denied that mortgage had been in fact properly acknowledged. The case was referred to a master and examiner, Francis R. Hindman, Esq., before whom the plaintiff testified that Mr. and Mrs. Reese both signed the mortgage and then Laughlin, the Justice, picked it up and started with her into the back room. Isaiah Reese testified that the mortgage was not read or explained to his wife; that he was with her all the time they were in Callensburg and that the Justice did not explain to her the mortgage or the effect of it; that he did not take her separate and apart into any room at any time while they were there. Mrs. M. C. Reese testified that she signed a paper while at Laughlin's office; that it was not read to her; that the contents of it were not made known to her and that she was not examined apart from her husband.

Mrs. Mary E. Spencer, wife of plaintiff, testified that on the morning of the day the mortgage was signed and the loan made, defendants came to her husband's office; that Mrs. Reese did all the talking, beginning by saying, "Doctor, I came down to see about this money and fix the mortgage;" that the Doctor said, "I'm afraid you won't be any better prepared to pay at the end of a year than now;" to which Mrs. Reese replied that she wouldn't let a mortgage rest over her home for a year, she would sell a horse and pay it. Mrs. C. M. Hutchinson testified: "Several years ago, a cold, wet day in winter, Mrs. M. C. Reese came into our house and commenced talking about her business, saying that her husband was a very good worker, but not a good manager and she had to do so many things. . . . . She said she had come down to borrow and get one hundred dollars from Dr. Spencer. . . . . She went over to 'Squire Laughlin's office just across the street from our place and came back again. . . . . After she came back she said she had got the money."

It appeared that the Justice was a member of the bar.

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On this testimony the master found that a proper acknowledgment had been made, and reported a decree in favor of plaintiff. Exceptions were filed, which after argument were sustained by the Court, CLARK, P. J., and a decree was made dismissing the bill at the costs of the plaintiff.

The plaintiff took this appeal.

John W. Reed, (*Harry R. Wilson* with him), for appellant.

W. A. Hindman, (*M. A. K. Weidner* with him), for appellee.

January 7, 1895. FELL, J. This is a proceeding under the Act of 25th of May, 1878, to reform a defective certificate of the acknowledgment of a mortgage by a married woman. The defect in the certificate which it is sought to remedy is that it does not appear that upon her separate examination by the magistrate he read or otherwise made known to her the full contents of the mortgage and that she thereupon declared that she did voluntarily and of her own free will and accord sign and seal and as her act and deed deliver the same. It is alleged in the bill that the mortgage was in fact properly acknowledged in due form of law, and that the the magistrate through inadvertence or otherwise neglected or omitted so to certify the same. The answer denies that the acknowledgment was otherwise than as shown by the certificate or that there was any omission through inadvertence or neglect. Section 1 of the Act of 1878 confers upon the Common Pleas the power when it is satisfactorily shown that "a certificate of acknowledgment defective in form was in fact really and properly acknowledged in due form of law" to make a decree for the reforming of such certificate in accordance with the actual facts. And section 2 provides that the proceeding "shall be by bill in equity as in other cases for the reformation of a written instrument."

The first inquiry is, what is essential to constitute the valid acknowledgment by a married woman of a conveyance or mortgage of her real estate? In this State her right to convey or charge her real estate is derived solely from the Act of February 24, 1770. Having no power to contract or convey except by virtue of this statute, it has been uniformly held that its requirements must be strictly complied with and that this must appear in the certificate of the officer taking her acknowledgment: Watson *v.* Bailey, 1 Binney, 470; Evans *v.* Commonwealth, 4 S. & R. 272; Thompson *v.* Morrow, 5 S. & R. 289; Watson *v.* Mercer, 6 S. & R. 49; Jourdan *v.* Jourdan, 9 S. & R. 268; Barnet *v.* Barnet, 15 S. & R. 71; Trimmer *v.* Heagy, 16 Pa. 484; Glidden *v.* Strupler, 52 Pa. 400; Graham *v.* Long, 65 Pa. 383. In Trimmer *v.* Heagy, *supra*, it was said: "The only legitimate evidence of consent is the execution of the deed in the manner and form pointed out by the Act." In Glidden *v.* Struppler: "The policy of the Act which denies the capacity to do the act as clearly denies the capacity to confirm it except in the legal mode." And in Barnett *v.* Barnett: "It does not appear by the certificate of this acknowledgment that the contents of the deed were made known to the wife by the Justice who took her acknowledgment, or that she did in fact know them. It has been expressly decided by this Court that this is an incurable defect."

This rule has been announced in an unbroken line of decisions and has not been affected by the rulings in Miller *v.* Wentworth, 82 Pa. 280; Hornbeck *v.* Mutual Building and Loan Association, 88 Pa. 64, or the other cases in which it has been held that a certificate of acknowledgment is good which shows a substantial compliance with the statute.

Where acknowledgments not in the language of the Act have been held good the certificates have shown that what was done was equivalent to what was in terms required, that the compliance was substantial, and that the essentials of a valid acknowledgment—the separate examination of the wife, her full knowledge of the contents of the instrument, and her voluntary consent to the execution of it—in fact existed. The rule first stated in Watson *v.* Bailey, *supra*, that parol evidence is not admissible to supply defects in a certificate of acknowledgment except in cases of fraud or duress has been rigidly adhered to. If what is certified fails to show a substantial compliance, the defect is incurable. The Act of 1878 does not change the law, but provides only for reforming the certificate so that it shall conform to the facts. It furnishes a remedy where the acknowledgment was made in due form of law and the certificate is defective in not stating what did actually occur. It cures a defective certificate, but can give no life to a defective acknowledgment.

The question of the sufficiency of the testimony, as to which the master and the Court differed, was, we think, properly decided. The proceeding was in equity and the well-recognized rules of evidence in relation to the reformation of written instruments apply. The answer was responsive to the bill. The certificate was evidence only of what it contained, and no presumption arose that anything took place before the magistrate except that to which he certified. As was said by McCOLLUM, J., in Hand *v.* Weidner, 151 Pa. 362, "The certificate of acknowledgment is in the absence of fraud or duress conclusive of the facts therein stated, but it does not tend to establish the existence of other facts."

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There were no corroborating circumstances which threw light on the material facts in issue. They were to be determined directly from the testimony. Of the four persons who were present when the acknowledgment was taken, one, the plaintiff, testified to the facts which would establish its validity. Two, the defendant and her husband, squarely and directly contradicted him. The fourth, the magistrate, was dead. The learned Judge of the Common Pleas was clearly right in holding that the testimony was insufficient.

The decree is affirmed at the costs of the appellant.

H. B.

Oct. 94, 25. October 2, 1894.

Paul v. Grimm.

Sale agent—Acceptance of payment by—Procedure Act of 1887—Pleading.

An agent to sell has no right to take payment in anything but money, unless specially authorized so to do, and if without special authorization, he take in payment for the property of his principal anything else, he at once becomes liable to the principal for the money value of the thing sold.

A letter of attorney authorizing an agent to sell property "for such sum or price and on such terms as to him shall seem meet," and to receive all sums of money due on account of the sale and "to compound and agree on the same," does not authorize the attorney to take payment in bonds; "terms" in such connection means the times and amounts of payment and if any payments are deferred it may embrace stipulations as to how such payments are to be secured. "Price" in the same connection does not differ in its meaning from "sum"

An action for money had and received, even before the Procedure Act of 1887 could be maintained for money which the defendant ought to have received, and since the Act, the statutory assumpsit may be maintained to recover from an agent the price of land, the payment for which he has, without authority, accepted in articles or things other than money.

Appeal of John L. Paul, administrator of Sarah Paul, Jane Adair, Samuel Thompson and others, plaintiffs, from the judgment of the Common Pleas of Westmoreland County, in an action of assumpsit against Simon H. Grimm, administrator of James L. Thompson, deceased.

This case was tried by agreement before DOTY, P. J., without a jury. The facts found by the Court were as follows: The plaintiffs were owners of a certain tract of land in Westmoreland County and executed, on December 23, 1882, a power of attorney to James L. Thompson, defendant's decedent, authorizing him, "For us and in our names, place and stead to enter into and take possession of, make sale and convey all such messuages, lands, tenements and real estate, whatsoever, in Washington township, county and State aforesaid, being bounded and described as follows, to wit, ... containing 151 acres, and 152 perches, to or in which we are or may be in any way entitled or interested, and to grant, bargain and sell the same, or any part or parcel thereof, for such sum or price and on such terms as to him may seem meet, and for us and in our names, to make, execute, acknowledge and deliver good and sufficient deeds and conveyances for the same, with covenants and warranty; and until the sale thereof, to let and demise the said real estate for the best rent that can be procured for the same and to *ask, demand, recover* and *receive all sums of money* which shall become due and owing to us, by means of such bargain, sale or lease, and to take all lawful ways and means for such recovery thereof, etc."

By virtue of said letter of attorney, the said James L. Thompson in his lifetime sold the coal underlying said tract of land to one R. C. McCurdy, by deed dated 30th January, 1883, for the expressed consideration of six thousand dollars, lawful money of the United States.

The sale in fact was made and deed delivered in consideration of the payment to the attorney-in-fact by the purchaser of $6,000 in the first mortgage bonds of the Westmoreland County Coal and Coke Co.

Thompson died on the 5th day of September, A. D., 1888, intestate. At the time of his decease he had in his custody twelve bonds of the Westmoreland County Coal and Coke Co., of the par value of $6,000; with coupons attached due and unpaid January 1, 1888, and July 1, 1888. The said bonds were the proceeds of the said sale by the intestate, as attorney-in-fact for the heirs of Alex. Thompson, deceased, of the real estate aforementioned.

The said bonds have no market value. The Westmoreland County Coal and Coke Company became insolvent and defaulted in the payment of the interest on the bonds. Some coupons, however, were paid by the company to the said James L. Thompson and the proceeds were paid by him to the heirs of Alex. Thompson and their receipt taken therefor on 14th August, 1886.

During the trial the defendant offered to prove that the property was conveyed to McCurdy for a consideration of $6,000, payable in bonds of the Westmoreland County Coal and Coke Company. Objected to. Objection overruled. (Sixth assignment of error.)

The plaintiffs presented, *inter alia*, points which with their answers were as follows:

"2. That the above named parties, with William Thompson, made and executed a power of

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attorney, dated 23rd December, A. D. 1882, in which they authorized James L. Thompson to sell the said premises as in said power of attorney set forth; by virtue and in pursuance whereof the said James L. Thompson sold the said premises, for the consideration of six thousand ($6,000) dollars, lawful money of the United States of America."

Answer. The first part of the proposition is correct. But we cannot report that James L. Thompson sold the said premises for the consideration of $6,000 lawful money of the United States. The fact is otherwise. (First assignment of error.)

"3. The plaintiffs in this action are entitled to judgment against the said defendant, Simon H. Grimm, administrator of the estate of James L. Thompson, deceased, for their respective shares of the consideration money received by said Thompson in his lifetime, to wit, $6,000, that is to say, in the proportions set out in the first paragraph, subject to the credits, as shown by the receipts offered by defendant to the amounts in said receipts set forth, with interest from 13th January, A. D. 1883."

Answer. This point is refused. (Second assignment of error.)

The Court entered judgment for the defendant, saying in the course of its conclusions of law:

"The letter of attorney authorized James L. Thompson to 'grant, bargain and sell the same, or any part or parcel thereof, for such sum or price and on such terms as to him may seem meet.' There was no other authority to make the sale. Both parties are bound by the language of the power of attorney. If the language be doubtful, it would be taken most strongly against the plaintiffs, whose language it is. There was a clear authority to sell. The only question is, whether there was any authority to make a sale for other consideration than lawful money. The word 'sum' naturally imports a sum of money, and so does the word 'price,' as ordinarily understood. The latter word, however, has not necessarily such a restricted meaning. It is sometimes used in the sense of 'reward' or 'equivalent.' But, without basing a decision on the technical meaning of these words, there is a clause which seems to give to the attorney ample discretionary power. 'And on such terms as to him may seem meet.' This clause does not necessarily refer to the time of payment, but, we take it, it gives some discretion also as to the manner of payment. 'Terms' are the equivalent of 'conditions' in contracts. Webster defines 'terms' as 'propositions stated or promises made, which when assented to or accepted by another, settle the contract and bind the parties.' The letter of attorney, therefore, if this view be correct, empowered James L. Thompson to negotiate for the sale of the farm and to sell for such price and on such conditions as to him might seem meet.

"Of course, if there was any bad faith on the part of the attorney-in-fact, the case would be different, and he would have been liable on another principle. But there is no allegation of bad faith, or negligence, on his part. The transaction was in good faith. The uncontradicted evidence shows that the coal was sold at the best price and the best terms obtainable at the time. The attorney-in-fact sold his own coal on the same terms and an offer was made to show that three thousand acres of adjoining coal was purchased about the same time and on like terms as to price and payment. It is true, this offer was excluded, as it did not seem pertinent under the issues, but on the question of good faith, it would have been material. Coal fields are not infrequently taken up in this way. The money actually received by Thompson was promptly paid to the parties in interest and releases taken therefor. Part of this was the proceeds of coupons paid by the Westmoreland County Coal and Coke Company before the default was made.

"We have then an action for money had and received. The evidence shows that defendant's intestate held no money received for the use of the plaintiffs; that if there is any liability it is by holding him responsible for what he ought to have received. The consideration mentioned in the deed as $6,000 lawful money of the United States is not conclusive. The fact is, that money was not received but, instead, $6,000 bonds of the Westmoreland County Coal and Coke Company. That James L. Thompson acted in perfect good faith is apparent, as he sold his own coal on the same terms and conditions. Under these circumstances we are not to construe the letter of attorney most favorably to the plaintiffs. The letter admits of the construction we have already given it, and it would be a great hardship to otherwise hold. All were confident of the success of the undertaking at the time, and that the company afterwards failed cannot be charged to the attorney-in-fact. He was constituted attorney with full discretionary powers, and having acted in good faith, there ought to be no responsibility in this or any other form of action."

Exceptions were filed, which were dismissed.

The plaintiffs took this appeal, and filed, *inter alia*, the assignments of error above indicated.

John F. Wentling, *David A. Miller* and *Edward B. McCormick*, for appellants.

An agent to sell has the right to sell for money only and has no right to barter the subject of sale, or exchange it for anything.

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Creveling *v* Wood, 95 Pa. 152.
Ives *v*. Davenport, 3 Hill, 373.
Guerreiro *v*. Peile, 3 B. & Ald. 616.

Nothing but money can be received by an agent for sale or collection in the absence of a special authorization.

Bank *v*. Ashworth, 123 Pa. 212.
Bank *v*. Goodman, 109 Id. 422.
McCulloch *v*. McKee, 16 Id. 289.

An agent who exceeds his authority even unintentionally or in the bona fide belief that his authority extends further than it does is liable for any loss resulting to his principal.

Schrack *v*. McKnight, 84 Pa. 26.
Kroeger *v*. Pitcairn, 101 Id. 311.
Opie *v*. Serrill, 6 W. & S. 264.

No authority to take anything but money can be found in the use of the word "price" and "upon such terms as to him may seem meet."

The word "price" and the phrase "upon such terms as to him may seem meet," as both used here, are used in every power of attorney for the sale of lands, which follows the usual legal forms. (See Dunlap's book of forms, page 586.) If the forced construction given by the Court in this case be correct, it would seem to be scarcely possible for an attorney-in-fact in such case to exceed his powers in Pennsylvania.

Further, prior to the time the attorney-in-fact made the unwarranted exchange for coal bonds, for which he is to be held liable in this action, the sale and conveyance had been made for lawful money of the United States, and the terms were thus fixed at that time.

V. E. Williams, (with him *A. M. Sloan* and *W. A. Griffith*), for appellee.

The action is assumpsit upon an implied promise to pay to plaintiffs any moneys received by defendant for their use. Between them there was no express contract, nor is any such express contract alleged or proved. Bad faith or negligence is not imputed to the defendant. In this aspect of the case the plaintiff is not entitled to recover.

Lee *v*. Gibson, 14 S. & R. 105.
Rush *v*. Good, Id. 230.
App *v*. Lutheran Congregation, 6 Pa. 201.

The letter of attorney authorized the agent to receive the bonds in payment. "Sum" imports a sum of money.

U. S. *v*. Van Auken, 96 U. S. 368.

"Price" being used in the disjunctive must mean something other than "sum,"—a reward, value, equivalent.

Hudson Iron Co. *v* Alger, 54 N. Y. 177.

"On such terms" etc., gave the agent absolute discretion as to the time and manner of payment, and the words "to ask, demand, recover and receive all sums of money which should become due and owing to plaintiffs by means of such bargain and sale, and to compound and agree for the same," allowed him to take payment in something else than money.

Huffmans *v*. Walker, 26 Gratt, 316.

January 7, 1895. GREEN, J. In 2 Benjamin on Sales, sec. 1099, note 26, it is thus stated: "Payment to an agent must be in money. This is the general principle in the absence of express authority to the agent to receive something else than money," citing a large number of cases.

In the case of Catterall *v*. Hindle, L. R. 1 C. P. 186, KEATING, J., delivering the opinion, said, "That a broker or agent employed to sell, has *prima facie*, no authority to receive payment otherwise than in money, according to the usual course of business, has been well established, and it seems equally clear that if, instead of paying money, the debtor writes off a debt due to him from the agent, such a transaction is not payment as against the principal, who is no party to the agreement, though it may have been agreed to by the agent," citing several cases.

In Underwood *v*. Nicholls, 17 C. B. 239, (84 E. C. L. Rep.,) the facts were that A., as agent for B., sold wine to C., who paid for it by returning to A. his own check which C. had cashed for him a few days previously, and which it appeared had never been presented by C. Held that this was not as between B. and C. payment of C.'s debt, although the jury found that the transaction was bona fide. WELLES, J., said, "*Prima facie*, an agent should receive debts for his principal in money. A payment by a check the jury would no doubt find to be a payment in the ordinary course of business. The transaction here merely amounts to the giving back of the agent's check, which in his hands was a piece of waste-paper."

In McCulloch *v*. McKee, 16 Pa. 289, we held that an agent having authority only to collect a debt, has no right to take a note for the amount of it from the debtor to himself and thus substitute himself as creditor. CHAMBERS, J., delivering the opinion, said, "Carpenter's authority by the order of McKee was to pay the money to McCulloch. McCulloch was a special agent to receive the money from McKee, and as such he had not authority to substitute anything else for the money so as to discharge McKee. An agent specially employed to receive payment in money cannot vary from his authority in receiving a bill."

Fifth National Bank *v*. Ashworth, 123 Pa. 212. If a bank receiving a check upon another bank for collection, surrender the check to the drawee and receive a cashier's check in lieu thereof, its liability to its depositor becomes fixed, as much as if it had received the cash. "It has no right

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unless specially authorized to do so, to accept anything in lieu of money." PAXSON, J.

In Opie *v.* Serrill, 6 W. & S. 264, SERGEANT, J., delivering the opinion, said, "An agent undertaking to collect a debt placed in his hands, who releases it and takes from the debtor a new note to himself, does in law receive payment of the debt, and is at once liable to the principal as if he had received the money. . . . He must be considered as having made himself liable for the money he ought to have received." In Wilson *v.* Wilson, 26 Pa. 393, LEWIS, C. J., said, "The primary obligation of an agent whose authority is limited by instructions, is to adhere faithfully to those instructions in all cases to which they ought properly to apply: Story on Agency, sec. 192. He is in general bound to obey the orders of his principal *exactly*, if they be imperative and not discretionary; and in order to make it the duty of a factor to obey an order it is not necessary that it should be given in the form of a command. The expression of a wish by the consignor may fairly be presumed to be an order. . . . . To justify a departure from instructions, where a loss has resulted from such deviation, the case must be brought within some of the recognized exceptions."

The foregoing authorities are not, and cannot be, controverted, and it is only necessary to show that they are applicable to the present case. The letter of attorney under which the defendant's intestate sold the plaintiffs' land, authorized him to sell the same, "for such sum or price and on such terms as to him shall seem meet . . . and to ask, demand, recover and receive all sums of money which shall become due and owing to us by means of such bargain, sale or lease, and to take all lawful ways and means for such recovery thereof." By virtue of the authority thus conferred, the attorney-in-fact, James L. Thompson, very shortly after the date of the letter of attorney, which was December 23, 1882, sold and conveyed the coal underneath the land of the plaintiffs, by deed dated January 13, 1883, to one R. C. McCurdy for the sum of "six thousand dollars, lawful money of the United States," as recited in the deed. In point of fact, the agent, instead of requiring money from the purchaser, took from him six thousand dollars of bonds of the Westmoreland County Coal and Coke Company, which proved to be utterly worthless and of no value whatever.

The learned Court below was of opinion that because the letter of attorney granted authority to the attorney to sell "on such terms as to him shall seem meet," it was competent for him to take the bonds in payment of the purchase money instead of money. We cannot assent to that proposition. The word "terms" in such a connection in ordinary acceptation means the times and amounts of the payments, if there are any deferred payments it may also embrace stipulations as to how such payments shall be secured. It certainly does not import that the attorney has license to take anything he pleases as payment, whether it has value or not. Nor, we apprehend, does the use of this word authorize the attorney to subvert the rule of law applicable in such cases and substitute for money, which the law implies, specifically property of any kind. The Court also thought that because the word "price" was used, it might authorize the acceptance of some other form of payment than money, though the decision was not put upon that ground. As, however, counsel for the appellee has pressed this ground in the argument, we only stop to say that we regard it as altogether untenable. In the connection in which it is used here, we cannot recognize any distinction between it and the word "sum."

A point was also suggested by the Court, and insisted upon by appellee's counsel in argument, that this is an action for money had and received, and therefore nothing can be recovered but money actually received by the defendant. This was not really true even before the practice Act of 1887 was passed: Opie *v.* Serrill, 6 W. & S. 269, in which it was held that the action included all money which the defendant ought to have received. But since assumpsit has become a statutory remedy its scope has been vastly enlarged, and without any doubt embraces everything claimed in this action.

The findings of the Court below do not inform us as to whether the plaintiffs ever had any knowledge that the bonds in question were taken in payment for their coal, nor whether they ever assented to that kind of payment, but certain it is the bonds were never delivered to the plaintiffs, because they were found among the papers of the attorney after his death. Nor is there any finding or evidence that the bonds were ever tendered to the plaintiffs. If they ever did have any value and had been delivered or tendered to the plaintiffs at the time they were taken in January, 1883, there would have been an opportunity to realize on them at least what they were worth in the market. Where the attorney chose to keep them in his own possession, he is certainly chargeable with the loss which resulted during his retention of them. So far as this record shows, he never gave his principals for their coal except a few dollars which he paid some of them in 1886, and for which sums he took their releases.

If the attorney had exercised the commonest and most ordinary prudence, and had taken from the purchaser, bonds secured by a mortgage on the property sold, with a suitable agreement as to the removal of the coal, he could doubtless have secured the payment of all the purchase money

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for his principals, and saved himself from any ulterior liability. But for the Court to sanction the degree of license in dealing with the property rights entrusted to him by his principals, which he practiced in this instance, would be so wide a departure from the law as we understand it, that we cannot give it any sanction. We cannot agree that an attorney-in-fact, with power to sell the lands of his principal for lawful money, may accept as payment the worthless bonds of an insolvent company, and thereby discharge himself of all liability to his principals.

All the assignments of error except the fourth and seventh are sustained.

The judgment of the Court below is reversed and the record is remitted with instructions to the Court below to enter judgment in favor of the several plaintiffs for such sums as are due them after deducting all money payments received by them respectively with costs. H. B.

Oct. '94, 45. October 21, 1894.

Seanor v. McLaughlin.

Contract — Bailment — Collateral security— Remedies of bailor—Rescission, or enforcement of bond—Remedies not cumulative.

Where A. delivers to B. a chattel under a contract of bailment which provides for payment at specified times, and in default of payment confers upon A. the right to re-take the chattel, and at the same time B. gives to A. his bond as collateral security for the performance of the contract, upon B.'s default A. may proceed either to re-take the chattel, thus rescinding the contract, or he may elect to stand by the contract and proceed against B. on the bond, but the remedies are not cumulative.

Appeal of Seanor & Bierer, plaintiffs, from the judgment of the Common Pleas of Westmoreland County in favor of Samuel McLaughlin, defendant.

At the trial, DOTY, P. J., directed a verdict for the defendant. The facts are stated in the opinion of the Supreme Court. Plaintiffs appealed.

V. E. Williams (with him *A. M. Sloan* and *W. A. Griffith*), for appellants.

John M. Peoples (*D. S. Atkinson* with him), for appellee.

January 7, 1895. DEAN, J. The plaintiffs were manufacturers of agricultural implements. The defendant travelled from place to place threshing farmers' crops. On the second of September, 1889, the plaintiffs put in defendant's possession a traction engine and thresher, he to use the same with care and keep in good order. The contract was one of hiring or bailment. As the parties evidently intended the event should be an absolute purchase, for security the venders retained the title until final payment of the hire. The sum of the hire was the price of the machine, $1700, to be paid as follows: on delivery $750; on the 1st of January, 1890, $316.67, with interest; and a like sum on the 1st of January, 1891 and 1892, with interest. As collateral, "to secure the payment of said rental," the defendant executed and delivered to plaintiffs a judgment bond of same date, in the penal sum of $1900, conditioned for the payment of the three installments with interest; and further stated: "This bond is given as collateral to secure the rental for certain machines leased by obligor from obligees." The first payment of $750 was made, and the defendant took possession of the machine and used it in threshing the crop of 1889.

Some time before the 1st of January, 1890, the defendant informed Seanor, one of the plaintiffs, that he would be unable to pay the first installment of $316.67.

On that day Seanor called on defendant and demanded payment, who again told him he was not able to pay, and that Seanor should take the machine away; Seanor then examined it and the same evening arranged to have it removed. Defendant demanded his bond, or a receipt for it, before the machine was taken away, but Seanor refused to give either, and early on the morning of the 3d of January removed it. After taking the machine, on the same day, plaintiffs confessed judgment on the bond, and issued execution for the first installment. On petition and affidavit of defendant, the Court opened the judgment and awarded an issue. At the trial, the facts were, in substance, as we have stated them. The Court below was of the opinion that: 1. The rights of the parties were to be determined by the written contract between them, the lease and the bond. 2. That on default of payment of any installment plaintiffs could enter judgment and collect by execution, or rescind the contract, and repossess themselves of the machine, but could not adopt both remedies. 3. That the undisputed evidence showed a rescission of the contract, and thereafter defendant was no longer answerable on the bond. Therefore, a verdict was directed for defendant. From the judgment entered plaintiffs press this appeal.

The merit of the assignments of error depends solely on whether the construction given by the learned Judge of the Court below to the written contract, as set out in the lease and bond, was right. The contract was to pass the possession of the machine to the defendant, and to make secure the payment of its value to the plaintiffs. Its value, as fixed by both parties, was $1700.

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It is fair to presume the plaintiffs intended by the contract to get this sum once, and that defendant did not intend to pay it or any part of it twice. Parties may, in contracting, provide penalties for non-performance, but unless they do so in unmistakable language, courts will not insert them. In the lease, after specifying the three instalments and their dates of payment, the defendant immediately said: "And as collateral to secure the payment of said rentals, I have executed and delivered . . . . my judgment bond of even date herewith." Then almost the last words of the bond are: "This bond is given as collateral to secure the rentals." The principal obligation by the contract was to pay for the machine, $316.67, with the interest, on the 1st of January of the three following years; and, "If default be made in said payments . . . . they, said Seanor & Bierer, or their agents, may resume actual possession of the same; and I hereby further authorize and empower the said Seanor & Bierer . . . . to enter the premises wherever said machines may be, and take and carry them away."

This was primarily the obligation to pay, and the remedy to enforce payment. Plaintiffs retained title to the chattel, with the right to resume possession in default of payment of the hire. Then the judgment bond is given, in express terms, as a security collateral to the performance of this principal obligation. There is no technical legal definition of the word collateral, distinct from its common signification; it is an additional security for the performance of the principal obligation, and on the discharge of the latter it is to be surrendered. Therefore the plaintiffs had two distinct remedies, either of which they might adopt to enforce their right. They parted with the possession of the machine at the price of $1700; $750 of this to be paid in hand, which they received; they still retained title, with the right to resume possession on default in either payment of $316.67. But the subject of the contract being a movable chattel, and this security being at best little more than a chattel mortgage, they took a personal judgment bond with power of attorney to enter it and confess judgment in any Court of record of the United States or elsewhere, as collateral to the original obligation. Either remedy was complete in itself, and the plaintiffs, on default, could adopt either; but they were not cumulative, they could not adopt both, unless it was plainly expressed in the contract, or a necessary implication from its terms. The words of this contract negative such a construction; the defendant stipulates that "if default be made in said payments, or any of them, ... then, in that case, I hereby covenant and agree to return said machines to said Seanor & Bierer, and that they . . . . or their agents may resume actual possession of the same." That was the penalty for default of the primary obligation, and repossession of the machines the discharge of it. On default of payment the plaintiffs were not bound to accept the machine or take possession of it; they could have entered judgment on the bond, levied on the machine and any other property of the defendant, in satisfaction of their demand. But they rescinded the contract by retaking into their possession the subject of it, which they had a right to do, and then immediately entered their bond and issued execution to levy on other property of defendant, which they had no right to do, for the contract or obligation to which the bond was collateral, no longer existed. It ought to have been surrendered to defendant when he demanded it at the time plaintiffs took away the machine. The contract in this case is not essentially different from those in Campbell *v.* Hickok, 140 Pa. 290, and Scott *v.* Hough, 151 Id. 630, in both of which cases we held that the remedies were distinct and not cumulative. If the bailor rescinded by repossessing himself of the property, the right of personal action against the bailee was at an end. That the words "rescission" or "rescind" do not occur in this contract is not material. Rescission is a fact; the word itself may be used by the contracting parties to indicate the right, but other words may be adopted to point out that course of conduct of the parties, which shall constitute the fact of rescission.

The decision in Campbell *v.* Hickok, *supra*, was based on the stipulation of the contract, that the lessor had the right, on lessee's failure to pay any installment, to repossess himself of the property, and having exercised this right, the contract was rescinded in fact, and there was an end of personal obligation on part of lessee. While the word "rescinded" is used in that contract, the right to rescind and the act necessary to a rescission are plainly expressed without it, and the interpretation was fully warranted even if the word had not been used.

Here the plaintiffs in effect, in their contract, stipulated that in default of payment of rental they should have the right to take the machine back to make good the default; there was default, and because of it they took back the machine. This was both a right to rescind and the exercise of the right or a rescission in fact. The construction put upon the whole contract by the learned Judge of the Court below was right. Therefore the assignments of error are overruled, and the judgment is affirmed. J. D. B., Jr.

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Oct., '94, 69. October 3, 1894.

Kennedy v. Agricultural Insurance Company.

Foreign Insurance Companies—Service upon—Attachment execution—State agent—Acts of April 4, 1873, and June 20, 1883.

Foreign insurance companies licensed to transact business in this State have always been considered and are in fact essentially a distinct class of corporations, justifying and requiring legislation appropriate to the class itself.

The Act of April 4, 1873, as amended by the Act of June 20, 1883, P. L. 134, was designed to place such companies within easy and convenient reach of process, and the terms of the Act are very comprehensive. "Any and every writ" in the Act clearly comprehends an attachment execution, and service upon the "State agent" anywhere within the State is a good service upon the company.

Appeal of M. J. Kennedy, plaintiff, from the judgment of the Common Pleas of Westmoreland County, striking off judgment entered by default against the Agricultural Insurance Company of Watertown, N. Y., garnishee, and setting aside the service of an attachment execution upon the said garnishee.

The facts are fully stated in the opinion of the Supreme Court. DOTY, P. J., having stricken off the judgment for plaintiff and having set aside the service upon the garnishee, plaintiff appealed, assigning this action as error.

V. E. Williams, (with him *A. M. Sloan* and *W. H. Griffith*), for appellant.

J. R. Smith, (*John C. Robinson* with him), for appellee.

January 7, 1895. STERRETT, C. J. Judgment was obtained in the Court below by the plaintiff against Charles Haney, whose dwelling house was covered by a fire insurance policy of the Agricultural Insurance Company of Watertown, New York, the defendant above named. Shortly afterwards, the house was totally destroyed by fire, and thereupon the plaintiff issued an attachment execution on the judgment and caused the same to be served on Frederick Theis, the designated State agent of the insurance company at his office in the City of Wilkes-Barre, Pa. The attachment was served personally on said agent by the Sheriff of Luzerne County, who, for that purpose, was specially deputized by the Sheriff of Westmoreland County to whom the same was directed. The writ, in usual form, after reciting the judgment of $400, etc., contains a clause of summons commanding said insurance company, garnishee, to be and appear, etc., on the first Monday of May, then next, to show cause, if any it has, why the judgment aforesaid should not be levied of the effects of said defendant in its hands, agreeably to the Acts of Assembly, etc. Neither the insurance company nor its said agent appeared in person or by attorney, and on August 26, the Court, being advised of the company's default, gave judgment against it in the form approved by this Court in Layman *v.* Beam, 6 Whart. 181, and Jones *v.* Tracy, 75 Pa. 417. Subsequently, the defendant garnishee moved the Court to strike off the last mentioned judgment, set aside the service of the attachment, etc., because: (*a*) "The Court has no jurisdiction over the said garnishee"; (*b*) "There is no Act of Assembly authorizing the issuing and serving of such writ, or requiring the insurance company to come into this Court and make answer"; (*c*) "The State agent of said insurance company does not reside within the County of Westmoreland"; (*d*) "A person or corporation not a resident can only be attached in the county where it can be properly served"; and (*e*) "The said service is illegal and void." The Court, recognizing the reasons thus assigned by the defendant garnishee, as sufficient, struck off the judgment entered against it in default of appearance, and set aside the service of the attachment execution. This action of the Court is the subject of complaint in the specification of error.

The Act of April 4, 1873, as amended by the Act of June 20, 1883, declared: "No insurance company, not of this State, nor its agents, shall do business in this State, until it has filed with the insurance commissioner of this State a written stipulation, duly authenticated by the company, agreeing that any legal process affecting the company, served on . . . the agent specified by the company to receive service of process for said company, shall have the same effect as if served personally on the company within this State. . . . . The term process shall be construed to mean and include any and every writ, rule, order, notice or decree, including any process of execution that may issue in or upon any action, suit or legal proceeding to which said company may be a party, by themselves, or jointly with others, whether the same shall arise upon a policy of insurance or otherwise, by or in any Court of this Commonwealth having jurisdiction of the subject matter in controversy, and all writs, rules, orders, notices or decrees aforesaid shall be directed to the sheriff, constable or other officer, authorized by law to serve similar writs, of the county wherein the same shall be issued, who is hereby authorized to serve the same on any and every person or persons, body politic or corporate, named in said process with said company, either as plaintiff, defendant or otherwise, or who may be impleaded in said action, suit or proceeding with

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said company, found in said county, ... as may be directed by the plaintiff or person issuing said process or his attorney, and in the absence of such direction, as shall be most convenient, the officer to whom said process may be directed, shall by writing indorsed on or attached to said process, deputize the sheriff, constable or other officer of the county where the State agent designated by any company, as provided by law, to receive service of process for said company may reside, to serve the same on him; and each and every service so made, shall have the same force and effect to all intents and purposes as personal service on said company, in the county where said process issued."

While this Act is somewhat involved and not as clearly expressed as it might have been, we think it was intended to authorize service of an attachment execution on the State agent of a foreign insurance company, garnishee, whether the agent has his office in the county whence the writ issued or not. In other words, we are of opinion that, in the circumstances of this case, the service of the writ, on the garnishee company's State agent, was made according to the provisions of the Act, and its legal effect is the same as if it had been served personally on his principal, within this State. For the purpose of being served with any "writ, rule, order, notice or decree," authorized by the Act, the State agent is *pro hac* the company itself, and is to be constructively regarded as a resident of each and every county in the State.

The Act is not obnoxious to the objection that it is special legislation and therefore unconstitutional. Foreign insurance companies, licensed to transact business in this State, have always been considered and are in fact essentially a distinct class of corporations, justifying and requiring legislation appropriate to the class itself. If such companies, owing their existence to some authority outside and not having their principal offices within the State, are permitted to transact business here, it must necessarily be upon such terms and conditions as will enable the insurance department of the Commonwealth to supervise their business operations, etc., and place them within easy and convenient reach of process at the suit of the Commonwealth or any of its citizens. Hence the provision requiring them to appoint a State agent on whom "any and every writ, rule, order, notice or decree," etc., may be served with the same effect as if served personally on the company within this State. The specified forms of process are very comprehensive. "Any and every writ" clearly comprehends an attachment execution, which is of a two-fold nature. As to the defendant in the judgment on which it issues, it is a species of execution process, but as to the garnishee who becomes a party defendant therein, it is an original process—a summons commanding him to appear and show cause, if any he has, why the judgment in favor of the plaintiff should not be levied of the goods and effects of the defendant in his hands. In form as well as in effect, the summons clause of an attachment execution, required to be served on the garnishee, is in every proper sense of the term a "writ," and therefore within the provision of the Act.

We are therefore of opinion that the learned president of the Common Pleas erred in holding "that the attachment execution was not properly served upon the garnishee."

The order of December 11, 1893, striking off "the judgment and setting aside the service of the attachment execution upon said garnishee," is reversed and set aside, and said judgment and service are hereby re-instated, with costs to be paid by the garnishee defendant.

J. D. B., Jr.

Oct. '94, 108. October 3, 1894.

Berwald v. Ray, Sheriff.

Trespass—Attachment under Act of March 17, 1869, and supplement of May 24, 1887—Bond—Measure of damages.

Where an attachment execution is issued, and under proceedings had upon it, goods of a third person are sold by the sheriff as the goods of the debtor, the sheriff is liable in trespass to the owners of the goods, and the remedy for such sale is not confined to an action upon the bond given when the attachment issues.

The liability of the obligor on the bond given in attachment proceedings is limited to costs, fees, and damages sustained by reason of the attachment; and such damages must be such as are the natural and usual result of the seizure of goods, but not such as are indirect or consequential, or punitive.

Appeal of Benjamin Berwald, by his next friend, A. H. Michaels, plaintiff, from the judgment of Common Pleas of Venango County, in an action of trespass against L. L. Ray, sheriff of Venango County.

The facts of the case are sufficiently stated in the opinion of the Supreme Court, *infra*. The Court at nisi prius, Taylor, P. J., charged the jury as follows:

"For the reasons we have stated heretofore, we will say the plaintiffs' right to recover should have been upon the bond given in this case. If there was any defect in the bond, they ought to have called it to the attention of the Court before, but having acquiesced in it until final judgment in the case, it is too late then to raise

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the question as to the validity of that bond. In our opinion suit upon the bond would be the proper remedy of the plaintiff instead of an action of trespass."

Verdict for defendant.

The plaintiff took this appeal, and assigned as error the above-quoted charge.

J. H. Osmer, (with him *Osmer, Osmer, Breen* and *Murphy*,) for appellant.

The owner of goods seized as those of another, is not obliged to intervene *pro interesse suo* on pain of forfeiting his rights of property or action. Unless he be called upon to make good his claim by virtue of statutes relating to interpleader, he may sue the officer and recover damages.

Megee *v.* Beirne, 39 Pa. 50.

A sheriff who in attachment seizes goods of any person other than the defendant, is liable in trespass, irrespective of the event of the suit between plaintiff and defendant.

Rothermel *v.* Marr, 98 Pa. 285.

Robert T. Glenn, for appellee.

The refusal to dissolve the attachment stamped the transaction by which the defendants therein obtained them, as fraudulent, and authorized the sheriff to hold the goods for the purpose of satisfaction.

Walls *v.* Campbell, 125 Pa. 346.

The plaintiffs' remedy is on the bond.

Rothermel *v.* Marr, 98 Pa. 285.
Plunkett *v.* Sauer, 101 Id. 356.
Gunnis *v.* Cluff, 111 Id. 512.

That the sheriff, prior to making sale of the goods attached, upon the writ of fi. fa. issued to him, received from plaintiffs a bond of indemnity, can avail appellant nothing. Such bond does not change the legal status of the parties in this action.

January 7, 1895. FELL, J. This action was against the sheriff for selling the goods of the plaintiff under an execution against another person. The learned Judge directed a verdict for the defendant, and this is the error assigned. H. & C. Wise caused an attachment under the Act of March 17, 1869, to issue against R. Berwald and B. Berwald, under which certain goods contained in a store conducted in the name of B. Berwald, and claimed by him as his property, were seized. A rule to dissolve the attachment was discharged, and a rule for judgment for want of a sufficient affidavit of defence was made absolute as to a part of the claim against R. Berwald and discharged as to B. Berwald, the plaintiff here. Execution was issued upon the judgment against R. Berwald, and the goods attached were levied upon. B. Berwald notified the sheriff that the goods were his, but the sheriff, on being indemnified by the plaintiff in the attachment, sold them. The attachment proceedings were subsequently discontinued, no judgment having been obtained against B. Berwald. The reason assigned by the Court for the peremptory instruction to find for the defendant was that the plaintiff's only remedy was by action on the bond given when the attachment issued.

An action may be maintained on a bond given in an attachment proceeding under the Act of March 17, 1869, as amended by the Act of May 24, 1887, where there has been a failure to prosecute the attachment with effect, or if the attachment has been quashed, dissolved or ended; and recovery in such an action is limited to legal costs, fees and damages sustained by reason of the attachment. It is a statutory bond, and liability under it cannot be extended beyond its terms. The damages which may be recovered are such as are the natural and usual result of the seizure of goods, as loss of sales and interruption of business, but not such as are indirect or consequential, or punitive. Commonwealth *ex rel.* Cord *v.* Magnolia Land and Imp. Co., 163 Pa. 99. The sale of the plaintiff's goods was not the result of an attachment against him, but of a judgment and execution against another. It was not in violation of the condition of the bond, but of his rights entirely, irrespective of the bond. An action on the bond could be maintained only for a breach of its condition, and any recovery would be limited to loss resulting from the seizure of the goods. For the unlawful sale of the property his remedy was in trespass, and on the issue raised, it was his right to go to the jury.

The assignment of error is sustained, and the judgment reversed with a venire facias de novo.

H. F.

Oct. '94, 155. October 3, 1894.

Moffitt v. Lytle.

Right of way—Deed—Reservation or exception —Use of servient tenement by owner.

A clause in a deed for land, "Said party of the first part reserves the right of road or lane from said F. road along said west line and M's. east line, 18 feet wide, to said party of the first part's fields or orchards" is a reservation of a right of way and not an exception of a strip of land from the grant, and the grantee may make any use of the strip which does not interfere with the grantor's use thereof for the purposes of a way.

A grantor who has reserved a way over part of the land granted has no right to erect a fence along the same on the said land.

Where a right of way exists, the owner of the servient

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tenement may plow up the ground, provided that by so doing he do not interfere with the right of way, and whether he has so interfered is a question for the jury.

Appeal of Samuel S. Lytle and Charles Lytle, defendants, from the judgment of the Common Pleas of Venango County, in an action of trespass brought by Richard Moffitt.

This was an action brought to recover damages for interference with a right of way and for removing a fence erected to protect the same.

On the trial, before TAYLOR, P J., the following facts appeared: Richard Moffitt, the plaintiff, owning a strip of land, conveyed by deed to one Henderson a piece of four acres, the western line of which was identical with the eastern line of land of one Elizabeth McElhinney. The deed contained the following: "Said party of the first part reserves the right of road or lane from said Franklin and Mercer road along said west line and McElhinney's east line, eighteen feet wide, to said party of first part's fields or orchard." In 1892 Samuel S. Lytle, one of the defendants, bought the four acre piece at sheriff's sale, upon an execution against Henderson. The sheriff's sale was made subject to the reservation of the right of way above mentioned. At the time Lytle became possessed of the land a barn was situated thereon within about three feet of the strip over which the right of way extended, and it had been so situated since a time long before Lytle became the owner of the land. The main entrance to the barn was from said strip; and Lytle from the time he took possession of the land was accustomed to have ingress and egress to and from the barn, for himself, his horses and cattle, by that entrance and over said strip. About June 20, 1892, Charles Lytle, one of the defendants, by the direction of his father, Samuel S. Lytle, the other defendant, plowed and harrowed a part of the land over which the right of way extended.

Shortly after said plowing and harrowing was done, plaintiff erected a fence on a part of said strip and along and near the eastern line thereof, so as to prevent appellants from having access to the barn by its main entrance. Thereupon defendants took down and removed enough of the fence to enable them to get into and out of the barn with teams and cattle.

Counsel for defendant proposed to ask one of the defendants whether the erection of a fence along the interior line of the right of way would interfere with the use of the barn. Objected to. Objection sustained. (First assignment of error.)

The Court charged as follows: "This is an action of trespass brought by Mr. Moffitt against the defendant here for interfering with his alleged rights. It is not contended upon the part of the plaintiff that there is any serious amount of damage done, but they got into a controversy which it seemed they had to have settled in Court, if the uncontradicted evidence is believed. The defendant claimed he had the right to plow up the road or use it in any way he pleased, and finally Mr. Moffitt was compelled to bring this action to test the right. Under those circumstances there is no wonder the case got into Court. It is always better to keep these little cases out of Court. [Under this reservation in the deed the defendant was bound to take notice of it. The deed in which the reservation was contained was made to Moffitt on the 25th day of March, 1876. It was upon record upon the first day of April, 1876, almost twenty years ago. Being so, the defendant purchased with notice of what was in the deed. He was bound to know if there was a reservation in it, and was bound by that reservation. It seems there has never been any controversy about it till lately. I will not decide whether this reservation is exclusive or not. Sometimes there are pretty nice questions raised by reservations and exclusions in deeds, but this is not necessary for the decision of this case.] (Second assignment of error.)

"If you believe the uncontradicted evidence that this land was interfered with, and plowed up in the way testified to by the plaintiff, and the fence torn down that was built by Mr. Moffitt within the line of this right of way, as he has stated here, it is unnecessary to decide whether that right of way is exclusive in him or not. The defendant had no right to interfere with it. He had the right to go over it at any and all times, and without any interference upon the part of the defendant. And [if you find that he has plowed it up and left it in the shape that is testified to, or has taken down a fence that had been erected on that right of way, they had no right to do it, and your verdict would be for the plaintiff. The plaintiff don't ask for anything here; it is not an item of dollars and cents. They merely want a small item of damages.] (Third assignment of error.) If you find nothing has been done to interfere with it then you would find a verdict for the defendant."

The plaintiff presented, *inter alia*, certain points, which with their answers were as follows:—

"1. The reservation in the deed gives to the plaintiff the exclusive right to this road or lane and the defendant would have no right to go upon it to plow it up for sowing in buckwheat or any other purpose and the verdict should be for the plaintiff." *Answer*. "With the word exclusive stricken out, we affirm that point." (Fourth assignment of error.)

"2. If the jury finds that the reservation was

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for a road or lane, it is a reservation separate and apart from the grant of the balance of the land, and to individuate it from the balance of the land by a fence, and if defendant tore down the fence so erected he is a trespasser and their verdict must be for the plaintiff." *Answer.* "Affirmed." (Fifth assignment of error.)

"3. If the right of way was not exclusive in plaintiff, then the defendants would not be warranted in entering upon the right, and without the consent of plaintiff plow it up, or tear down the fence erected, and their verdict should be for the plaintiff." *Answer.* "Affirmed." (Sixth assignment of error.)

The defendants presented, *inter alia*, certain points, which with their answers were as follows:—

"2. That if the jury believe that the fence was erected on the land of defendants or either of them, without their or his consent or against their or his will, after the plowing complained of by the plaintiff was done, their verdict must be for the defendants, as to the trespass alleged by the plaintiff in tearing down said fence."

Answer. "That would be true if there was a shadow of evidence to warrant it. There is no evidence at all that the fence was erected there except upon the right of way." (Seventh assignment of error.)

"3. That the plaintiff's right of way in question was not exclusive, and the defendant S. S. Lytle or defendant Charles Lytle, acting under the direction of said S. S. Lytle, had a right to enter upon, occupy and use the ground over which said right of way extended, for every purpose not inconsistent with the plaintiff's said right of way, and might in doing so lawfully take down and remove said fence."

"This point, as made, answered in the negative." (Eighth assignment of error.)

Verdict for plaintiff for $6 and judgment thereon.

The defendants took this appeal and filed the assignments of error above indicated.

W. C. Rheem, for appellants.

The clause in the deed is a reservation of a right of way, not an exception from the conveyance, therefore the defendant, Lytle, was entitled to travel anywhere he pleased within his own lines, and in so doing might lawfully remove the fence erected within the same by the plaintiff.

Kister *v.* Reeser, 98 Pa. 1.
Dietrich *v.* Berk, 24 Id. 470.

The plowing and harrowing was at most *damnum absque injuria*, and the jury should have been allowed to have found whether the same was injury to the way.

Robert W. Dunn (*J. S. Carmichael* with him), for appellee.

January 7, 1895. GREEN, J. That the reservation contained in the deed from Moffitt to Henderson, is not an exception of a part of the land conveyed, but is only a reservation of a right of way over the surface of the land, is so manifest, that it is not really denied by the plaintiff. The very point was decided by this Court, of Kistler *v.* Reeser, 98 Pa. 1, where the reservation was made in terms almost precisely similar to the reservation in this case. Mr. Justice TRUNKEY delivering the opinion, said, "Where land is granted and the right of way reserved, that right becomes a new thing derived from the land; and although before the deed the grantor had the right of way over the land whenever he chose to exercise it, yet when he conveyed the land the reservation was a thing separate from the right of the grantee in the land: State *v.* Wilson, 46 Me. 9. A reservation is the creation of a right or interest which had no prior existence as such in a thing or part of a thing granted. It is distinguished from an exception in that it is of a new right or interest. An exception is always of part of the thing granted it is of the whole of the part excepted."

In the present case, the whole of the land was conveyed in fee by Moffitt to Henderson, and the reservation was in these words: "Said party of the first part reserves the right of road or lane from said Franklin and Mercer road along said west line and McElhinny's east line eighteen feet wide to said party of the first part's fields or orchard." After the conveyance, Henderson was the owner of the fee of the whole four acres conveyed, including the land embraced within the right of way, and Moffitt was the owner of a right of way over the surface to the extent of a strip eighteen feet wide. There was nothing in the reservation to exclude Henderson from also passing over the strip or from such use of it as did not interfere with Moffitt's use of it for his right of way.

The plaintiff's statement of his cause of action included two distinct acts of trespass, one the plowing and harrowing of the surface, and the other, the tearing down of a short piece of fence which was erected by the plaintiff on the reservation, but so as to cut off the defendants' access to their barn. The plaintiff's right of way over the land gave him no right to build the fence, and the defendants were not guilty of any trespass when they tore it down. The first specification of error complains of the rejection of a question to Charles Lytle, whether the erection of a fence along the interior line of the right of way would interfere with the use of the barn. This was a proper subject of proof, and the question should have been allowed. The first specification is therefore sustained. The second is sustained because the reservation was not exclusive,

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and the Court should have so instructed the jury. The third specification is sustained, because the charge is manifestly erroneous, so far as taking down the fence was concerned, and it would be erroneous as to the plowing, if the plowing did not interfere with the plaintiff's right of way. The fourth specification is sustained, because the plaintiff's first point asked for a binding instruction to find for the plaintiff, and this was affirmed without qualification. The defendant's right to plow the land would depend upon whether the plowing interfered with the plaintiff's right of way. The fifth assignment, as to the fence, is sustained for the reasons already stated. The sixth is sustained because the plaintiff's third point asked for a binding instruction to find for the plaintiff, and this was affirmed. Whether the defendants could enter and plow on the right of way would depend upon whether the plowing would interfere with the right of way, and as to tearing down the fence, as we have already said, it was not a trespass. The seventh assignment is sustained, because the plaintiff had no right to build the fence, even on the right of way, so as to shut off access to the defendant's barn. The land on which it was built was the land of one of the defendants, the plaintiff having nothing but a right of way over the surface, which did not need a fence in order that the plaintiff might enjoy his right.

The eighth assignment is sustained, because the defendants' third point should have been affirmed just as it stood.

Judgment reversed, and new venire awarded.

H. B.

Oct. '94, 206. October 4, 1894.

Johnson et al. v. Smith, Executrix.

Landlord and tenant—Lease—Evidence.

In an action upon a lease to recover rental for premises, in this case a water-right held or used by the defendant, it is competent for the defendant to show, notwithstanding the lease, signed by the lessors only, that he did not occupy the premises under the lease, or pay rent thereunder, but occupied by virtue of another and oral contract.

Appeal of Mary Smith, executrix of D. S. Smith, deceased, surviving partner of D. S. Smith & Co., defendants, from the judgment of the Common Pleas of Venango County, in favor of S. W. Johnson, A. B. Maynard, M. L. Bostwick, L. E. Johnson, and M. L. Steanes, co-partners, trading as Johnson & Co., plaintiffs.

This was an action to recover rent alleged to be due upon a lease of certain water power. On the trial, before TAYLOR, P. J., the plaintiffs gave in evidence a lease of said power for the term of twenty-five years from J. A. Dewar and Z. O. Smith to Dewoody, Smith & Co., of which firm the defendant's decedent was a member. The lease was dated January 25, 1866, was signed by the lessors only, and the power was recited therein to be for use in the machine shops of the lessees. This was followed by a deed from Dewoody to one Brashear, dated October 1, 1868, conveying, *inter alia*, one undivided fourth of the tract of land on which was the machine shop, and the grantor's interest in the machine shop, with ways, waters, water courses, etc.; a deed dated April 12, 1866, from Z. O. Smith to J. A. Dewar, conveying one undivided half of the above mentioned land and the tenements, hereditaments thereunto belonging; and a deed dated January 31, 1871, from J. A. Dewar and wife to D. S. Smith and A. Brashear for one-half of the land and one-half of the business of the machine works; this deed contained an express grant of the grantor's interest in the water right.

Parol evidence was also given; *inter alia*, that of D. T. Lane, who testified that he had put in the machine works using the water in 1864, and had made a verbal agreement with Dewar for the privilege of the water power for twenty-five years at $100 per annum, and in 1865 sold out to Dewar. The rent claimed was that accruing since June 1, 1886. The defendant called D. G. Dewoody, who testified that he was the head of the firm of Dewoody, Smith & Co., and knew under what arrangement the firm operated the water power for the machine shop. The following colloquy then took place:—

Mr. McCalmont, for defendant.—We offer to prove by the witness that the water power was operated by Dewoody, Smith & Co. up until the fall of 1868, when that firm ceased to do business, under the arrangement which Mr. Dewar had formerly made with D. T. Lane, as testified to by him; that the alleged lease on which this suit is brought was never accepted or entered into by the firm of Dewoody, Smith & Co., or rent paid by them thereunder.

By the Court.—When did you leave them? A. I sold out in 1868.

Q. You left the firm in 1868? A. Yes, sir, I left the firm in 1868.

Counsel for plaintiff objects to the offer made by the defendant.

By the Court.—I don't think it lays in your mouth for you to come in and say that the lease was not valid, after paying him the rent upon it.

Mr. McCalmont, for defendant.—We never paid the rent upon it from the beginning.

By the Court.—I think we will overrule the offer. (Sixth assignment of error.)

The defendant requested the Court to charge, *inter alia*, (1) that the verdict must be for defendant; (5) that there was no sufficient evidence

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of the acceptance of, or entry under, the paper in suit, by the partnership of Dewoody, Smith & Co., or D. S. Smith & Company, or D. S. Smith, and the plaintiffs could not recover.

The Court refused both of these points. (Fourth and fifth assignments of error.)

Verdict for plaintiffs and judgment thereon.

The defendant took this suit, and filed assignments of error as above indicated.

John O. McCalmont, (*B. H. Osborne* with him,) for appellant.

Thomas McGough, for appellee.

January 7, 1895. GREEN, J. The lease under which the plaintiffs claim to recover the rent in controversy, bears date January 25, 1866, and was made by J. A. Dewar and Z. O. Smith, to a firm called Dewoody, Smith & Co. David S. Smith was a member of that firm, and the executors of his will are the defendants in the present suit. David S. Smith, or the different firms of which he was a member, continued to pay rental at the rate of one hundred dollars annually for the use of the water power in question, up until 1886, the last payment being made June 3, 1886. In that year the factory using the water power burned down and was not rebuilt, and this action was brought to recover rent for the remainder of the term of twenty-five years, commencing October 12, 1865, and ending October 15, 1890. The lease was recorded in June, 1868. From the brief statement of the leading facts of the case it would seem that there could be no question as to the liability of D. S. Smith and his estate for the rent claimed. But on the trial the defendants offered to prove by David G. Dewoody, a member of the firm of Dewoody, Smith & Co., who were the lessees named in the written lease, that the water power was operated by Dewoody, Smith & Co. up until the fall of 1868, under an agreement which Mr. Dewar had formerly made with D. T. Lane, as testified to by him, and "that the alleged lease, on which this suit is brought, was never accepted or entered into by the firm of Dewoody, Smith & Co., or rent paid by them thereunder."

D. T. Lane had already testified that he had had put in the machine shop plant (the Petroleum Machine Works using the water) in 1864, and that he made a verbal contract at the time with Mr. Dewar, the owner of the mill property above the machine shop, from which the water power was derived, for the use of the water power at one hundred dollars a year for twenty years. He had also testified that he sold out to Dewar in March, 1865. It is alleged by the appellants, in their history of the case, that the firm of Dewoody, Smith & Co. was organized in October, 1865, and Dewoody testified that he continued in the firm until 1868, when he left it. Now the written lease in question was made in January, 1866, to the firm of Dewoody, Smith & Co., and *prima facie*, the inference would be that they and those who succeeded them, held under the lease. But the offer of proof was that the water power was operated, not under the written lease, but under the verbal agreement made by Dewar with Lane. The learned Court below rejected the offer, saying that it did not lie in the mouth of Dewoody to say that the lease was not valid after paying rent upon it, and thereupon counsel for the appellants said that they never paid rent from the beginning. While it certainly does seem strange that D. S. Smith did not claim under this written lease, an offer to prove the contrary, and that he really claimed under a different contract altogether, cannot be rejected. For, supposing the offer to have been admitted, and thereupon proof given in accordance with the offer, a question of disputed fact would arise which could only be determined by the jury; to wit, under which contract did Smith or his firms really proceed and pay the rent? Of course the determination of that question would involve a consideration of all the evidence in the case, as well that which indicates a holding under the written lease as that which indicates a holding under the verbal contract made by Dewar with Lane. We will not discuss nor even enumerate any of those facts, nor will we discuss or decide the other questions which are raised in the paper books. It will be time enough to do that when the whole merits of the case are presented. We sustain the sixth specification of error, and say nothing about the others, except that we do not sustain the fourth or fifth specifications.

Judgment reversed, and new venire awarded.

H. B.

Jan. '94, 127. April 30, 1894.

Saalfield, Assignee, v. Manrow.

Mortgages—Consideration—Evidence—Burden of proof—What sufficient consideration to support action on a mortgage.

A mortgage is a sealed instrument which imports a consideration, and the burden of proof lies on the mortgagor, who alleges an illegal consideration, or the failure of a lawful one, to establish either to the jury by competent evidence.

J. having embezzled the money of a client of his employer B., his father P. gave his bond and mortgage for the amount to the client W. In a suit upon the mortgage, it appeared that the mortgage was given for the debt of J. and for his benefit. P. claimed that B. promised to give J. employment, so that he could gradually pay the money back, and assured him that he would not be called upon, as the bond would be extended from time to time;

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that he only gave the mortgage for that purpose, and that no employment had been given to J.

Held, that the evidence warranted a finding that there was an understanding that the mortgagee would not bring action against J. until the mortgage matured, which consideration was sufficient to sustain the mortgage, and that the Court below erred in directing a verdict for defendant.

Appeal of Henry Saalfield, assignee of the First National Bank of Bradford, Pennsylvania, which was the assignee of H. S. Baker and C. B. Whitehead, plaintiff, from the judgment of the Common Pleas of McKean County, in an action of scire facias sur mortgage, brought by said plaintiff against Patrick Manrow, to recover the sum of seven hundred and ninety-three dollars and three cents, secured by said mortgage.

Upon the trial, before MORRISON, J., the following facts appeared: James Manrow, the son of the defendant Patrick Manrow, being in the employment of McSweeney & Byles, was entrusted with the collection of certain rents which McSweeney & Byles collected as attorneys for Baker & Whitehead. About March 20, 1891, it was discovered that James Manrow had converted to his own use some seven hundred and eighty dollars of the money of Baker & Whitehead, which he had so collected. When accused of the crime James Manrow admitted his guilt, and assisted in balancing the books and ascertaining the exact amount of his defalcation. In order to settle the matter, he induced his father to come to the office of McSweeney & Byles, and on March 21, 1891, Patrick Manrow executed and delivered to Baker & Whitehead the note for $793.03, and the mortgage in suit. Patrick Manrow testified that he was induced to give the mortgage by a promise made by Byles in the presence of Baker and Whitehead that he would not have to pay the money, as McSweeney would give his son James employment, so that he could pay off the amount of his defalcation in instalments, and that the note and mortgage would only be security that James would do the work and turn over the money, and further, that they would extend the note from time to time to enable James to pay it. He averred that this promise was never kept, and that a threat was made to arrest and imprison his son if he did not give the mortgage. His testimony, however, as to the promise that McSweeney would employ his son James was negatived by Baker and Whitehead, whom he called to corroborate it. Byles also testified that he made no threat to prosecute James, or promise to procure employment for him, and in this he was corroborated by the testimony of his clerk John Finnerty. Upon this evidence the Court below instructed the jury to find a verdict for the defendant, charging, *inter alia*, as follows:—

"Patrick Manrow, as we understand the undisputed evidence, received no consideration whatever for executing this mortgage and giving this note. He did it for his boy. There is no evidence that Baker & Whitehead released any right of action they may have had against McSweeney & Byles for this money, or against James Manrow.

"There is no evidence that McSweeney & Byles executed any release to James Manrow, as to an action against him for this money, or that Baker & Whitehead executed any release for a right of action for damages against Manrow for taking this rent of theirs and appropriating it to his own use.

"Now, in the view we take of this—we may be wrong, and if we are we can correct ourselves on motion for a new trial, or, if the parties don't see fit to give us that opportunity, they can take it to the Supreme Court and they can correct us—we cannot bring ourselves, as we understand the law now, to make a ruling that would hold Patrick Manrow to pay this money, no part of which he received and no benefit that we can see ever came to him for it; and we don't see that the parties who were entitled to this money released any claim or right of action they may have had against James Manrow, [so we consider this mortgage a "nudum pactum"— the giving of a voluntary mortgage to secure a debt that Patrick Manrow was under no obligation to pay and he received no benefit, and the other parties received no injury that we can see, and therefore we think it is without consideration, and we direct the prothonotary to take your verdict for the defendant.]"

Verdict for defendant and judgment thereon. Whereupon the plaintiff took this appeal, assigning for error the action of the Court in instructing the jury to find for the defendant, and the portion of the charge above quoted in brackets.

Edward McSweeney, (*H. McSweeney* with him), for appellant.

The mortgage was executed at the request of, and in the presence of, James Manrow, and for his benefit; it was, therefore, founded on a good and sufficient consideration.

Popple *v* Day, 123 Mass. 520.
York *v*. Pearson, 63 Me. 587.
Andrews *v*. Marrett, 58 Id. 539.

By the acceptance of the mortgage, the right of action against James Manrow was suspended until after the maturity of the mortgage.

18 Am. & Eng. Encyc. of Law, page 177.
Parsons on Notes and Bills, 195.

The mortgage being under seal would of itself import a sufficient consideration.

Farnum *v*. Burnett, 21 N. J. Eq. Rep. 87.
Saving Assoc. *v*. Bullard, 1 Del. 122.

R. B. Stone, for appellee.

There was no express lawful consideration for

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the mortgage, and any such inference is in the face of the testimony.

The mere fact that James Manrow is not prosecuted is not a sufficient consideration.

Spackman *v.* Ott, 65 Pa. 135.
Conmey *v.* McFarlane, 97 Id. 361.

Nor will the seal import such consideration as can not be rebutted.

Wilson *v.* Wilson admr., 2 Pitts. 205.
Wharton on Contracts, sec. 495.
21 Am. & Eng Encyc. of Law, page 899.

January 7, 1895. McCollum, J. James Manrow was a clerk in the law office of McSweeney & Byles, who were the agents of Baker & Whitehead for the collection of their rents. Manrow, acting for McSweeney & Byles, collected these rents and appropriated $780.13 of the same to his own use. When the embezzlement was discovered he admitted it and called upon his father, the defendant in this case, and said to him "that he had got into trouble in the office about some money matters, and wanted him to go down and see what he could do about it." The defendant complied with his son's request and his visit to the office resulted in his giving his note to Baker & Whitehead for the sum embezzled, and his mortgage to secure the same. The note and mortgage were assigned by the payees and mortgagees to the First National Bank of Bradford, which assigned them to the plaintiff.

The defendant alleges that he was induced to give the bond and mortgage by a promise which was not kept, and by a threat to arrest and imprison his son if he did not give them. He testified on the trial that Byles, in the presence of Baker and Whitehead, explained to him the nature and amount of James' defalcation and proposed that he should give his note and mortgage for it, payable in four months; that he protested his inability to pay it, and Byles then said he would not have to, as McSweeney could furnish James employment "at fifty dollars a month and found," and that Baker & Whitehead would take his note as security that James would do the work and turn the money over to them, and that they would extend the note from time to time to enable James to pay it. He testified further that Byles said if he did not do this he would prosecute James for embezzlement. He testified also that he gave the bond and mortgage on the terms or conditions stated by Byles. He then testified that neither McSweeney nor Byles furnished any employment for James after the bond and mortgage were executed. He called Baker & Whitehead to corroborate him in his statement relating to the employment of James by McSweeney, but their evidence clearly negatived his claim in this respect. Byles testified that he made no threat to prosecute James, or promise to procure employment for him. In this he was corroborated to some extent by the testimony of John Finnerty.

The learned Court below directed the jury to find for the defendant on the ground that there was no consideration for the mortgage, and this instruction constitutes the complaint of the plaintiff on this appeal. Was it authorized by the evidence? We think it was not. It is true that the note and mortgage were given for the debt of James, but it might fairly be inferred from the testimony that they were given on his request and that the giving of them suspended the right of action for it at least four months. According to the defendant's own version of the transaction, it afforded James an opportunity to pay in twenty monthly instalments a debt then due. If the transaction involved an agreement by the mortgagees to extend the time for payment of the debt, in order to enable James to pay it, such agreement would constitute a sufficient consideration for the mortgage and the note secured by it. We think the evidence warranted a finding that there was an understanding between the parties which precluded the mortgagees or their assignees from bringing suit against James for the debt before the defendant's note for it matured. Besides it is to be remembered that the action is upon the mortgage—a sealed instrument which imports a consideration. An illegal consideration, or the failure of a lawful one, may constitute a defence to it, but it lies on the mortgagor who alleges either, to establish it by competent evidence. In the case before us an illegal consideration was not shown.

It follows from these views that the learned Court erred in holding that there was no consideration for the mortgage, and directing the jury to find for the defendant.

Judgment reversed and venire facias de novo awarded.

S. H. T.

Oct., '93, 2. October 1, 1894.

Kunkle v. Peoples' Natural Gas Co.

Lease for drilling gas wells—Penalty for failure to proceed—Refusal to pay rental—Forfeited in case of fraud or a trick.

A husband executed to a natural gas company a lease for oil purposes of certain land owned by himself and wife as tenants in common. When the first instalment of rent fell due the lessee objected to paying it, for the reason that the title to part of the land was in the wife, and the lease had been signed by the husband only. The husband, then, undertook to obtain his wife's signature to the lease, which paper the president of the defendant company declined to deliver, saying that he would send

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it by messenger. This was not done, but instead the company wrote to the plaintiff offering to surrender the lease if he would execute to it a written release and discharge of all rights to rent or royalty. This he refused to do, and the company retained the lease for more than a year afterwards, and until after the commencement of action, when it unconditionally surrendered it. There was no fraud on the part of the plaintiff or his wife and no interference or attempted interference by the wife with the defendant's control of the land:

Held, that the lessee had had that sort of possession under its contract to which it was entitled, and had no defence in law or equity against a demand for rent and royalty payable at the expiration of the first six months.

Appeal of the People's Natural Gas Company, defendant, from the judgment of the Common Pleas of Westmoreland County, in an action in assumpsit wherein Frank Kunkle was plaintiff.

The facts of the case are fully stated in the opinion of the Supreme Court, below.

Upon the trial of the case before DOTY, P. J., the defendant presented the following points:

1. It appearing on the plaintiff's own showing that the instrument on which he sues was not signed or sealed by the defendant, and that defendant never entered into possession under it; that the plaintiff had not title to the whole of the premises thereby demised; that there was a mistake in the drawing of the instrument, and that because of such mistake the plaintiff demanded either that the mistake be corrected or the instrument surrendered; that thereupon a new agreement was made, by the terms of which a new lease was to be drawn by which the said mistake was to be corrected and to which new lease the plaintiff's wife, who owned an interest in the land, was to become a party; and that within a few days thereafter the defendant offered to return the lease on which the plaintiff sues, and followed such offer by an actual return and surrender of said lease, plaintiff cannot recover, and your verdict must be for the defendant. (*Answer.*) This proposition is affirmed with the qualification that the plaintiff cannot recover for any rent which accrued after this new agreement, referred to in the proposition, occurred between the parties. But as we view it now, and under the evidence we instruct you that plaintiff would be entitled to recover for any rent which had accrued at that time, to wit, 19th April, 1890, the exact amount of which we will give you in a moment.

2. Under all the evidence admitted your verdict must be for the defendant. (*Answer.*) This is refused.

3. The word "demise" in the lease on which the plaintiff sues implies a covenant that the plaintiff had title and good right to lease the premises; and it appearing by his own testimony that he had not title to the whole of the premises demised, he cannot recover the rent which was the consideration of such covenant, the defendant never having entered under the lease or enjoyed the premises. (*Answer.*) This proposition we will reserve for the further and future consideration of the Court.

Verdict for plaintiff for $630 rental with interest from the time of its accrual, subject to the question of law reserved.

Upon the point reserved the Court entered judgment for the plaintiff on the verdict.

The defendant took this appeal and filed the following assignments of error:

1. The Court erred in instructing the jury to find a verdict in favor of the plaintiff for $630 and interest.

2. The Court erred in not affirming defendant's second point, viz: "Under all the evidence submitted your verdict must be for defendant."

3. The Court erred in not affirming the defendant's third point, *supra*.

W. S. Miller, for appellant.

Under the pleadings the burden of proof was on the plaintiff to show what title he had, if any, in the premises described in the lease or agreement sued on, and this he failed to do.

It appeared from his own testimony, that he had not title to the whole of the land but that his wife owned an undivided interest in it and that they both resided upon the farm.

The lease being a conveyance of the oil and gas, and amounting to a conveyance of land, the rule of estoppel between landlord and tenants does not apply.

The fact that plaintiff executed and delivered the lease in suit to the defendant, the language in said lease representing and purporting that the plaintiff was the sole owner of the property, when in fact he was not, his wife being one of the owners thereof and residing with him on the property, was such misrepresentation on the part of the plaintiff as should have prevented a recovery.

Mays *v.* Dwight, 82 Pa. 464.
Miles *v.* Stevens, 3 Barr. 21.
Gibson *v.* Union Mill Co., 3 Watts, 32.
Horbach *v.* Gray, 8 Watts, 492
Geiger *v* Cook, 3 W. & S. 266.
Jenks *v.* Fritz, 7 W. & S. 201.

Where a tenant has been induced to accept the lease by misrepresentations, fraud or trick practiced upon him by the lessor, he is not estopped from setting up a superior title to that of the lessor.

Hamilton *v* Marsden, 6 Binn. 45.
Baskin *v.* Seechrist, 6 Barr. 154.
Koontz *v.* Hammond, 62 Pa. 182.

A grant of the "exclusive right to mine, take and carry away all the coal in and underlying a tract of land" is equivalent to a conveyance of the coal itself.

Caldwell *v.* Fulton, 31 Pa. 484, 485.

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Armstrong *v.* Caldwell, 53 Id. 287.

The grant in the lease sued on, is equivalent to a conveyance of the oil and gas and a right to mine it and take it away. This being so the rules governing landlords and tenants are not the only rules between the parties in this case, but the relative obligations and duties of grantor and grantee, with the corresponding covenants expressed and implied must be considered.

In Washburne on Real Estate, Vol. 1, p. 518, star page 325, we find the following, viz: From the word "demise" in a lease under seal the law implies a covenant—in a lease not under seal, a contract for title to the estate merely, that is for quiet enjoyment against the lessor and all that come in under him by title and against others claiming by title paramount during the term, and the word "let" or any equivalent words which constitute a lease have the same effect but no more; and on page 519 we find the following, viz: So the word "lease" has been held to be equivalent to "demise" in creating an implied covenant. These words "lease" or "demise" imply a covenant against a paramount title, and the following cases are cited:

Maule *v.* Ashmead, 20 Pa. 482.
Ross *v.* Dysart, 33 Id. 452.

This suit is in the nature of an action for specific performance.

Nicol *v.* Carr, 35 Pa. 381.
Hammer *v.* McEldowney, 10 Wright, 334.

The rule that the tenant is not permitted to deny his landlord's title should not govern this case. An indenture such as the one in this suit, is not a lease in the ordinary acceptation of the term, but creates a chattel real, vests an estate or interest in the land in the party of the second part. See cases above cited. Again the defendant had not put itself in the position of tenant to the plaintiff—had not possession and had not even signed the agreement called the lease. The words "grant, demise and let" carried a warranty of the title and without some proof of title the plaintiff was not entitled to recover. If plaintiff has not title the implied covenant of warranty is broken as soon as made.

Edward E. Robbins, (*John E. Kunkle* with him), for appellee.

Except in cases where there is fraud or misrepresentation, a tenant cannot dispute the title of his landlord, as it was when he took the lease.

Martin *v.* Holt, 51 Pa. 503.

In the case cited the lessor, as in the case at bar, held an undivided interest and had signed the lease as agent and the tenant offered to show that the landlord did not have title, which offer was refused. This doctrine is fully sustained in the following cases:

Seyfort *v.* Bean, 83 Pa. 452.
Bedford *v.* Kelly, 61 Id. 491.
Baskin *v.* Seechrist, 6 Barr. 154.

The proposition urged by the appellant that a gas lease such as the one in suit, is a conveyance of land, is not sustained by the decisions of this Court.

Barnhart *et al.* *v.* Lockwood *et al.*, 152 Pa. 84.
Glasgow *v.* Chartiers Oil Co., 152 Id. 48.
Venture Oil Co. *v.* Fretts, 152 Id. 451.
Wettengel *v.* Gormley, 160 Id. 567.

There is no evidence of any fraud or misrepresentation. The testimony clearly and plainly shows that Mrs. Kunkle was present during all the negotiations in regard to the lease, that she was not dissatisfied with any part whatever, nor is there any averment nor did the defendant attempt to show that she ever denied the right of her husband to lease the land, or that she ever interfered with the defendant in any way, or prevented the enjoyment of its rights under this lease, and under the rule of law laid down by the Supreme Court in—

Baskin *v.* Seechrist, *supra*,

"The mere inception of a claim in the lessor is enough."

Cooper *v.* Smith, 8 Watts, 540.
Jackson & Gross on Landlord and Tenant, sec. 615.
Kline *v.* Johnston, 24 Pa. 72.

"When a principal has been informed of what has been done by his agent, he must dissent and give notice of it in a reasonable time."

Kelsey *v* National Bank, 90 Pa. 426.
Schrack *v.* McKnight, 84 Id. 29.
Bredin *v.* Dubarry, 14 S. & R. 26.
Porter *v.* Patterson, 15 Pa. 229.
Wills *v.* Manufacturers' Natural Gas Co., 130 Id. 233.
Westmoreland Natural Gas Co. *v.* DeWitt, 130 Id. 252.
Kitchen v. Smith, 101 Id. 457.
Leatherman *v.* Oliver, 151 Id. 650.

January 7, 1895. DEAN, J. This action was assumpsit for rental on a lease of the gas and oil on a tract of 130 acres of land in Washington Township, Westmoreland County. The term was ten years. The consideration was one-sixth of the oil and $500 annually for each paying gas well. The defendant covenanted to commence operations within six months from the execution of the lease, and complete one well, or pay to plaintiff the sum of $500, and further agreed to pay $130 as rental until the completion of the first well. The right to occupancy of the land for cultivation was reserved by plaintiff. The lease was to take effect at the date of it, which was the 20th of September,

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1889. On that day it was delivered to defendant, and remained in its possession until after suit brought, a period of more than one year and nine months. The grant was for the "exclusive right to drill, bore, excavate and produce" oil and gas on the 130 acres of land; defendant to hold the right for the period of ten years for that purpose; one well to be completed every year, until four wells were drilled; if not drilled, the royalty, $500, to be paid the same as if drilled.

The defendant did nothing in the way of development the first six months, which expired the 20th of March, 1890. About the second of April, 1890, the plaintiff went to the office of defendant in Pittsburgh, and demanded the rental and royalty then due, $630. There was a dispute as to the amount actually due at that time, the plaintiff claiming that the agent of the company, when the lease was delivered, had promised him a bonus of $260, one-half to be paid in two or three weeks, which had not been done. Mr. Pew, the president of the company, refused to pay this, and while not denying the liability of the company for the $630 stipulated for in the lease, did not pay or offer to pay any part of it. Before this interview closed, Kunkle made known the fact, that his wife had an interest in the land; the defendant then demanded that the wife sign the lease; to this Kunkle assented, and the president of the company promised to send the lease out to their home by an agent, that the wife might also join. This promise he did not keep. The wife was present at the negotiations which resulted in the execution of the original lease, and, so far as appears, concurred in the contract made by her husband; and there is no evidence that she then or afterwards made any objection. The president, however, insisted on retaining in possession of the company the lease, until the wife joined in it. On the 19th of April following this interview, the company wrote to Kunkle, offering to surrender the lease if he would execute to it a written release and discharge of all rights to rent or royalty. This he refused to do and the company, as before noted, retained the lease up until after the commencement of this suit when it unconditionally surrendered it.

The complaint of appellant is, that the contract signed by Kunkle implied a covenant of title to the entire estate in the land, and as the evidence showed a fractional interest in his wife, the covenant was broken as soon as made, and therefore there could be no recovery by plaintiff.

It will be noticed, the grant was for the exclusive right to drill, bore, excavate and produce for a period of ten years. Whether the apparent approval by the wife during the negotiations and agreement on terms in her presence, and her silence for more than six months after the delivery of the lease, would, in equity, estop her from asserting a right antagonistic to it, it is not material to inquire. She never did object. The defendant had no knowledge of her interest until its obligation to pay was fixed by the lapse of the stipulated six months. On knowledge of her interest defendant did not at once surrender but held on to the lease.

During that time, it had the right to do either of two things: first, sink one well, or, second, do nothing and pay $630. In either event, its exclusive right as against the plaintiff remained; he could not grant an exclusive right to another, for he had, so far as he could do so, already granted it to defendants; nor could his wife grant such right, for the husband, in the face of his contract with defendant, could not join her. The defendant by its contract with the husband, had tied up the property for development for ten years. It might not choose to sink a single well but then it must pay. It had leased many of the surrounding properties and was engaged in developing some of them. It evidently, as was its reasonable right, intended no other, by operations on this 130 acres, should reach the fruits of its expenditure in prospecting on adjoining lands. By this contract, it enjoyed to the full one of the benefits stipulated for; it had one of the kinds of possession intended by both parties; it was not molested in any way. If it had attempted development, and the wife, by legal proceedings or otherwise had attempted to obstruct it, or even if she had given notice of an adverse claim, which might have deterred the company from an attempt to exercise its right, it would have some standing in equity to resist payment of the first six months. But as, so far as appears, she concurred in the contract, and defendant had the full enjoyment of every right under the contract it chose to assert, it cannot set up an after-discovered fact to relieve it from payment for a benefit already received. It must be borne in mind, that there was no obstacle to the full enjoyment of the ten years term. The president of the company, when the husband informed him of his wife's interest, demanded that she also sign the contract; to this, the husband assented and it was agreed the agent of the company would take the instrument to plaintiff's house that the wife might sign it; this was not done; the defendant was not willing to even trust the husband with the possession of the paper for that purpose. It retained the lease for more than a year afterwards; asserted its right under it after full knowledge of the wife's interest, by demanding a release in full of all indebtedness before surrendering it. That is, after the full enjoyment of the right for six

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months defendant questions the landlord's title when called upon for rent.

If defendant had actually commenced operations on the land within six months and taken from it gas or oil, equity, on its complaint of peril to its rights from the wife's outstanding interest, would, probably, have decreed that she join formally in the grant before payment of royalty and rent. But the enforcement of such an equity was not asked at this trial. As the case was presented in the Court below, the company, after enjoyment of the contract for six months, was not ready to pay; it then learned of the wife's interest, and based its refusal to pay on that ground; when the plaintiff was willing to have the contract technically perfected by the wife's signature it changed its ground, and offered to surrender on condition that a full release from all indebtedness be executed and delivered; then after suit brought made an unconditional surrender of the lease. Not a single authority cited by appellant rules the case in its favor on such a state of facts. All of them are cases where the lessee had been deterred from taking possession by fear of the adverse claim, or where he has been induced to accept the lease by fraud or trick practised by the lessor.

Here the lessee had that sort of possession under its contract it was entitled to. There was not the semblance of fraud perpetrated or intended. The learned Judge of the Court below rightly held that as to the rent and royalty payable at the expiration of the first six months, there was no sufficient defence in law or equity. The assignments of error are overruled and the judgment is affirmed. W. C. S.

Oct. '94, 183. October 8, 1894.

Commonwealth ex rel. Parker v. Blatt.

Habeas corpus—Custody of child—An order not final is not subject to review.

The legal right of the parent to the custody, care and companionship of his children is not to be interfered with except for the most substantial reasons affecting their welfare. The hasty disposition of such a case, unless it is very clear, is likely to result in great injustice to the parent and ultimate injury to the child.

Until the final disposition of a case, and an order in pursuance thereof, it cannot be the subject of review by this Court.

Appeal of S. D. Parker, relator, from the decree of the Common Pleas of Lawrence County, on a writ of habeas corpus brought to recover the body of Glenn B. Parker.

Stanford D. Parker married a daughter of H. S. Blatt and by her had two children—Lois, a daughter, and Glenn B., a son. His wife died in June, 1891, but the relator kept his family together. In June, 1892, he married again and took his wife to his home. For a short time preceding the issuing of the writ in this case, Glenn B. was on a visit to his grandfather, H. S. Blatt, in Lawrence County. The relator went to bring his son home, when Mr. Blatt refused to let him go, whereupon Mr. Parker caused a habeas corpus to issue for his body. Within a few days thereafter Mr. Blatt sued out a writ of habeas corpus to obtain the custody of Lois, who then was and had been continuously since her birth in the custody and care of her father. The hearings on both these writs were had together upon the same testimony, and the Court made, April 18 1894, an order remanding Glenn B. (aged four years) to the custody of H. S. Blatt, and Lois (aged six years) to the custody of her father, with the provision that H. S. Blatt should have the exclusive possession of Lois for one whole week in three and the father should have the exclusive possession of Glenn B. for one whole week in three, or if the parties agreed amicably they might alternate, the selection of the week when Glenn B. was to be with his father was to be made by the father and the selection of the week when Lois was to be with the grandfather was to be made by the grandfather; that the week that the father had possession of Glenn B. should be concurrent with the possession of Lois, and that the week that the grandfather has possession of Lois should be concurrent with the possession of Glenn B., so that the minors should be together two weeks in three. In pursuance of this order the parties amicably agreed upon the weeks during which the children should be in the custody of the respective parties. On June 7, 1894, the first Wednesday of June term, the next term after the term at which the preceding order was made, the Court ordered that both minors should be remanded into the custody of Mr. Blatt. Whereupon this appeal was taken and the record removed to this Court, leaving Glenn B. in the custody of Mr. Blatt and Lois in the custody of Mr. Parker.

The assignments of error were as follows:—

1. The Court erred in making the order and decree of April 18, 1894, which order and decree was as follows:—

"Now, April 18, 1894, it is ordered that the minor Glenn B. Parker be remanded into the custody of his grandfather H. S. Blatt, there to remain until further order of the Court, with this qualification, that the father, Stanford D. Parker, shall have exclusive possession of the said Glenn B. Parker for one whole week in three, or if the parties agree amicably they may

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alternate. The selection of the weeks to be made by Stanford D. Parker.

"It is further ordered the writ of habeas corpus stand over as a pending writ, subject to such further action as may hereafter be adjudged by the Court to be right and proper in relation to the custody of said minor. It is further ordered that the week which the father of the minor has possession shall be concurrently with the possession of Lois Parker, so that they shall be together two weeks in three.

"And it is further expected that each of the parties in possession of the children, minors, will not in any way prejudice, attempt to prejudice, cause or allow the minds of the minors to be prejudiced against the opposite parties, but must act in good faith each to the other."

2. The Court erred in making the order and decree of June 7, 1894, which order and decree was as follows:—

"And now, June 7, 1894, it is further ordered that the minor, Glenn B. Parker, be remanded into the custody of H. S. Blatt, the respondent, there to remain until further order of the Court, with this qualification: that the relator, S. D. Parker, father of said Glenn B. Parker, be permitted to see said Glenn B. Parker at all reasonable times and hours; that the writ in this case stand over as a pending writ, subject always to such further order as may hereafter be adjudged for the best interest and welfare of said minor."

3. The Court erred in remanding Glenn B. Parker into the custody of Mr. Blatt, there to remain until the further order of the Court.

B. A. Winternitz and *John G. McConahy* (with them *D. B. Kurtz* and *L. T. Kurtz*), for appellant.

The general rule undoubtedly is that the father is entitled to the custody of the children and it is usually enforced, unless adequate cause be shown against enforcing it.

Fitler *v* Fitler, 2 Phila. 372.
Heinemann's Appeal, 96 Pa. 112, 114.
In re Scarrett, 43 Am. Rep. 768.

His claim will be enforced unless it be shown that he is an improper or unfit person.

Comth. *v.* Smith, 1 Brewster, 547.
Comth. *v.* Sage, 160 Pa. 399.
Comth. *v.* Barney, 4 Brewster, 408.

The only question in the case at bar was the fitness of the father to retain the custody of his child. After hearing all the evidence offered in the case the Court below did not find that the father was an improper or unfit person to have the custody of his child, but did find that the welfare of the child would not be injuriously affected by being in his custody, as appears by the order and decree of the Court of April 18, 1894. It must be presumed that the Court when making said order considered the present condition and future prospects and advantages of the child.

Comth *v.* Sage, 160 Pa. 399.

In such cases the Court administering the functions of the writ is to be guided by a sound discretion upon the evidence.

Demott *v.* Comth. 64 Pa 305.
Schlaudecker *v* Marshall, 72 Id. 200.
Sparrow's Petition, 138 Id. 116.
Grubb's Appeal, 82 Id. 23, 32.
Appeal of Jenkintown Nat. Bank, 124 Id. 337.
Comth. *v.* Titman, 148 Pa. 168.

The action of the Court in making the order and decree of April 18, 1894, was not the exercise of a sound discretion upon the evidence, as is apparent from the face of the record. And this Court has power to examine and correct all error of the justices, magistrates and Courts of this Commonwealth, in the process and proceedings, judgments and decrees as well in criminal as in civil pleas or proceedings.

Act June 16, 1836, sec. 1, P. L. 785.
2 Purd Dig. 1576, Pl. 20.
Comth. *v.* Newton, 1 Grant, 453.
Case of Hummell & Bishoff, 9 Watts, 416.

As to the decree of June 7, 1894, the question before the Court below in making the decree of April 18, 1894, whether right or wrong, was final as to the custody of the child, and could not be lawfully changed or altered after the expiration of the term at which it was entered.

Comth *v* Mayloy, 57 Pa. 291.
King *v.* Brooks, 72 Id. 363.
Mathers's, Exr. *v.* Patterson, 33 Id. 485.
Stephens *v.* Cowan, 6 Watts, 511.
Catlin *v.* Robinson, 2 Id. 373.

J. Norman Martin (*S. H. Miller* with him), for appellee.

The Court is not bound to deliver infants to the custody of any particular person. The duty of the Court is to exercise its discretion for the best interests of the children.

Comth *v.* Addicks, 5 Binney, 520.

The writ of habeas corpus is a writ of right to remove the unlawful restraint of liberty, but it is not a writ of right to be used to transfer the custody of the person from one claimant to another. The Judge administering the functions of the writ is guided by a sound decision upon the evidence. The true question for the Court is, what is for the best interest of the child?

Comth. *v.* Demott, 64 Pa. 305.

If the right of a father ought not, for the sake of the child, to be enforced, the Court will decree accordingly. The legal right of the father must yield to consideration affecting the welfare of the child.

Comth. *v.* Sage, 160 Pa. 399.

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The Court sought what was right and proper in relation to the custody of the child, not to determine an absolute right in the father to that custody.

The decree of April 18, 1894, was not definitive and the writ stood over as a pending writ. The Court so declared; the appellant did not complain but acquiesced, and remained in Court. He did not appeal but prosecuted the proceedings in the forum where they were begun. June 5, 1894, he is still in Court and files his statement. He does not question the right or power of the Court to make further order on the pending writ. The order of June 7, 1894, was made after appellant had filed his statement and after the Court had fully examined the evidence. In the exercise of a sound discretion after a careful examination of the evidence the Court made the decree of June 7, 1894, on the writ then pending. The order of April 18, 1894, was interlocutory, and a Court that does not see the evidence cannot say that it was not for the best interest of the child that the final order be postponed until the Court has carefully examined the evidence. The Court has no jurisdiction to review the decision of the Court below upon a habeas corpus.

Comth. *v.* Kryder, 1 Penny. 143.

Nor will it review decisions on matters within the discretion of the Court below.

Loretto Road, 29 Pa. 350.
Renniger *v.* Thompson, 6 S. & R. 1.

The Commonwealth, the legal plaintiff, is *parens patriæ*, and exercises its duties and functions through the Courts, and it will not permit the interests or custody of minor children to be frittered away on the technical ground of the passing of a term of Court.

January 7, 1895. FELL, J. The assignments of error relate to two orders made by the Court in proceedings under a writ of habeas corpus, concerning the custody of the minor children of the relator.

Neither of these was a final order from which an appeal lies. In each it was directed that the writ should stand over as a pending writ, subject to such further action as the Court might adjudge right and proper. Until a final disposition of the case and an order in pursuance thereof, it cannot be the subject of review by this Court. The order of April 18, 1894, was acquiesced in by all the parties, and the appeal was taken almost immediately after the order of June 7, 1894, was made, and without requesting the Court to proceed to final judgment. The subject was one of the most difficult and most delicate upon which a Court is called to act. The legal right of the parent to the custody, care and companionship of his children is not to be interfered with except for the most substantial reasons affecting their welfare. The hasty disposition of such a case, unless it be very clear, is likely to result in great injustice to the parent or ultimate injury to the child; and it frequently happens that the Court can be best informed as to its duty, and ascertain what final action should be taken, by observing the results of such tentative orders as were here made.

It is, however, the right of the appellant to have a final determination of the case and an order filed in pursuance thereof. This will doubtless be accorded him upon a proper application.

The appeal is dismissed. W. C. S.

Oct. '94, 184. October 8, 1894.

Commonwealth ex rel. Blatt v. Parker.

Appeal of S. D. Parker, defendant, from the decree of the Common Pleas of Lawrence County, on a writ of habeas corpus.

The facts are similar to those in the preceding case.

B. A. Winternitz and *John G. McConahy* (with them *D. B. Kurtz* and *L. T. Kurtz*), for appellant.

J. Norman Martin, (*S. H. Miller* with him), for appellee.

January 7, 1895. FELL, J. The facts in this case are identical with those in Commonwealth *ex rel.* S. D. Parker *v.* H. S. Blatt, and for the reasons stated in the opinion filed in that case the appeal is dismissed. W. C. S.

July '93, 84. February 6, 1894.

Climenson v. Climenson.

Justices of the peace—Reference of actions pending before—Requirements for reference—Common law submission—Act of Assembly of 20th March, 1810.

As a basis for the reference provided by the Act of 1810 an action should be pending before a justice of the peace, and it should appear that the plaintiff's claim exceeds five dollars and thirty-three cents, and that one of the parties refused to submit to the determination of the Justice.

When parties appear before a justice and state that they have agreed to an arbitration, name the arbitrators, and the time and place fixed for hearing, and the justice enters the agreement upon the docket under the caption "amicable action," the reference is at common law, and not under the Act of 1810, and the case is not altered by

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the fact that the arbitrators return their award to the justice instead of handing it to the successful party.

Appeal of Edmund Climenson, defendant, from the judgment of the Common Pleas of Chester County, in an action wherein Bentley J. Climenson was plaintiff.

Assumpsit upon an alleged common law award. The plaintiff's evidence showed that the agreement for a reference and the award of the arbitrators were made in an amicable action pending before a justice of the peace.

The defendant offered evidence tending to show that the arbitrators refused to consider two claims presented by the defendant.

Defendant submitted the following points, all of which were disaffirmed by the Court:—

1. That the transcript in evidence, and the admission of the plaintiff, shows that the reference in this case was of an action pending before J. W. Morton, justice of the peace. The arbitration and award cannot, therefore, be treated as a common law submission and award.

2. If the jury believe that the submission in this case was of an action pending before a justice of the peace, the award cannot be treated as a common law award.

3. If the jury believe that the arbitrators refused to hear and consider claims presented by Edmund Climenson, the award is bad, and cannot be sued on.

4. Under all the evidence the verdict should be for the defendant.

The Court gave a binding charge for the plaintiff. Verdict accordingly and judgment thereon.

The defendant took this appeal, and assigned as error the refusal of his points and the binding charge for the plaintiff.

R. Jones Monaghan, (*J. Frank E. Hause* with him), for appellant.

The submission and award sued upon in this case is either at common law or is an action pending before a justice of the peace under the Act of 1810. It cannot be both. It must be one or the other. Which it is, depends, not on the wish of the parties or either of them at this time, but on what was their intention when the agreement for a submission was signed. By the stipulation of record it is expressly agreed that the reference and award were made in an amicable action pending before a justice of the peace.

Exactly our case in effect and principle was decided by this Court so long ago as 1816.

McKillip *v.* McKillip, 2 S. & R. 489.

And see

Lockwood *v.* Deming, 1 Pitts. 212.
Benjamin *v.* Benjamin, 5 W. & S. 562.

Where *all matters* were submitted *all matters* must be determined, because it was plainly not the intention of the parties that some matters only should be determined, and that they should be at liberty to go to law for the rest.

Bradford *v* Bryan, Willes, 270.
Morse on Arbitration, 342.
Jones *v.* Wellwood, 71 N. Y. 208.
Gaylord *v.* Norton, 130 Mass. 74.
Richards *v* Drinker, 1 Halsted, 319.
Harker *v.* Hough, 2 Id. 428
Johnston *v.* Blackbill, 1 P. & W. 369.
Hamilton *v.* Hart, 125 Pa. 149.

Alfred P. Reid, (*C. W. Talbot* with him), for appellee.

The express intent of the parties, as gathered from this agreement, was that the award should be a final settlement of all disputes. It does not refer to any suit or Act of Assembly.

The award is therefore enforceable by action as though a bond had been given, conditioned to perform the award.

Slocum *v.* Taylor, 8 S. & R. 399.
Hume *v* Hume, 3 Pa. 144.
White *v.* Shriver, W. 471.

In McKillip *v.* McKillip, 2 S. & R. 489, there was no agreement that the award should be final, nor any waiver of the right of appeal. It was doubtless for that reason that reference was held to have been under the statute of March 20, 1810. Otherwise, if the case had been within the jurisdiction of the justice it would have deprived the parties of the right of appeal.

In Lockwood *v.* Deming, 1 Pittsburg, 212, the submission contained the words, "according to the Act of Assembly of 1836," showing that it was under that Act they made their agreement.

In a submission and award at common law, a mistake on the part of the arbitrators, either in matter of fact or law, is insufficient to set aside the award. The award is ever considered as valid and binding upon the parties, unless it is impeached on the ground of excess authority, misbehavior, partiality or corruption in the arbitrators. Whenever this is shown to be the case, their award will be set aside, but for no other cause.

Benjamin *v.* Benjamin, 5 W. & S. 562.

There was nothing of this kind shown in this case.

October 1, 1894. WILLIAMS, J. This action was brought upon an award, and the question raised by the defendant on this record is whether the award will support an action. Is it an award at common law, or must it be treated as made in an action pending before a justice of the peace, and enforceable only by him in the manner pointed out by the Act of 1810?

That Act makes provisions for the reference

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of actions pending before a justice when the amount of the plaintiffs' claim exceeds five dollars and thirty-three cents and either party refuses to submit to the determination of the justice. In such a case it becomes the duty of the justice to request the parties to choose referees "one, two or three each, and mutually to agree upon a third, fifth or seventh man." The referees when chosen are to be sworn well and truly to try all matters in variance between the parties, submitted to them; and after the trial they are to make an award and transmit the same to the justice, whose duty it is to enter judgment thereon for the sum awarded with costs. These provisions show that as a basis for the reference provided by the Act of 1810 there should be an action pending before a justice of the peace for some cause of action; it should appear that the plaintiff's claim exceeds five dollars and thirty-three cents; and that the parties, or one of them, refuses to submit to the determination of the justice.

These circumstances should appear upon the docket of the justice, and should be followed by the selection of the referees, by their award, and by the entry by the justice of a judgment for the sum awarded with costs. The entries upon his docket thus become a connected and self-sustaining record of the proceedings from the beginning of the action to the entry of judgment therein. Turning now from the provisions of the Act of 1810 to the case before us, we find that we have no pending action, no statement of the nature of the amount of the plaintiff's claim, and no refusal to submit to the determination of the justice. On the other hand the parties seem to have presented themselves before the justice in order to have their agreement reduced to writing. They declare before him that they have agreed to refer, not a pending action but all matters in variance between them, to three men, whom they name, for their decision; and that they have fixed upon a time and place for the hearing. The justice wrote out this agreement on his docket, writing above it as a caption the words, "Amicable Action." So far the action of all parties indicates a common law submission. Nothing but the words "Amicable Action" could by any construction connect the justice with the agreement in any other capacity than as the scribe of the parties. The arbitrators were probably misled by the caption to the submission, and returned their award to the justice, who thereupon wrote upon his docket "Judgment publicly according to the above award."

We think the justice had no jurisdiction over this award, and the entry on his docket is without effect upon the rights of the parties. The basis for a submission under the Act of 1810 is wholly wanting. There was no action pending, no statement of any claim or demand, nothing to show the amount demanded, and no refusal to submit to the judgment of the justice. On the other hand the elements of a common law submission are present. There was an agreement between the parties to submit all matters at variance between them to the decision of arbitrators; this agreement was reduced to writing, and a copy of it furnished to the arbitrators; the arbitrators heard the parties and made an award which they reduced to writing.

This award was returned to the justice instead of being delivered to the successful party; but this could not change the character of the submission or give jurisdiction to the justice. The submission and award are at common law. The learned Judge of the Court below was right in so holding, and the judgment is affirmed.

W. C. S.

July, '94, 15. May 10, 1894.

Victor v. Penna. R. R. Co.

Negligence—When question to be determined by jury—Duty of travelers by rail.

It is negligence on the part of a passenger to alight from a moving train.

Where, however, the passenger leaves the train by direction of the company's agents, or is placed in peril through their neglect, or is in the act of alighting and cannot retrace his steps, the question of negligence is to be determined by the jury.

Where an announcement is made by those in charge of a train that the next station is S., and before the train stops, a passenger rises and after he has risen the train stops before reaching the station, whereupon the passenger attempts to alight and in alighting is hurt, the case falls within the rule above stated and not within the exception. The defendant's agents not having announced that the station had been reached, had no reason to suppose that the passenger would attempt to leave the train before it had been stopped at the proper place.

Appeal of Anna M. Victor, plaintiff, from the judgment of the Common Pleas of Fayette County, in an action of trespass by her against the Pennsylvania Railroad Co.

The facts of this case are fully stated in the opinion of the Supreme Court, *infra*.

The error assigned was that the Court below directed a verdict for the defendant.

Edward Campbell, for appellant.

Whether there was negligence in the conductor's and the brakeman's failing during the interval before plaintiff alighted to correct the erroneous statement they had made to her, and in their allowing her to act under the wrong direction they had given her, although she did her

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best to "make" them tell her what to do or stop the train, while all they *did* do was to hang over the south side of the car where no passenger could get off, leaving her although within their reach to carry out the instructions she had received and alight or, as she thought, be carried past her destination, was for the jury.

Walters *v.* The Phila. Traction Co., 28 Atl. R 941.
Johnson *v.* W. C. & P. R. R. Co., 70 Pa. 357.
Stager *v.* Passenger Railway Co., 119 Id. 70.
Pa. Co *v* Lyons, 129 Id 113.
Pa. Railway Co *v.* Peters, 116 Id. 206.
Pa. Railway Co. *v* Kilgore, 32 Id. 292.
Canal Co. *v.* Webster, 18 WEEKLY NOTES, 339
Meier *v.* Pa. Railway Co , 64 Pa. 225.
Fredericks *v.* Northern Central Railway Co., 27 Atlantic R. 689.
Rose *v.* N. E. Railway Co., L. R. 2 Ex Div. 248.
Bridges *v.* North London Railway Co., L. R. 7 H. L. 213.
Gates *v.* Pa. Railway Co., 154 Pa. 566.
Patterson *v.* Omaha & C. B. Ry., 57 N. W. R. 880.
C. & S. F. Ry. Co. *v.* Vinson, 24 S. W. R. 956.
Union Pac Ry. Co. *v* Porter, 56 N. W. R. 808.
Alford *v.* Chicago, M. & St. P. Ry., 56 N. W. 743.
Gulf C. & S. F. Ry. Co. *v.* Brown, 23 S. W. R. 618.

W. H. Playford, for appellee, made no oral argument, but submitted a paper book in which he cited:

Pa Railroad Co. *v.* Aspell, 23 Pa. 147.
McClintock *v.* Pa. Ry. Co., 21 WEEKLY NOTES, 133.

October 1, 1894. FELL, J. It may be stated as a general proposition that it is negligence on the part of a passenger to alight from a moving train: P. R. R. Co. *v.* Aspell, 23 Pa. 147; McClintock *v.* R. R. Co., 21 W. N. C. 133. To this rule there are well recognized exceptions, as where the passenger leaves the train by direction of the company's agents, or is placed in peril through their neglect, or is in the act of alighting and cannot retrace his steps, and others in which the question of negligence is to be determined by the jury: Johnson *v.* W. C. & P. R., 70 Pa. 357; Pa. R. R. Co. *v.* Lyons, 129 Pa. 113, and cases there cited.

The plaintiff's difficulty in this case was to avoid the rule and come within the exceptions. She was a passenger on a train of the Pennsylvania Railroad Company, defendant, going from Greensburg to Stewart Station. As the train approached the station its speed was lessened, and the conductor and brakeman each announced: "The next station is Stewart." The plaintiff immediately started from the seat she had occupied in the back part of the car for the door in the front. When she reached the front platform the brakeman stationed there asked her to pass on to the next car, stating as the reason for his request that she could not alight from the car in which she was without getting into the water or mud at the side of the tracks. When she had reached the middle of the second car the train stopped, but started again before she had come to the front platform. The conductor and a brakeman were on this platform, on the side of the car from the station, looking forward to ascertain the cause of the stoppage of the train. They neither saw nor heard her when she said that she wanted to get off, and she made no further attempt to attract their attention. She testified that she then noted the speed of the train, and thought that she could alight safely. With a bundle in her hand she stepped down from the moving train to the platform. While doing this she observed that the train was moving faster than she had supposed, and to avoid falling she took hold of the rail of the car with her back to the engine, and was thrown between the platform and the track.

The momentary stoppage of the train when she was at the middle of the car was to allow a train moving in the opposite direction, which had reached the station, to discharge and receive passengers.

Under this evidence the Court directed a verdict for the defendant, and to this assignments of error relate.

The testimony left no doubt as to the facts. Upon the announcement of the name of the next station, and while the train was in motion, the plaintiff walked to the front platform of the car in which she was riding and stood there waiting for the train to stop. At the suggestion of the brakeman she crossed the platform to the next car, and while she was in that car the train stopped until another train had left the station, but was again in motion before she had reached the front platform. Supposing the station had been reached and the train would not stop again she spoke to the brakeman and conductor, who were standing within her reach, and failing to attract their attention she considered the chances of alighting from the train safely. She concluded she could do this, and attempted it by walking straight out from the steps of the car to the platform of the station. When it was too late she saw the danger, and added to it by taking hold of the railing of the car instead of that of the platform, thus placing her back to the engine and the direction of the motion of the train. When she fell she was within a car's length of the station, where the train stopped.

The train was stopped in the cut before reaching the station by the engineer for reasons that were wise and under the rules of the company imperative. It was not anticipated by the conductor or brakeman, nor was the reason for it at the time understood by them. They had not announced that the next stop would be at

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Stewart's, but that the next station was Stewart's; and while they knew that the plaintiff intended to leave the train they had no reason to expect that she would get off until it stopped.

The plaintiff, then, was injured in getting off a moving train. She was neither requested nor directed to do this, nor led to do it by any negligent act of those in charge. The announcement of the next station by the conductor and brakeman, and the stopping of the train by the engineer before reaching the station, doubtless induced the belief on her part that the station had been reached; but these were all proper acts properly done, and the least observation by her would have corrected her error. The request of the brakeman to pass from the rear car to a forward one was made in order that when she did alight she would be at the platform and avoid the mud, and it was in no sense a direction to get off. When it was made the train had not stopped, and he had no expectation that it would stop before the station was reached.

The conductor omitted no duty unless the company was bound after the unexpected stop to give notice to passengers that the station had not been reached. Such a duty might have arisen if the passengers were then attempting to alight, as was the case in Penna. R. R. Co. *v.* White, 88 Pa. 327, where the plaintiff was led to believe that the station had been reached, and was injured after alighting from a standing train. While the train was standing the plaintiff in this case was in the middle of the car, and there was no occasion to warn her not to get off. When it was again in motion there was no reason to apprehend that she would attempt to alight, and no duty to watch over her and prevent her from so doing.

We are of opinion that the learned Judge was right in withdrawing the case from the jury. The judgment is affirmed.

W. C. S.

Jan. '94, '83. January 25, 1894.

Deery v. Camden and Atlantic R. R. Co.

Negligence—Contributory negligence—Reasonable rules for use of cars—Passengers' assent to same.

A passenger s consent to all the company's reasonable regulations for entering, occupying or leaving their cars is implied and the company is not liable for an injury occasioned by the failure of the passenger to observe them, although the negligence of the company's servants may have concurred in causing the injury.

Nothing but a paramount and justifying necessity will excuse a departure from these regulations; the fact that the car was crowded and egress less convenient is no justification for the action of a passenger in getting off by the side or baggage door of a combination car.

The fact that the conductor was standing at this side door and told the plaintiff to "step lively" and extended his hands to assist her, did not charge the company with responsibility for her careless act.

Appeal of Jennie Deery, from the judgment of non suit by Common Pleas No. 2, of Philadelphia County.

The facts of the case are as follows:—

The plaintiff was injured while a passenger in the care of the Camden and Atlantic Railroad Company. She had purchased a round trip ticket from Atlantic City to Longport, N. J. On her return she was accepted as a passenger in a combination car in which she had to stand until she reached the Excursion House station, only half of the car being provided with seats. The car became so crowded and packed that the means of ingress and egress were not readily accessible, excepting by the side door, and many passengers got off the car through the side door; the conductor standing there and telling them to "step lively." There was no station platform, and in stepping down with other passengers at the invitation of the conductor, who extended his hands to help her, the plaintiff received the injury of which she complains.

The Court, FELL, J., on motion of defendants' counsel. granted a compulsory non-suit. Plaintiff appealed, assigning for error this action of the Court.

T. Elliott Patterson and *William H. Staake*, for appellant, cited the following cases:—

Merwin *v.* Manhattan R. R. Co., 8 Hun., 611.
Whipple *v* R. R. Co., 2 WEEKLY NOTES, 559.
Leggett *v.* R. R. Co., 143 Pa. 39.
Reilly *v.* G. and Coates P. R. R. Co., 4 WEEKLY NOTES, 273.
P. R. R. Co, *v.* Langdon, 92 Pa. 21.
Snow *v.* Fitchburg R. R Co., 136 Mass. 552.
Foss *v.* B. & M. R. R. Co., 47 A. & E. R. R. C, 566.
B. & O R. R. Co. *v.* Leapley, 65 Md. 571.
P. R. R. Co, *v.* McCloskey, 23 Pa. 526.
McDermott *v.* Chicago & N R Co., 82 Wis. 246.
Neslie *v.* Second and Third S. P. R. Co., 113 Pa. 300.
Laing *v.* Colder, 8 Id. 482.
Penna. R. R. Co. *v.* MacKinney, 124 Id. 462.
Herstein *v.* L. V. R. R. Co, 151 Id. 245.
Hartzig *v.* L V. R. R., 154 Id. 364.
P. & R. R. R. *v.* Killips, 88 Id. 413.
L. S. R. R. *v.* Frantz, 124 Id. 307.
D. & H. C. Co. *v.* Webster, 18 WEEKLY NOTES, 339.
Johnson *v* W. C. & P. R. R. Co., 70 Pa. 366.
Neiman *v.* D. & H. C. Co., 149 Id. 92.

David W. Sellers, for appellee.

A passenger's assent to regulations in regard to entering and leaving cars is implied.

Drake *v.* Penna. R. R, 137 Pa 352.
Reilly *v.* Railway, 4 WEEKLY NOTES, 273.
Langdon *v.* R. R. Co., 92 Pa. 22.

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There can be no recovery for injuries to one violating such rules even though the company's servants concurred in causing the mischief.

Sullivan *v.* R. R. Co., 30 Pa. 234.

October 1, 1894. McCollum, J. In getting off the defendant company's car the plaintiff received an injury which she attributes to the negligence of the company and for which she seeks to recover compensation in this action. There is no reason to suppose that she would have been injured if in leaving the car she had conformed to a rule of the company which she observed in entering it. At each end of the car there were the usual conveniences for ingress and egress, consisting of a door, platform, steps and railing. It was a rule of the company well known to the traveling public that its passengers should enter and leave its cars where these conveniences were provided. The plaintiff was in a combination car in one portion of which there were seats for passengers while the other part of it was appropriated to baggage. In the baggage compartment there was a side door through which the baggage was received and discharged. When the train stopped at Excursion House the plaintiff instead of going out at the rear, or front end of the car where there were conveniences for safe and easy entrance and exit, got off through the side door, and in doing so jumped from the floor of the car to the ground and received the injury complained of. It was an act in plain violation of a familiar rule governing passengers in entering and leaving cars, and it constituted, *prima facie* at least, a bar to an action against the company for the injury caused by it. That the injury for which the plaintiff seeks compensation was so caused is beyond question. "When a railroad company undertakes the transportation of a passenger for an agreed price the contract includes many things. On the part of the passenger his consent is implied to all the company's reasonable rules and regulations for entering, occupying and leaving their cars, and if injury befell him by reason of his disregard of regulations which are necessary to the conduct of the business the company are not liable in damages even though the negligence of their servants concurred with his own negligence in causing the mischief:" Sullivan *v.* The Philadelphia & Reading Railroad Company, 30 Pa. 234. Nothing short of a paramount and justifying necessity will excuse a departure from these regulations, "or render the company liable for an injury caused by it:" Pennsylvania Railroad Company *v.* Zebe, 33 Pa. 318. There was no such necessity in this case. That the car was crowded with passengers and in consequence thereof egress from it was retarded somewhat and rendered less convenient than under ordinary conditions, furnished no justification of the plaintiff's disregard of a reasonable regulation of the company. It nowhere appears in the testimony that she made an effort to get off the car at the place provided for the accommodation and safety of passengers in leaving it, or that she was required to get off from it where she did. Neither the language of the conductor while she stood in the side door, nor the assistance he gave her in alighting, nor both combined, charged the company with responsibility for the consequences of her careless act. It was in violation of a rule for the protection of passengers; it was obviously dangerous, and she must be considered as having voluntarily assumed the risk involved in it. In such case something more is required to render the company liable than its employé's consent to the passenger's negligent act: 4 Am. & Eng. Ency. of Law, p. 766, and cases cited; Pennsylvania Railroad Company *v.* Langdon, 92 Pa. 21.

The specifications of error are overruled.

Judgment affirmed.

W. M. S., Jr.

Orphans' Court.

April, 1894, 425.

Jakey's Estate.

Register of wills—Letters of administration in default of next of kin—Grant of letters to escheator.

An escheator, as such, has no status to apply to the register of wills for letters of administration in default of next of kin of decedent, if a demand for letters has previously been made by a creditor who is unobjectionable and who has qualified.

Under the Act of March 15, 1832, a creditor of a decedent to have status to apply for letters must be a principal creditor; and it is a discretionary matter with the register whether he shall grant the letters to such creditor (in default of next of kin) or "to any fit person" that is to be selected.

Petition and answer.

The facts are sufficiently stated in the opinion.

William F. Johnson, for petitioner.

William A. Hayes, contra.

October 27, 1894. Ferguson, J. The petitioner in this case, on May 7, 1894, made application to the register of wills for letters of administration upon the estate of the decedent, upon the ground that he was a creditor. He failed to enter security, and of course letters were not issued to him. On May 28, 1894, three weeks afterwards, the respondent as

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deputy escheator made a similar application, and the register of wills, after a hearing, dismissed the original application and granted letters of administration to him. We are now asked to reverse this action of the register.

The Act of May 2, 1889, makes it the duty of any escheator, after having been commissioned by the auditor-general, to apply for letters of administration if no letters had been previously granted to any one else. "And the said register of wills shall, if no next of kin or creditor of decedent entitled under existing laws shall appear and demand such letters, forthwith grant the same to the said escheator." The persons entitled to letters of administration under existing laws, in default of next of kin, are "one or more of the principal creditors of the deceased applying therefor, *or* to any fit person, at the register's discretion:" Act of March 15, 1832.

We think that the escheator, as such, would have no status to apply for letters, if a demand for the same had previously been made by a creditor who was unobjectionable, and who properly qualified; but under the Act, a creditor stands on the same plane as any fit person, and whether it is a creditor or a fit person that is to be selected, is a matter that is wholly and entirely in the discretion of the register.

In this case, the amount of the petitioner's claim was only three dollars, and before the granting of the letters this was tendered to him, and refused, so that he can be hardly dignified with the name of a creditor; and he certainly could not have been a principal one, as required by the Act. He was guilty of laches in not entering security with the register for three weeks after his application for letters of administration, which application he admitted that he made at the request of one Sheridan, who claims the whole estate by virtue of an alleged gift to him in the lifetime of the decedent, so that his interests are inimical to those of the estate.

On the whole, we think the register of wills very properly exercised his discretion in this case, and his decision was fully justified by the facts and circumstances.

The petition is dismissed, and the decision of the register of wills is affirmed.

F. B. N.

January, 1894, 240.

Erwin's Estate.

Wills—Undue influence—Issue devisavit vel non.

It is the business of the Orphans' Court to determine whether proof of alleged undue influence be sufficient to sustain a verdict against the will: if it is, an issue must be awarded.

Where the charge of undue influence centres in the relations which obtained between testator and those accused of exerting the influence, any testimony which throws light upon these relations is a vital factor in the case.

Continued and liberal gifts and emoluments from one person to another, where the persons stand in such relationship as client and lawyer, show that the donee has found his way to both the affections and judgment of the donor.

Cuthbertson's Appeal, 97 Pa. 163.

Petition for issue and answer.

The facts of the case, and the important portions of the testimony, are rehearsed in the opinion.

M. Hampton Todd, for petitioner.

John G. Johnson, contra.

December 15, 1894. ASHMAN, J. The testatrix died at the age of eighty-eight years, having suffered the gradual diminution of physical vigor which is incident to the decline of life. She left a will by which her confidential legal adviser largely benefitted. It was not the subject of argument between those who upheld and those who opposed the probate of the will, that the legatee was bound to bring himself within the rule adopted in Cuthbertson's Appeal, 97 Pa. 163, and maintained by every case which has followed in its wake. Both parties admitted in its entirety the doctrine that "where the testator is shown by evidence to be weak in mind, whether from age, bodily infirmity, great sorrow, or other cause tending to produce such weakness, though not sufficient to create testamentary incapacity, and the person whose advice has been sought and taken receives a large benefit under the instrument propounded as a will, it must be shown affirmatively that the alleged testator had a full understanding of the nature of the disposition contained in it;" and that "every man who draws a will in his own favor, under such circumstances, should know that he will be required to prove affirmatively all the circumstances connected with the drawing of the will." The legatee asserted that his action had been taken on the direct line which had been thus clearly marked out. When the testatrix told him of her intended provision in his favor he refused to draft the will. At her request, he sent for counsel, who received directly from testatrix, and discussed with her at full length in a private interview, certain written instructions, to be again referred to, which he afterwards incorporated in the will which she executed, and who declared that the testatrix was of full testamentary ability, was cognizant of the value of her estate, and

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gave intelligent reasons for the disposition which she had planned to take effect at her death. Could any legatee do more than this, either to establish his own integrity or to secure for his client the wisest and most disinterested advice? Properly to answer this question requires us to say that if this is the most which can be demanded, it is also the least. It is vulnerable to the criticism that it gives an overmastering importance to the testimony of the agent who intervenes between the legatee and the testator, and practically surrenders the issue to his decision. If he is swayed with a friendly sympathy for the legatee, if he performs his duty perfunctorily, if he is weak or venal, or if possessed of the highest skill and animated by the nicest conscientiousness, he knows nothing of the history or associations, or habits of thought and disposition of the testator, he may utterly fail to draw out from him his ultimate and untrammelled wish as to the bestowal of his wealth. It is a coarse view of the influence which may dominate the mind of a testator, to regard it as necessarily palpable and as attending the presence of the person who wields it; its potency may be greatest when it is least felt, and it may invest the victim with an atmosphere from which he can no more escape than from the air which he breathes. The proponent, therefore, did not conclude the controversy when he showed that the testatrix, at the moment of executing her will, was of apparent testamentary capacity and unbiased judgment; he simply transferred the burden of proof to his opponents. We do not care to discuss now the point whether, in the class of cases to which this belongs, the law does not always raise a presumption of undue influence, and whether the evidence to counteract that presumption involves an issue of fact which must necessarily be submitted to a jury. Certainly no authority, however severe in its rulings, has gone the length of upholding this proposition in terms, and we do not think it can be fairly extracted from any reported decision. Our business is to determine whether the alleged proof of undue influence is sufficient to sustain a verdict against the will, because, if it is, an issue must be awarded.

The really significant facts can be compressed within a narrow compass. The contestant is the widow of a nephew of the testatrix, who, in his lifetime, enjoyed in an eminent degree her affection and confidence. He was a physician, and, although he lived elsewhere, he always retained his office in the dwelling of his aunt; and he managed for her the interests of her estate. Immediately after his death, and, indeed, before his burial, the testatrix executed a will, whereby the bulk of that estate was given to the contestant. She called in to her aid at this juncture, and at the solicitation of the contestant herself, the respondent, who had conducted some legal business for the nephew, the deceased husband of the contestant. From the outset the testatrix conferred upon this gentleman a discretion in dealing with her business interests quite as large as that which she had given to the nephew; and on Oct. 10, 1891, very little more than one month after the nephew's death, she delivered to the respondent a power of attorney, by which she relinquished her estate to his keeping. The contestant was not behind the testatrix in her show of confidence, and, indeed, both ladies regarded him in the light of a friend as well as a legal adviser. His own declaration was that he was a daily visitor at the residence of the testatrix for months before her death. Comparatively few of these visits were of a professional character, for the reason that the estate, large as it was, was free from complications. The only matter which called for any display of legal acumen arose out of the fact that the testatrix, in her lifetime, with a view to escape from participating in a variety of business details, and to enable him to handle it with greater facility, had conveyed her entire estate to her nephew, Dr. Erwin. The estate was given back to her by the codicil to his will, but the gift was subject to the collateral inheritance tax, and, to avoid its imposition, a bill in equity was filed, and a decree was obtained to the effect that the doctor had held the title for her use. This suit, however, was conducted by counsel other than the respondent. As the charge of undue influence centres in the relations which obtained between the respondent and the testatrix, any testimony which throws light upon those relations is a vital factor in the determination of the case. Originating in a casual business acquaintanceship, acquired almost by an accident, they merged, at the nephew's death, into ties of the closest friendship. The decedent emphasized her idea of their sanctity by substantial acts of generosity, to which the recipient, we feel bound to say, scarcely did full justice when he undertook to rehearse them on the witness stand. He was asked whether he received a reward for his services to the testatrix, and replied: "No, sir; only the ordinary reward of commission for attention to business; the same reward I would have got from any other person." He was then asked whether the testatrix gave him any additional rewards, and his answer was: "She may have given me some presents at times." "Did she give you any large presents?" "No. . . . . She gave me presents at Christmas; ordinary Christmas presents." The presents which were thus flip-

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pantly brushed aside, were all received by the respondent in 1893. They started out with a gift of 25 cents for car fare, but this was reinforced with $1,000 in January, $3,500 in May, $225 in August, and a well secured mortgage for $12,000, which in its turn, was followed by the legacy of $25,000 under the will. In addition to gifts, a fee of $2,000 was paid to respondent in the equity suit, and a commission, which bore a strong resemblance to a gift, of $15,500, for amicably settling the joint estates of decedent and Dr. Erwin; and there were other commissions, of which one item was $882 upon collections of income. Instances of liberality by a client to a lawyer are so unusual, that a Court would perhaps be justified in holding that, whenever they occur, they raise a presumption that the donor is insane. We do not assert that any such presumption has arisen here. On the contrary, we regard the testatrix's benefactions to her domestics and her counsel as mute expressions of her sympathy for two classes of persons who are, perhaps, equally helpless, and, more than any other people in the world, unfit to provide for themselves. These gifts and emoluments (and that is all they are cited for) undoubtedly show that the legatee had found his way not only to the affections, but to the judgment of the testatrix; and this is equivalent to saying, that he had gained some power over her will. How he exerted that power is really the ultimate and decisive problem. He was the trusted adviser and professed friend of the testatrix and the contestant; he drew, or was consulted in drawing, the two wills which gave the contestant most of the estate, and the will which excluded her from all part in it; he figured in every business transaction between the parties; he could detect the slightest change in their attitude to each other; and if he did not himself incite or promote that change, he at least must have known the cause which produced it. The change which actually did take place was as remarkable as was his silence respecting it. On September 6, 1891, the testatrix devised and bequeathed to the niece nearly the whole of her estate; on August 26, 1892, by a new will, she gave her as residuary legatee the great bulk of the estate, and on October 30, 1894, she made a will under which the niece took nothing. Yet, throughout this time, the outward relations of the parties remained the same; the aunt and the niece exchanged family greetings, and the respondent was the happy custodian of their separate confidences. We have looked through the testimony to discover, if possible, some clue to so profound a revulsion of feeling, and the only suggestion of a motive, and it was volunteered by the respondent at the argument, was a change which the contestant made in her place of residence. She had lived on Arch street, not far from the testatrix, in a house which, after her husband's death, was inconveniently large, and she removed some squares to the south of that street. While the actual removal did not take place until long afterwards, it was contemplated at the time of the death, and in some way it came to the knowledge of the testatrix. It is true that an added reason was given by the testatrix to the counsel who drew the will, that the contestant's family had received enough from the estate already, the fact being that they had received no more than they possessed when the prior wills were written. Standing by itself, nothing more void of offence could be imagined than a change of abode from one street to another, a few hundred feet distant. But it might become a powerful irritant, if it engendered a suspicion that its real purpose was to bring the contestant within social environments which should be superior to those which then surrounded the decedent. A single hint of such an intention, subtly conveyed to an aged person, jealous of the respect which was due to her years and station, might poison the memories and predilections of a lifetime. Just here, a piece of evidence which was injected into the case by the respondent himself, may have a special significance. Some sixteen months before the removal to Locust street, the contestant wrote a note to the respondent, acknowledging the receipt of a check, and casually requesting him to tell her aunt Margaret, in case anything should be said on the subject, that she expected to remain where she was, and adding: "If ever I should go, it will be off Arch street; but while she lives, I shall try, if I can, to stay where I am." A better weapon for mischief, in the hands of one skillful enough to use it, than this note, written apparently in absolute innocence of evil, could not have been devised by the most ingenious malice. We do not say that it was so used; but it was produced by the respondent to support his theory that the contestant regarded her aunt as being of a grade socially inferior to her own. Outside of his own suggestion, there was not a line in the testimony to support the thought that the contestant was ambitious for social distinction, except the inference which might be wrung out of this single letter. The respondent gathered from it this inference, or he would not have offered it in evidence to sustain the inference. But the note was in his hands, and the decedent could learn its contents only through his agency. From what source except the respondent did she receive a suspicion, which none but the respondent had entertained, and which he himself seems to have imbibed

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from that note? We shall notice one other incident. The respondent refused to prepare the will of October 30, 1893, because he was personally interested as a beneficiary; but he did prepare a draft of its intended provisions, which, he says, he left with the testatrix. When the counsel selected by him came on the following day to receive the instructions of the testatrix and to draw her testament, he was handed, not the paper which had been written by the respondent, but another, which was in the handwriting of a servant and signed by the testatrix, and which was in fact and in law a complete testamentary writing, and he used this paper as the basis of his inquiries of the decedent. No reason was given for the disappearance of the respondent's draft, and the servant was not called to show at whose instance she wrote the substituted paper and procured the signature of the testatrix. In an issue in which the good faith of the respondent was at stake, and at no point more decisively than in the making of the will, this failure to explain an ambiguous transaction is, at least, significant. It is doubly significant, in view of the declarations of the counsel who was called in and who prepared the will. He said that he was not informed by the respondent, and had no idea that the respondent himself had drafted the instructions of the testatrix, and that, if he had known the fact, he probably would have been more careful than he was in interrogating the testatrix. He said, also: "I think I would have been very apt to discuss the question with her to see that she knew entirely what she was doing, and acted of her own free will and accord; as there was a devise to her physician and her counsel, she ought to have full knowledge of the reasons, and ought to be clear in those reasons when she put them in force." The net result of this statement is, that the witness, upon whom the respondent leans to show that the will-power of the testatrix was uncontrolled and unbiased, was diverted from any searching scrutiny into the only matter which is fairly in dispute, because he had never been advised of the existence of this paper.

We think that these materials, without going into any further analysis, show facts in dispute which should be submitted to a jury. They present the elements, on the part of the testatrix, of old age, with impaired vitality; a change of testamentary purpose, involving an alienation of feeling towards a kinswoman and legatee, and a corresponding affiliation with a comparative stranger, which latter was manifested by munificent gifts and by extraordinary pay for ordinary service, and a complete and unquestioning reliance upon that stranger in all matters connected with her estate. They disclose, moreover, no adequate cause for estrangement between the testatrix and her niece, while they do show a suspicion, which was entertained by the respondent and assigned by him as the motive, which he himself gathered from a private letter, addressed to him by the niece, and which could be known to the testatrix only through his action. If a jury should find from this testimony that an influence had been exerted upon the mind of the testatrix, which had unduly operated upon her in the execution of her will, their verdict would doubtless be allowed to stand.

The exceptions are dismissed. Counsel will prepare the necessary decree, providing for notice to the next of kin, as well as devisees and legatees: Miller's Appeal, 159 Pa. 562.

F. B. N.

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WEEKLY NOTES OF CASES.

VOL. XXXV.] *FRIDAY, JAN. 25, 1895.* [No. 20.

Supreme Court.

Oct., '94, 202. October 16, 1894.

Pfeiffer v. Brown et al.

Water-course—Right to discharge water upon lower tenant.

The right of the upper land owner to discharge water upon the lower lands of his neighbor is in general a right of flowage only in the natural ways and natural quantities.

The only case in which a land owner has the right to discharge upon his neighbor's land water in artificially increased quantities, as from a point of concentration, is where such discharge is in the natural, proper and non-negligent use of his own land, and where the damage suffered by the neighbor can not be prevented, by the owner of the lands from which the discharge takes place, by reasonable care and expenditure.

The right of one land owner to injure the land of another is founded on necessity and exists only where he himself wou'd otherwise be deprived of the beneficial use of his own land.

Where the expense which would have to be incurred by a land owner to prevent his act from working injury to his neighbor is such as to practically counterbalance the profit or benefit expected from the use of the land, it is unreasonable to require him to incur it; on the other hand, no matter how large it may be, in actual amount, if it be small in proportion to the gain to himself, the land owner must prevent injury to his neighbor or pay for the damage done; between these two limits each case must stand upon its own facts, the only general rule being that if the expense required would so detract from the purpose and benefit of the contemplated act as to be a substantial deprivation of the right to the use of one's own the damage consequent upon the act is not *injuria*, but if it could have been prevented short of this it is *injuria* which will sustain an action.

Appeal of Catharine Pfeiffer, plaintiff, from the judgment of the Common Pleas of Butler County, in favor of defendants, J. L. Brown, Wm. Breaden, Adam Schultz, John Keck, L. Ganz, P. M. Frederick, J. M. Doty and Emily Best, in an action of trespass.

On the trial of this cause, before GREER, P. J., the following facts appeared:—

Prior to the month of December, 1892, plaintiff was the owner of a tract of land situated in Forward township, Butler County, Penn'a, bounded on the north by land of the heirs of John Stewart, deceased.

Sometime in that year (1892) the defendants obtained a lease of three acres on the above mentioned tract of the Stewart heirs and commenced to drill a well for oil thereon at a point within eighty or ninety feet of appellant's northern line. At this place the land sloped gently toward the south, and while there was no natural water-course or channel passing from the Stewart tract to the appellant's land there was a broad depression.

The well of defendants was located at about the upper end of this depression while their receiving tanks were located a short distance further down it toward plaintiff's north line. The oil was found in what is called the hundred-foot formation and when the defendants commenced to pump the well, they brought great quantities of salt water to the surface. This is the invariable result in all oil wells drilled in this formation. The oil and water were pumped from the well into a storage tank, where the former being the lighter would rise to the surface, then as soon as the tank was full the salt water would be drawn off at the bottom and appellees would allow it to flow where it would, regardless of all the consequences to anybody. Gravity naturally inclined it down the depression in the direction of appellant's lands, over which in the months of December, 1892, and January, 1893, it flowed in great quantities and spread out over a wide surface to the damage of the plaintiff's herbage, orchard and soil.

She then caused a ditch to be plowed along the centre line of the depression and at its lowest part. This ditch passed from her north line, or the south line of appellees' lease, down this depression and at its lower end terminated in a small brook.

Thereafter the salt water passed down this artificial channel until it reached the brook and from that time did no damage to the surrounding land or its products, nor is any damage claimed as having resulted from and after the plowing of the ditch.

The plaintiff claimed the amount of damages she had sustained from the flow of salt water, up to the time of the making of the ditch.

The plaintiff presented the following points:

1. If the jury believe the defendants could have conducted the salt water away from their lease so that it would not run over Mrs. Pfeiffer's property, they were bound to do so notwithstanding it would have involved them in a certain amount of trouble and expense, and if they failed in this your verdict must be for the plaintiff for the amount of injury you find she has sustained under all the evidence. *Answer.* If this point had read, "if they can run it off Mrs. Pfeiffer's and not on some other person's land," we might affirm it with slight qualification, but the

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defendants have no right to run it on some other person's land. If you believe that the damage resulted from the salt water we affirm it. You must believe that the damage resulted from the salt water and that the defendants could have taken this salt water off at slight expense without putting it on some other man's land. (Third assignment of error.)

2. The law makes it the duty of every man so to handle and manage his property as to inflict no damage on his neighbor's property beyond that which is absolutely unavoidable, and if the jury believe the defendants could have avoided injuring plaintiff's property by piping or ditching the salt water away from their well and tanks, they were bound to do so, and if they failed in this duty to their neighbor—the plaintiff—they must respond in damages. *Answer.* The defendants were not bound to pipe or ditch this salt water over Mrs. Pfeiffer's land. As I said before, they are bound to take reasonable and ordinary care to do her no damage that could be avoided by them; they were not bound to ditch over her land, and if they could have piped or ditched it some other place to injure no other person at small expense, it was their duty to do so, but they had no more right when this water reached them to ditch over her land than she had, because her land was servient to their land. The defendants have asked us to say to you, "The Court is requested to say to the jury, that under all the evidence the plaintiff cannot recover." (Fourth assignment of error.)

In the course of the general charge the learned Judge said, "[The defendants had a right to drill as many wells on their land as they saw fit, and to drill where they saw in their own interest it was best to drill them, and if in operating these wells honestly and carefully the salt water or oil or anything else that might come from the wells flowed the natural course and went into the streams, there can be no damages collected from them.] (Fifth assignment of error.) It is true the law in most cases provides for injury, but if there is an injury for which they are not responsible the law does not provide a remedy. In this case the defendants had a right to drill this oil well; if the fresh water and salt water came out with the oil, that was not their fault and they are not to blame if there was no negligence or malice on their part; if there was any way by which they could prevent the water from flowing on Mrs. Pfeiffer's land it was their duty to do it; [when the water comes to the top of the ground and is separated from the oil by the siphon and taken from one tank to another and the water is let out of the tank and the water flows the natural course, that is no fault on their part and they would not be liable in damages unless there is some way by which they can prevent the flowing of the water at reasonable expense.] (Sixth assignment of error.) It is the duty of defendants, if possible, to save the property and lands of others adjoining, and the law makes it the duty of Mr. Brown and his fellow defendants to, if possible, prevent the flow on the land of Mrs. Pfeiffer if they can do so without unreasonable expense; if they cannot do so then all he can do is to let the water take its course. This is an action of trespass and the burden of proof is on the plaintiff; the plaintiff must show to you malice or negligence on the part of the defendants before she can recover; the mere fact of the water running away would not be malice, neither would it be negligence if there was no way by which Mr. Brown and the defendants can prevent it; [they must prevent it, if they can prevent it without putting it on the lands of other people, if they can do so without unreasonable expense or inconvenience.] (Seventh assignment of error.) If they ran this water off the natural course and it would do damage to other persons, then these other persons would have no trouble collecting damages, because there was a change of the natural course and the parties injured would have a right to collect damages off them for whatever wrong or damages resulted therefrom; [before the plaintiff can recover she must show that Mr. Brown and the other defendants could, by a reasonable outlay of money or by reasonable expense, have taken this water some other place and not have hurt some other person, and if that is not proven the verdict must be for the defendant.] (Eighth assignment of error.) It has been stated by the plaintiff that this tank could have been raised higher and the water taken down the other way and turned on the public road and let run down there and in that way kept off this ground. Was that practicable? Could that be done? I want to say that the public road is for persons to pass and travel on. It ought to be kept clean and the people have no right to deposit filth on it; you heard the proof of the witnesses that they could have cut down the ground and put the tanks above the derrick and have pumped the oil into the tank, this is a question for you. Before you go into the measure of damages you must find that the defendants were negligent or acted with malice. [They had a right to let the water take its own course; they had a right to separate the water from the oil and pour it out on their ground and if it ran down on Mrs. Pfeiffer's land, that is not their fault. They have no right to spend more in saving it than the amount of damages; they would have no right to spend two or three hundred dollars in order to turn the water and save her to save fifty or seventy-five or a hundred dollars in damages.] (Tenth assignment of error.)

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Verdict for defendant and judgment thereon.

W. H. Lusk, for appellant.

If the defendants had any reason to anticipate that the salt water would rise in the well and injure the plaintiff's property they were bound to guard against it by casing or any other means in their power.

Collins *v.* Chartiers Valley Gas Co., 131 Pa. 143.

While the owner of the property is without legal redress for the effect upon its desirability and market value, of the mere proximity of an undesirable business, yet if the business is so conducted as to affect the use of his property or the health of its occupants, these tangible and substantial injuries capable of measurement by a pecuniary standard will sustain an action for damages.

Robb *v.* Carnegie, 145 Pa. 324.

And see

Elder *v.* Lykens Valley Coal Co., 157 Pa. 490.
Steele *v.* Todd, 158 Id. 515.
Penna. Lead Co.'s Appeal, 96 Id. 126.

The Court erred in making no distinction between the artificial product, salt water, and the natural product surface water.

W. D. Brandon, for appellees, cited:

Pa. Coal Co. *v.* Sanderson, 113 Pa. 145.
Collins *v.* Chartiers Valley Gas Co., 131 Id. 143.

January 7, 1895. MITCHELL, J. The right of the upper land owner to discharge water on the lower lands of his neighbor is in general a right of flowage only in the natural ways and natural quantities. If he alters the natural conditions so as to change the course of the water, or concentrate it at a particular point, or by artificial means to increase its volume, he becomes liable for any injury caused thereby: Addison on Torts, sec. 283, ed. 1891.

In the present case the defendants by drilling a well and pumping, increased the aggregate quantity of water discharged, concentrated it at an artificial point of flow, and changed its character from fresh to salt, whereby it became more injurious to plaintiff's land. *Prima facie*, therefore, they were liable in this action and the burden of proof was on them to show some reason why the general rule should not apply. This they endeavored to do by the claim that the water was discharged in the lawful and proper use of their own land. The exception is well established and is thus expressed in the strongest authority in its favor, Penn. Coal Co. *v.* Sanderson, 113 Pa. 126: "Every man has the right to the natural use and enjoyment of his own property and if while lawfully in such use and enjoyment without negligence, an unavoidable loss occurs to his neighbor, it is *damnum absque injuria*." But this as was shown in Collins *v.* Chartiers Valley Gas Co., 131 Pa. 143, does not go beyond proper use and unavoidable damage. It was accordingly said in the latter case that "the use which inflicts the damage must be natural, proper, and free from negligence, and the damage unavoidable. . . . . Hence the practical inquiry is, first, whether the damage was necessary and unavoidable; secondly, if not, was it sufficiently obvious to have been foreseen, and also preventable by reasonable care and expenditure?"

This brings us to the consideration of what is meant by reasonable care and expenditure. In the Chartiers case it was said in the charge that the jury might have found that if the defendants had exercised any reasonable judgment, or investigated or paid attention to it, they would have known that the injury to the plaintiff would follow, and with the outlay of a small amount of money might have prevented it. These remarks appear to apply equally to the present case. On the facts shown it could hardly be contended that the injury was unavoidable. The very simple device resorted to by the plaintiff obviated it, and there was evidence from which the jury not only might but should have found that defendants should have foreseen the result of their operations and provided against it. In regard to what is a reasonable expense in this connection neither in the Chartiers nor any of the other cases has it been necessary to define it strictly, but it is clear from all of them that the word reasonable is not to be taken in a narrow sense. It is not to be lost sight of that the defendant's right to injure another's land at all, to any extent, is an exception, and the burden is always upon him to bring himself within it. And his exception is founded on necessity and because otherwise he would himself be deprived of the beneficial use and enjoyment of his own land. Unless that would be the substantial result of forbidding his action, he is not within the immunity of any of the cases. And the expense which will absolve him from the duty of preventing the injury must come substantially up to the same standard. If the expense of preventing the damage from his act is such as practically to counterbalance the expected profit or benefit, then it is clearly unreasonable, and beyond what he could justly be called upon to assume. If on the other hand, however large in actual amount, it is small in proportion to the gain to himself, it is reasonable in regard to his neighbor's rights, and he should pay it to prevent the damage, or should make compensation for the injury done. Between these two extremes lies a debatable region where the cases must stand upon their own facts, under the only general rule that can be laid down in advance,

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that the expense required would so detract from the purpose and benefit of the contemplated act, as to be a substantial deprivation of the right to the use of one's own property. If damage could have been prevented short of this it is *injuria* which will sustain an action.

In regard to the somewhat analogous right of eminent domain over a public franchise previously existing—a right resting on the same basis of necessity, it was said in Pittsburgh Junction Co.'s Appeal, 122 Pa. 511, 531, "The location claimed for defendant is a matter of economy, not of necessity. It can construct its road and reach its terminus by another route. It is true it would be expensive, but it is a mere question of money and engineering skill. It is not entitled to run through plaintiff's yard, and cripple its facilities for handling its business, merely to save money," and further quoting from Penn. R. R. Co.'s Appeal, 93 Pa. 150, there "must be a necessity that arises from the very nature of things, over which the corporation has no control; it must not be a necessity created by the company itself for its own convenience, or for the sake of economy." While it is not meant to be said that this standard should be enforced without qualification, against private rights to the natural use of property, it nevertheless illustrates the basis of necessity on which the exercise of such rights to the damage of another without compensating him, must rest. Each party has clear rights to the use and enjoyment of property, and each must concede something for the preservation of the other. Where conflict is irreconcilable the right to use one's own must prevail, but it can only do so without compensation where the resulting damage is not avoidable at all, or only at such expense as would be practically prohibitory.

In the charge and answers to several of the points the learned Judge used the expressions "at slight expense," "at small expense," etc., in reference to the duty of defendants to prevent the salt water from flowing on plaintiff's land. This was not giving the jury a proper standard.

Judgment reversed and venire de novo awarded.

H. B.

Oct. '94, 236. October 4, 1894.

Second National Bank of Clarion v. Morgan et al.

Promissory note—Fraudulent consideration—Defence must be fully stated—Burden of proof upon defendant—Usury—Affidavit of defence.

An affidavit of defence which does not allege any facts or circumstances upon which to found a belief, is unavailing; the mere averment of a belief without stating the facts upon which it is founded does not give any information to the Court upon which it can determine their efficiency.

The holder of a negotiable note *bona fide* for value without notice can recover, notwithstanding he took under circumstances which ought to excite the suspicion of a prudent man.

Phelan *v.* Moss, 67 Pa. 59, followed.

To constitute a defence against the holder of a note for value it must be shown that the note was taken *mala fide*, and the burden of proving bad faith rests on the defendant.

In an action by a national bank upon a promissory note usury cannot be set up as a defence by the maker of the note, or by his surety; the only remedy given by the Act of Congress is by a penal action to be brought for the recovery of double the amount of the illegal interest charged.

Appeal of Second National Bank of Clarion, Pa., plaintiff, from the decision of the Common Pleas of Clarion County, discharging a rule for judgment for want of a sufficient affidavit of defence, in an action against Lawson Morgan *et al.*

The statement and affidavit of defence are sufficiently recited in the opinion of the Court (CLARK, P. J.), in discharging the rule for judgment, except the third paragraph of the affidavit, which was as follows:—

"3. That the said plaintiff is a national bank, a corporation organized under the laws of the United States as set forth in its statement of claim filed, and is subject to the statutes of the United States governing and regulating such banks; that under said statutes said plaintiff corporation is limited and confined to the rate of discount and interest allowed by the laws of the State of Pennsylvania, wherein said plaintiff bank is located and doing business, and prohibited from receiving, reserving and charging a rate of interest or discount exceeding 6 per cent. per annum, being the maximum rate fixed by law in the said State of Pennsylvania; that affiants believe and expect to be able to prove upon the trial of this cause that said note, set forth in the plaintiff's statement of claim, was discounted for the payees therein named at a rate of interest or discount of twenty-five per cent. and upwards, the exact rate affiants are not now able to state, but expect to be able to prove upon the trial of the cause aforesaid; and affiants are advised by counsel and believe that by reason of the said usurious rate of interest or discount, if the said plaintiff were entitled to recover on said note at all, it cannot recover any interest thereon, nor can it recover an amount exceeding the actual amount paid for said note, to wit, the amount paid for said note less the credit indorsed thereon and the amount of interest or discount retained thereout by said plaintiff."

"The plaintiff's statement filed in this case

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shows that the action is brought to recover the amount of a certain promissory note, drawn by the defendants to Leggett & Johnson, or order, and endorsed by the payees to the plaintiff, dated July 5, 1892, and calling for the payment of eight hundred thirty-three and 33-100 dollars at the bank of Parker, Pa., eighteen months after the date thereof for value received with interest at six per cent. per annum, interest payable annually, less a payment or credit thereon endorsed by the payees for one hundred and sixteen and 66-100 dollars as of the date of said note. The statement avers that the plaintiff is a corporation organized under the laws of the United States, and is the *bona fide* owner and holder of the note on which the action is brought, and obtained the note before the maturity thereof, for value, by endorsement and delivery by the payees therein. The plaintiff's statement sets forth a copy of the note together with the credit of one hundred and sixteen and 66-100 dollars endorsed thereon, as paid to Leggett & Johnson, and the names of the endorsers, and claims that the balance of the principal sum, to wit, seven hundred and sixteen and 67-100 dollars with interest from the date of said note, to wit, July 5, 1892, remains unpaid and due from the defendants to the plaintiff, and that the note was duly presented for payment at the place therein designated at the maturity thereof and payment refused. On February 22, 1894, Peter Peters and others for themselves and co-defendants filed their affidavit of defence to plaintiff's claim duly sworn to, who say therein that they have a just and legal defence to the whole thereof, the nature and character of which is therein set forth. On April 2, 1894, plaintiff's motion was filed in Court for judgment in said case in default of a sufficient affidavit of defence, and upon which a rule to show cause was granted and ordered on the current argument list by the Court. The affidavit of defence is drawn in three distinct and separate clauses, the first of which is, 'That the consideration of the note in suit has wholly failed, and that said note was obtained from the defendants by means of false and fraudulent representations and pretences, to wit, by means of falsely and fraudulently representing and pretending to said defendants that Leggett & Johnson, the payees in said note, were the owners of a large stock farm and sales stable of imported horses at Batavia, N. Y., and that a certain Percheron stallion, called 'Orphelian' was duly registered and directly imported by them from France, and was worth the sum of twenty-five hundred dollars; that the said stallion was a reasonably sure foal getter, and was sound in every particular, and then and there falsely and fraudulently represented to the said defendants severally that certain of said defendants, who were well known, reputable and influential citizens and breeders of horses in the neighborhood, had agreed to take stock in the purchase of said stallion, and to sign, *inter alia*, the said note in suit; and that certain of said defendants being well known, reputable and influential citizens and breeders of stock in said neighborhood, had *bona fide* taken a certain amount of stock in the purchase of said stallion; when in truth and in fact the said stock had been given to said defendants at an under price for the privilege of the use of their names in selling the balance of said stock; that Harrison McCall and other well known and influential citizens and breeders of stock in said neighborhood had consented and agreed to take stock and sign, *inter alia*, the said note in suit in purchase of the said stallion; all of which representations were false and fraudulent, and by means and color thereof they, the said Leggett & Johnson, and one Converse, did persuade and induce said defendants, severally and apart from each other, to take stock in the purchase of said stallion and to sign, *inter alia*, the note in suit in part payment for the said stallion, with intent to cheat and defraud said defendants; that the said stallion was not a reasonably sure foal getter, was not sound in every particular, but in truth and in fact was and is entirely worthless for any and all purposes.'

"It is a well settled principle of law that a *bona fide* holder of a negotiable instrument, for a valuable consideration, without notice of the facts which impeach its validity between the antecedent parties, if he takes it under an endorsement made before it becomes due, holds the title unaffected by such facts and may recover thereon, although as between the antecedent parties the transaction may be without any legal validity: Bank of Pittsburgh *v.* Neal *et al.*, 22 Howard, 108.

"To the same effect is the case of Phelan *v.* Moss, 67 Pa. 59, and other kindred authorities therein cited. They, the counsel for defendants, say they do not base their defence upon this paragraph alone, but only in connection with the second paragraph of the affidavit, which they contend sets forth with reasonable precision and distinctness such a state of facts as would constitute a good and valid defence to plaintiff's claim. The language of the second paragraph is, 'that the affiants believe and expect to be able to prove upon the trial of this cause, that the plaintiff above named is not a *bona fide* holder, for value, of the note in suit before maturity, but that said plaintiff took said note under such circumstances and with such knowledge of the facts set forth in the preceding paragraph of this affidavit as to put it upon notice and inquiry which would have led to a full disclosure and knowledge that said note was obtained

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fraudulently and was without consideration.' The counsel for plaintiff contends that this paragraph, even in connection with the first, is insufficient; that it is evasive, equivocal and in the alternative.

"In the case of Bacon *v.* Scott, 154 Pa. 250, it was held in a suit on promissory notes by an endorsee against the maker, an affidavit of defence is sufficient which avers that plaintiff is not the holder and owner for value and before the maturity of the notes in suit, but the same were handed over to him by W. B. Mershon & Co., the payees, for the sole purpose of debarring the defendant, the maker thereof, from a defence to the same. In the latter case the learned Justice THOMPSON says: 'The language here used is identical with that used in Moeck *v.* Littell, 82 Pa. 356, in which it was said, viz: "This is not only an express averment that the defendant in error is not a purchaser for value of the note before it matured, but in substance the further averment that it is still the property of Rowley the payee." As against Mershon & Co., the payees, who are to be treated as the owner of these notes, the affidavits set forth with reasonable precision facts necessary to constitute a defence.' In the case of Reznor *v.* Supplee, 81 Pa. 180, it was held when the facts forming part of a defendant's case are not within his knowledge, an affidavit of defence is sufficient which avers 'that he believes and expects to be able to prove,' etc. In the same case the learned Justice who delivered the opinion, says, 'If an affidavit avers an expectation of ability to prove the allegations, the presumption is, that they can be proved.' It seems to be clearly settled by a long line of authorities, decided by the Supreme Court of this State, that when an affidavit contains allegations which if proven, would constitute a legal defence, the defendant is entitled to a trial by jury. West *v.* Simmons, 2 Wharton, 261; Liebersperger *v.* Bank, 30 Pa. 531; Thompson *v.* Clark, 56 Id. 33. It is sufficient to aver that the defendants believe and expect to be able to prove the facts set forth in the affidavit. Black *v.* Halstead, 3 Wright (Pa.) 64; Thompson *v.* Clark, *supra*. The next question for our consideration is, what effect has the latter clause of the second paragraph of the affidavit, beginning at the word 'but' and ending with the word 'consideration' upon all preceding it? Are we to consider it as a statement of the grounds of defendants' belief that the plaintiff is not a *bona fide* holder for value of the note before maturity, or are we to treat it as a separate and distinct averment? These questions were raised upon the argument of the rule. For our part we do not believe that it is necessary to make any distinction, as to whether the paragraph should be construed as a whole or the clauses therein separate and apart from each other.

"Either of the clauses are sufficient to prevent the plaintiff from taking judgment for want of a sufficient affidavit of defence.

"In Hutchinson *v.* Boggs, 28 Pa. 294, it was held that an affidavit of defence by the maker, alleging such facts as show that the note was obtained from him by misrepresentations and negotiated in fraud of his rights, is sufficient to prevent judgment being entered for want of a proper affidavit of defence, and that where a negotiable note has been obtained from the maker under false pretenses and fraudulently put in circulation by the payee, in an action by the holder against the maker, the former, to entitle him to recover, must show that he was a holder by purchase for value before the maturity of the note, without notice of the fraud.

"Where fraud is alleged that is sufficient for the cause to go to the jury. It was ruled in Lerch Hardware Co., Limited, *v.* First National Bank of Columbia, 109 Pa. 240, that in an action by the endorsee against the maker of a negotiable instrument, proof by the defendant that the note was fraudulently issued, puts the plaintiff to proof of his standing as a *bona fide* holder for value. The opinion in the latter case was rendered by Mr. Justice TRUNKEY, and the principles of law discussed therein are applicable to the case in hand. The facts set forth in the first and second paragraphs of defendants' affidavit are sufficient to entitle them to have this case tried before a jury. It is not necessary at this time to consider the third paragraph of defendants' affidavit.

"Under our view of the law the defendants in their affidavit have made out such a defence as entitles them to call upon the plaintiff to show that it is the holder and owner of the note by purchase, for value, before maturity, without notice of the fraud, and therefore make the following order:

"And now, May 8, 1894, after argument and upon due consideration of the rule to show cause (as to why plaintiff should not have judgment in default of a sufficient affidavit of defence), and of the affidavit, it appearing the first and second paragraphs thereof are sufficient to entitle the defendants to a trial before the jury the rule is discharged."

From this ruling the plaintiff appealed, and assigned for error the refusal of the rule for judgment.

J. T. Maffett, for appellant.

There is not a solitary word "set forth" in this affidavit showing *mala fides* on part of the plaintiff. "A case of *mala fide* on part of the plaintiff must be made out in order to defeat his claim."

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Phelan *v.* Moss, 67 Pa. 63.

It is not alleged in the affidavit that the plaintiff had notice or knowledge of a single fact alleged in the affidavit of defence.

The second paragraph of this affidavit is a weak attempt to bring the case within the rule of Gill *v.* Cubitt, 3 B. & C. 466; 3 Kent's Com. 81, concurred in by Judge SERGEANT in Beltzhoover *v.* Blackstock, 3 Watts, 20, in 1834, to the effect "that if an endorsee takes a note heedlessly and under circumstances which ought to have excited the suspicion of a prudent and careful man the maker may be let into a defence." This affidavit does not come up even to this standard, as it contains no intimation of what facts constituted the alleged "circumstances" that should have put the plaintiff upon inquiry. No duty of inquiry rested upon the bank. However, the doctrine of Gill *v.* Cubitt is no longer the rule in England or in this country. It was wholly exploded and repudiated in Phelan *v.* Moss, *supra*, and see

McSparran *v.* Neeley, 91 Pa. 26.
Griffith *v.* Sitgreaves, 90 Id. 167.
Sloan *v.* Union Banking Co., 67 Id. 472.
Passumpsic Bank *v.* Goss, 31 Vermont, 315.

The *bona fide* character of a holder can only be destroyed by proof of his participation in a fraudulent transfer of the instrument.

Phelan *v.* Moss, and
McSparran *v.* Neeley, *supra*.

Bacon *v.* Scott, 154 Pa. 250; Moeck *v.* Littell, 82 Pa. 356, do not apply. In each of these cases the instruments were never negotiated and the actions were between the original parties to the contract, in form, however, between alleged bogus and fraudulent endorsees to whom the respective affidavits of defence averred the instruments were merely handed over to cut off the defence. The affidavit admits that plaintiff had no knowledge of the alleged fraud by averring a duty to inquire after it. The affidavit does not aver that the note was obtained by fraud, or put in circulation by fraud, within the meaning of Hutchinson *v.* Boggs; but merely fraudulent representations as to the value and quality of the horse and a consequent failure of consideration.

When the defence sets up an issue of fact, the affidavit must state facts necessary to constitute a substantial defence. General averments of matters which in themselves are legal conclusions from facts not stated are insufficient.

Battles & Webster *v.* Laudenslager, 84 Pa. 446.
Kaufman *v.* Cooper Iron Co., 105 Pa. 541.

John W. Reed and *W. L. Corbett* (with them *Don C. Corbett*, *Harry R. Wilson* and *G. G. Sloan*), for appellees.

If one maker to a note enter into collusion with the payee, such collusion is a fraud on other makers to the same, and there can be no recovery on such note by the payee.

The first and second paragraphs of the affidavit of defence in this case are to be considered in connection with each other.

It is submitted that the authorities in Pennsylvania sustain affidavits of defence, where the language in the affidavit is similar to the one in the present case.

Bacon *v.* Scott, 154 Pa. 250.
Moeck *v.* Littell, 82 Id. 356.
Black *v.* Halstead, 39 Id. 64.
Reznor *v.* Supplee, 81 Id. 180.
West *v.* Simmons, 2 Whar. 261.
Leibersperger *v.* Bank, 30 Pa. 531.
Thompson *v.* Clark, 56 Pa. 33.

If the plaintiff bank be allowed to recover in this case it will in no way suffer by way of a forfeiture, and can Leggett & Johnson after collection of a judgment recover any amount against the bank?

The Act of Congress provides no remedy for such recovery even in cases where the consideration of the note is not impugned. The remedy provided by the Act is forfeiture and defendants contend it may be interposed by any party to the proceeding to enforce payment of the bill, note or other evidence of debt. A question may arise where such evidence of debt was for a good consideration, whether the party suffering the loss of illegal interest might recover the amount enforced as a forfeiture against a party enforcing the same where such party is not the injured one.

"Where a statute creates a new right or offence and provides specific remedy or punishment, they alone apply. Such provisions are exclusive."

Farmers' and Mechanics' National Bank *v.* Dearing, 91 U. S. 29.
Barnett *v.* National Bank, 98 U. S. 558.
Lucas *v.* Bank, 78 Pa. 228.
Overholt *v.* Bank, 82 Id. 490.

And kindred cases are only overruled so far as they hold that illegal interest in other transactions can be used by way of set-off or payment. Upon the remaining principles therein decided they are still the law.

January 7, 1895. GREEN, J. The affidavit of defence in this case makes three averments. First, that the consideration of the note in suit has failed, and that the note was obtained by the payees from the makers by means of false and fraudulent representations respecting a certain Percheron stallion. As these facts are not alleged to have been known to the plaintiff bank, and as the note is negotiable and the bank acquired it for value and before maturity, this defence is of no avail against the plaintiff.

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Second, that the defendants expect to be able to prove that the plaintiff was not a holder for value before maturity, but that the bank took the note under circumstances and with such knowledge of the facts as to put it upon notice and inquiry, which would have led to a discovery of the fraud. This defence is unavailing because the affidavit alleges no facts or circumstances whatever upon which to found a belief, and the mere averment of a belief without stating the facts upon which it is founded, gives no information to the Court upon which it can determine their efficiency; and if there are no facts and circumstances known to the affiants there is nothing upon which to ground any belief.

But independently of this consideration the affidavit of defence alleges only, in its second clause, that the plaintiff took the note under such circumstances and with such knowledge of the fraud as were sufficient to put it upon inquiry, and that inquiry would have led to a discovery of the fraud, and it nowhere alleges actual knowledge of the fraud when the note was taken. The learned Court below considered that this averment was sufficient to prevent judgment. But this Court decided as long ago as 1870 in a well considered case, and in an exhaustive and elaborate opinion by Mr. Justice READ, in the case of Phelan *v.* Moss, 67 Pa. 59, that such a defence when proved by testimony was no defence at all in an action on a negotiable note. We there held that a holder of a negotiable note *bona fide* for value without notice can recover it, notwithstanding he took it under circumstances which ought to excite the suspicion of a prudent man. Justice READ reviewed the authorities in England and this country, and showed with conclusive force that even in England, where for a short time the opposite doctrine obtained a lodgment, starting with the case of Gill *v.* Cubitt, 3 B. & C. 466, it had been altogether abandoned and overruled. This was accomplished through a series of decisions, when, in the last of them, Goodman *v.* Harvey, 4 Ad. & Ellis, 870, Lord DENMAN said, "We have shaken off the last remnant of the contrary doctrine. Where the bill has passed to the plaintiff without any proof of bad faith in him, there is no objection to his title."

Justice READ further reviews both the Federal and State decisions in this country, and includes in them the case of Beltzhoover *v.* Blackstock, 3 Watts, 20, in which Judge SERGEANT expressed a concurrence, though unnecessarily, in the doctrine of Gill *v.* Cubitt. And he also showed that this Court had never followed Beltzhoover *v.* Blackstock in this regard but had followed the opposite rule. He concludes by assuming that the note was obtained by fraud on the maker, and, reviewing the circumstances of suspicion, among which was the fact that the plaintiff bought the note, which was for $250 against a solvent drawer, for $100, he adds, "Neither one nor all these facts, if found by the jury, proved *mala fides* on the part of the holder, or brought home to him knowledge of the fraud; but on the contrary it was clear that he was a *bona fide* holder for value without notice, and of course entitled to recover." This case has been many times recognized and followed by this Court and never departed from to this date. In McSparran *v.* Neeley, 91 Pa. 17, Mr. Justice WOODWARD said, "Phelan *v.* Moss has been uniformly followed since it was decided," and in that case also we decided that the endorsee of a negotiable note who took it before maturity, *bona fide* for value without notice, is entitled to recover from the maker though a fraud was practiced on the maker in obtaining his signature to the note; the fact that a negotiable note which was obtained by fraud was taken by the holder under circumstances which ought to have excited a suspicion will not defeat a recovery; it must be shown that it was taken *mala fide*.

Most extended references both to decided cases and text writers could be added to the foregoing, but it would be a waste of time and space. We conclude therefore that the averment upon this subject in the second clause of the affidavit of defence in this case is of no consequence whatever and could not suffice to put the plaintiff to any proof on the trial. The burden of proving actual bad faith would still rest on the defendants.

The averment in the first part of the second clause that the affiants expect to be able to prove on the trial that the plaintiff is not a *bona fide* holder is not an assertion of the fact but only of the expectation of ability to prove it and the basis of the expectation is immediately stated by way of illustration as being the taking of the note under circumstances of suspicion. No actual circumstance of suspicion is stated, and no fact, impeaching the *bona fides* of the holder or as affording a ground of belief to that effect, appears anywhere in the affidavit. If, on the trial, the defendants should prove exactly what they have alleged in the second clause of the affidavit, to wit, that they believe and expect to be able to prove that the plaintiff was not a *bona fide* holder for value, and that it took the note under circumstances of suspicion, they would have accomplished nothing. Instead of proving belief they would be obliged to prove the fact of *mala fides*, and although they proved actual circumstances of suspicion, it would avail them nothing.

The authorities which hold that it is sufficient in an affidavit of defence to aver an expectation

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of ability to prove, are predicated of facts previously stated, and not of mere beliefs or inferences or conclusions.

It may be added that the third clause of the affidavit not only admits, but distinctly asserts, that the plaintiff paid for the note seventy-five per cent. or thereabouts in money of its face value, and is therefore fatally inconsistent with any allegation or inference that the note was not acquired for value.

We do not consider the case of Hutchinson *v.* Boggs, 28 Pa. 294, and Lerch Hardware Co. *v.* Bank, 109 Pa. 240, as applicable to this case, because here the defence relates to the want of consideration in the sale of a defective horse, and in that kind of defence the holder is not put to proof of his title to the note by the allegation of want of sufficient consideration.

We regard the first and second clauses of the affidavit as entirely insufficient to prevent judgment.

The third clause is in no better condition. It avers that the plaintiff being a national bank took usury in discounting the note at twenty-five per cent. or upwards of its value. It is impossible to understand how any allegation of usury can be made as to such a note as this, or how these defendants can have any interest in the usury in any event. The note was not given for a loan of money but for the price of a horse sold to them. They agreed to pay $833.33 for the horse and not for a loan of a sum of money twenty-five per cent. less than that amount. In the case of Barnet *v.* National Bank, 98 U. S. 555, the Supreme Court of the United States construing the Act of Congress of June 3, 1864, sec. 30, on the subject of taking usury by national banks said that the Act defined two categories of such cases which they then stated. This case cannot possibly come within the first category of the Act, to wit, "Where illegal interest has been knowingly stipulated for but not paid, then only the sum lent without interest can be recovered," because no sum of money was lent, and no illegal interest was stipulated for, the rate mentioned in the note itself being six per cent., which is a lawful rate.

The second category is in these words, to wit, "Where such illegal interest has been paid that twice the amount so paid can be recovered in a penal action of debt, or suit in the nature of such action against the offending bank brought by the persons paying the same, or their legal representatives." There are at least three fatal reasons why the defendants can take no benefit from this provision. (1) It has been decided several times by the Supreme Court of the United States that this defence cannot be made even by the maker of the note in an action against him on the note, (Barnet *v.* National Bank, 98 U. S. 555), nor by the surety (Stephens *v.* Monongahela National Bank, 111 U. S. 197), because the only remedy given by the Act of Congress is by a penal action to be brought for the recovery of double the amount of the illegal interest charged, and it therefore cannot be set-off in an action on the note. (2) Because no persons but those who paid the illegal interest or their legal representatives, can recover it. (3) Because no illegal interest was charged or paid upon a "sum lent," and therefore none can be recovered. The defendants if they owe anything on this note to the plaintiff, owe the whole amount of $833.33, with six per cent. interest, less any payments that were made on account. They do not owe it for money lent but for the price of a horse. So far as these defendants are concerned it is a matter of no consequence whether the plaintiff paid for the note its whole amount or any sum less than that.

Driesbach *v.* National Bank, 104 U. S. 52, is to the same effect as the above cited cases.

Judgment reversed and record remitted with directions to enter judgment against the defendants for such sum as to right and justice may belong, unless other legal or equitable cause be shown to the Court below why such judgment should not be so entered. W. C. S.

Oct., '93, 169. October 1, 1894.

Lamberton v. Dunham.

Forged note, payment of—Action of deceit to recover amount of—Bad faith in making false representations the only ground of recovery—Evidence.

The only ground for recovery in an action for false representations is the bad faith in making them, and the scienter must be proved.

If it appears that the defendant in an action of deceit knew nothing about the matter, and made the statement without any belief as to its truth or untruth, he was guilty of a moral wrong not less serious than a deliberate falsehood, and the jury may well find that he acted in bad faith and with a purpose to defraud.

Where the defendant who had stated that a signature, which proved to be a forgery, was genuine has testified that he had seen the alleged maker write and is familiar with his signature, and that his statement as to genuineness was based upon his belief founded upon this knowledge, letters containing genuine signatures of the alleged maker are admissible in evidence, as a resemblance of the admittedly genuine writing to the forgery on the check would go directly to the question of his good faith in the representation made with reference to it.

One who in good faith makes a statement, is not guilty of deceit, although the grounds of belief upon which he proceeds may be slight, and it is error to charge a jury, in an action of deceit, where a statement has been proved

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to be false, that in order to defeat the action the defendant must have had reasonable grounds for believing his statement to be true. Sincerity of belief is the only test and the jury has nothing to do with the reasonableness of the belief.

Appeal of M. M. Dunham, defendant, from the judgment of the Common Pleas of Venango County, in an action of deceit by R. G. Lamberton, S. H. Lamberton, C. M. Lamberton, partners, doing business as the Lamberton Savings Bank.

The facts of this case appear sufficiently by the charge of the Court, TAYLOR, P. J., and the opinion of the Supreme Court.

On the trial, it having been proved that the defendant identified as that of George W. Eaton, a signature which turned out to be a forgery, the defendant offered letters admitted by George W. Eaton to be subscribed by his signature, for the purpose of showing good faith on defendant's part in stating that the endorsement on the cashier's check of the Lamberton Savings Bank was genuine. This as corroborative of his testimony as to his having seen the signature of Mr. Eaton a number of times, and to show that the signatures were similar to the one on the check. This offer was overruled. (First assignment of error.)

The defendant presented, *inter alia*, the following points:

Third. If the jury find the defendant acted in good faith and believed the representations made by him to the plaintiffs were true, plaintiffs cannot recover, though such representations were untrue and plaintiffs were misled to their injury. *Answer.* Affirmed, if the jury further find that the defendant had reasonable grounds for believing such representations to be true. (Third assignment of error.)

Fourth. The question being one of good faith if the jury find the defendant was sincere in his statements their verdict must be in his favor, however apparently unfounded may seem his belief.

Answered in the negative. (Fourth assignment of error.)

Fifth. If the jury find the defendant believed his own statements, it is their duty to find in his favor. It is not their province to decide whether defendant had reasonable grounds for his belief.

Answered in the negative. (Fifth assignment of error.)

The Court charged the jury as follows:

"The plaintiffs bring this action to recover $400, with interest upon that sum from the time the money was obtained upon the 5th day of August, 1892. It is not an action of assumpsit. If at all the plaintiffs must recover for the wrongful acts either of omission or commission of the defendant. These matters that are controverted I will state over to you briefly. Some time prior to the 3d of August, it does not appear exactly when, but shortly prior to the 3d of August, a man calling himself May called at the bank in Franklin here and obtained a certain check there which is drawn to the order of Mr. Eaton. That check was good for nothing at all without Eaton's endorsement upon the back of it. About the 3d of August it transpires that this man May, who, it is admitted, was a scoundrel, about noon appeared in Jarecki's hardware store where this defendant was salesman. He was the traveling salesman in that store. Mr. Reed was in the store also and some other person. This man May entered into conversation with the defendant about the prices of oil-well supply tools. He talked with him a while and left. During the conversation the defendant here informed him of Mr. Eaton, who was a man who could give him some information he desired upon that subject. How long he was in the store the first time when the defendant was with him does not appear, but he was not there a great while, because the conversation was directed altogether to the pricing of some articles there. He is not seen again in the store until on the 5th, on Friday, at a quarter or twenty-five minutes before four o'clock. That is the time fixed exactly by the defendant when he next sees this man. May goes in and asks him to go down to the bank and identify him. He walks down to the bank with him and identifies him, saying, 'This is Mr. May.' The cashier said he did not know him, and the defendant was identified by a young man behind the counter, who said, 'Yes, that is Mr. Dunham.' The cashier says, 'I don't know Eaton's signature.' The defendant looks at it and says, 'Yes, sir, that is Mr. Eaton's signature all right.' Upon the faith of that being Eaton's signature upon that check, they paid this man May $400. Shortly thereafter it turns out that the defendant got $5 from him. He himself says he refused to take it but the fellow forced it upon him and he finally kept the $5. The plaintiffs allege it was paid for identifying him, and the defendant alleges it was for paying him for the trouble he had been to in giving him the prices upon the goods and helping him along. This was after banking hours. The bank closes at 3 o'clock and this was twenty-five minutes of 4 o'clock. The man gets the money and leaves the bank.

"[The next seen of him is by Mr. Paul. He thinks there is something wrong. He has been shadowing him for some little time, and he goes up and notifies the defendant that there is something wrong with the man. Afterwards he is notified by Mr. Paul that this man had got a horse and buggy and gone towards Reno. He then goes over to the stable and after washing

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his hands and getting things in shape he goes to the stable—I think the same stable where May had got the horse to go to Reno—at all events he goes to a stable and gets a horse and buggy to go out to Eaton's. He is told there again this man has gone to Reno. It is only a short distance to Reno. If the man could go down to Reno and catch the train it would seem he might follow him down with a buggy and catch the man before he could get the train. Instead of going in the direction he is told the man has gone, and told by the stable boy he has gone to take the train, instead of telegraphing there, he gets into a buggy and drives five miles in the opposite direction. He had driven five miles and then came five miles to Franklin and saw the train passing down around the point. The defendant's conduct after that appears to be very commendable, so far as he could, telegraphing and doing everything he could that evening to try and apprehend the man May. It is claimed upon his part he did everything in good faith and was trying to catch the fellow and did all he could for that purpose. It is claimed upon the part of the plaintiff, instead of acting in good faith, he was acting in bad faith, and went in the opposite direction from where he was told the man had gone, and after he had seen the man had got out of the country, that then he became anxious about his welfare. It is no doubt at all that when this man discovered that the man had got away, and he had been the means of assisting in getting the money from the bank, whether innocently or otherwise, he became anxious to capture May.] (Second assignment of error.)

"We will not comment upon the testimony at all. There is no controversy as to the falsity of the representations made. It is conceded that the representations made by the defendant were false. That is, when he said that that was Eaton's signature. That he was telling what was not true, that part is conceded upon the part of the defendant. Upon the face of that representation the bank paid out the money. It is narrowed down to a pretty narrow question.

"The defendant asks you to find that he was acting in good faith, and that he had reasonable grounds for believing that the representations he made as to the genuineness of the signature of Eaton was true; while the plaintiffs ask you to find if it was not actually and honestly done with intent to deceive, that the evidence shows a reckless disregard of the rights of innocent parties, that the defendant is responsible in damages for the injury which his act has occasioned. Now, gentlemen, you take the evidence all together, not piecemeal, and take the length of time this man had known the other man. How long had he known him? What opportunity had he of knowing Eaton's signature? What kind of care did he show in the representations that he knew Eaton's signature? Take all these things and then take the acts immediately afterwards, so far as they throw any light upon what transpired before that time. Take this testimony altogether and then apply this rule of law: If these representations of the defendant regarding the endorsement of Eaton were made in good faith and that he had adequate reasons to believe it was true, the plaintiffs cannot recover here. Upon the other hand, where the facts in evidence show a positive statement of a material fact which was relied upon, its falsity and circumstances tending to show a reckless assertion in conscious ignorance of the fact, is a matter of importance for the jury in arriving at whether this man was acting in good faith or not. It is enough, gentlemen, at arriving at this conclusion, if you find those facts tending to show a reckless assertion in conscious ignorance of the fact and it is a matter of some weight with the jury without any direct proof of a deceitful intent. It is not necessary to show that the person making the alleged fraudulent representations knew them to be false. It is sufficient to prove that he did not know them to be true, or, if believing them to be true, that he made them without reasonable grounds for such belief. Reasonable grounds for believing such representations to be true will not be inferred solely from the fact that the representations were untrue. As applicable to the facts in evidence in this case, I believe the true rule to be, when the alleged misrepresentations are admitted to be false, was it made under such reckless disregard of the rights of innocent parties who might be injured thereby, as would be equivalent to an intentional deceit? If made under such circumstances a plaintiff would be entitled to recover. If not under these circumstances, then your verdict would be for the defendant. If you find for the plaintiffs, you will find for the amount of the check with interest from the time the money was paid. The burden of proof is upon the plaintiffs. They must satisfy you, taking the testimony altogether, from the evidence that his theory is the correct one. The credibility of the witnesses is entirely for you. If there is any contradiction, there is very little contradiction here as to any actual facts that are material to the determination of this issue, but where there is any, if so, you must say where you will give the credit. This, with our answers to points which are submitted, will indicate our views of the law."

Verdict for plaintiff, $418, and judgment thereon. The defendant took this appeal and filed the assignments of error above indicated.

James Denton Hancock, for appellant.

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In questions based upon misrepresentations when there is no contract between the parties and no consideration upon which an implied contract can rest, the only grounds upon which a recovery for a false representation can be had must depend upon the good or bad faith with which such representation was made.

Boyd's Ex'rs *v.* Browne, 6 Pa. 316.
Huber *v.* Wilson, 23 Id. 178.
Cox *v.* Highley, 100 Id. 252.
Iron Works *v.* Barber, 106 Id. 125.
Dilworth *v.* Bradner, 85 Id. 238.
Duff *v.* Williams, Id. 490.
Kern *v.* Simpson, 126 Id. 42.

The letters should have been admitted. Comparison of hands in civil cases, where it goes in corroboration of other evidence, strongly tends to support the fact in dispute.

Farmers' Bank *v* Whitehill, 10 S. & R. 110.
Bank of Penna. *v.* Haldeman, 1 P. & W. 161.
Callan *v.* Gaylord, 3 W. 321.

These papers should also have been admitted upon a different principle of evidence. The issue here was not forgery, but whether the defendant exercised good faith in identifying a signature, and all evidence should have been admitted to the jury tending to explain his conduct in the matter. In this case a comparison of the papers by the jury would have been conclusive as to the good faith of the defendant.

The comments to the jury by the Court with reference to the defendant's actions after he had learned of the forgery, tended to mislead the jury and influence the verdict.

The Court erred in setting up as the test of the defendant's liability the existence of a reasonable belief on his part of the genuineness of the signature.

In an action for deceit the jury have to deal with a question of good faith and if they are satisfied that the defendant believed his own story it is their duty to find in his favor. A man who believes what he says is not chargeable with bad faith and the state of his belief is a fact for the jury. Sincerity of belief, however apparently unfounded is unmixed matter of fact.

Dilworth *v.* Bradner, 85 Pa. 238.
Duff *v.* Williams, Id. 490.
Boyd's Ex'rs *v.* Browne, 6 Id. 376.

J. H. Osmer, (*E. H. Lamberton* with him), for appellee.

"A comparison of handwriting is admissible in evidence in civil cases in corroboration of the belief of a witness, founded upon actual knowledge."

Bank of Pennsylvania *v* Haldeman, 1 P. & W. 161.
Travis *v.* Brown, 43 Pa. 9.
Cohen *v.* Teller, 93 Id. 123.

But what possible application has this rule to the facts of this case? No question as to the genuineness of handwriting was at issue. It was admitted that the signature to the check was forged.

If a man affirms that to be true within his own knowledge which he does not know to be true, this falls within the notion of legal fraud; the fraud consists in asserting positively his knowledge of that which he did not know.

Griswold *v.* Gebbie, 126 Pa. 353.
Addison on Torts, 407, sec. 1177.

"Fraud consists in false representations of things as facts which are not such, or in deceitful concealment of existing facts."

Grove *v.* Hodges, 55 Pa. 504.

It is not necessary to show that defendant knew as a fact what he stated was false. If he made the representation, not knowing it to be true, or without reasonable and probable grounds on which to suppose it to be true, he acted fraudulently.

Erie City Iron Works *v.* Barber, 106 Id. 139.

January 7, 1895. FELL, J. This action was founded upon the allegation that the defendant had falsely and fraudulently represented that the forged endorsement of a check was genuine. The error which appears in the charge and in the answers to points, is that the defendant was held not only to have acted in good faith, but to have had adequate reason for his belief.

It was shown at the trial that a stranger, representing himself to be Charles H. May, called at a store in Oil City where the defendant was employed, and examined machinery which he expressed a desire to purchase. During the course of his pretended negotiations he inquired for a competent judge of oil property, and was referred by the defendant to George W. Eaton. In the light of after events it became evident that his purpose was to lay the ground for a correspondence with Mr. Eaton in order to obtain his signature. Having done that he forged two notes purporting to have been made by Mr. Eaton, and presented them at the Lamberton Bank at Franklin for discount. The cashier of the bank, who knew the signature of Mr. Eaton, did not discover the forgery, but took the precaution to make payment by check to his order. May forged an endorsement of the cashier's check, and presented it for payment at a branch of the bank at Oil City. The cashier there not knowing the signature of George W. Eaton required proof of it, and also the identification of Charles H. May. At May's request the defendant, who was familiar with Mr. Eaton's signature, went to the bank and in reply to inquiries made, said: "This is Charles H. May," and identified the signature as that of George W.

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Eaton. Whether the person who planned and committed the forgery was Charles H. May did not appear at the trial and is of no importance in any aspect of the case, as no credit was given him as an individual. The right of recovery against the defendant, if any, was based entirely upon the identification of the signature of George W. Eaton.

The action was for deceit, and the primary question was whether the defendant had acted in bad faith in making the statement which led to the payment of the check. He acted in bad faith if he knew that the statement was untrue. If it appeared that he knew nothing about the matter, and made the statement without any belief as to its truth or untruth, he was guilty of a moral wrong not less serious than deliberate falsehood, and the jury might well have found that he acted in bad faith and with a purpose to defraud. But he could not be convicted of fraud because he entertained a belief which was not well founded. Whether he had a belief and honestly expressed it was in issue, but the reasonableness of his ground for that belief could not be called into question. As was said by SHARSWOOD, J., in Dilworth *v.* Bradner, 85 Pa. 238: "It would introduce a new and very dangerous element into the case to say that the jury must decide whether the defendant had reasonable grounds for his belief." That the scienter must be proved, and that the only ground for recovery in an action for false representations is the bad faith in making them, is settled in a long line of cases including Boyd *v.* Browne, 6 Pa. 316; Huber *v.* Wilson, 23 Pa. 178; Bokee *v.* Walker, 14 Pa. 139; Duff *v.* Williams, 85 Pa. 490; Cox *v.* Highley, 100 Pa. 252; Iron Works *v.* Barber, 106 Pa. 125; Kern *v.* Simpson, 126 Pa. 42; Griswold *v.* Gebbie, 126 Pa. 353. The subject has been so fully considered in some of the later decisions that its further discussion is unnecessary.

The offer of letters containing the signature of George W. Eaton should been admitted. The defendant testified that he had seen Mr. Eaton write, and was familiar with his signature, and that his statement to the cashier was based upon his belief founded upon this knowledge. The resemblance of the admittedly genuine writing to the forgery on the check went directly to the question of his good faith.

The first, third, fourth and fifth assignments of error are sustained and the judgment is reversed with a venire facias de novo.

W. C. S.

Oct. '94, 12. October 17, 1894.

Lithgow v. Supreme Tent of the Knights of the Maccabees of the World.

Beneficial associations—Insurance—Act of May 11, 1881—Evidence.

A certificate of membership in a beneficial association is not an insurance policy within the meaning of the Act of May 11, 1881, and it is not requisite that the by laws be contained in or attached to the certificate.

Dickinson *v.* A. O. U. W., 159 Pa. 258, followed.

Appeal of The Supreme Tent of the Knights of the Maccabees of the World, defendant, from the judgment of the Common Pleas of Washington County, in an action by Annie M. Lithgow, upon a certificate given by the defendant upon the life of her husband.

On the trial of this case before MCCLUNG, J., the following facts appeared: —

The defendant was a mutual benefit association, organized under the laws of the State of Michigan, and had established throughout the United States local organizations, known as great camps and subordinate tents or lodges, through the medium of which it operated in securing members, collecting assessments, and transacting business with its members. All of these great camps and subordinate tents or lodges were governed by the laws, rules and regulations adopted by the supreme tent of the order, which possessed original and exclusive jurisdiction, and was the supreme tribunal as to all matters emanating from subordinate tents, and as to all death claims, or any other claim which a member, or the beneficiary of a member, had against it. The object of the association, as set forth in its constitution and by-laws, was "to provide for endowments, sick benefits, funeral and accident disability benefits to its members between certain ages; to give all moral and material aid in its power to its members and those dependent upon them; to educate its members socially, morally and intellectually; to create a fund for the relief of sick and distressed members, and to care for the living and bury the dead; to establish a benefit fund or funds from which, on satisfactory evidence of the death of an endowment member of the order, who has complied with all its lawful requirements, a sum not exceeding three thousand dollars shall be paid to the beneficiary of such member, as he shall direct, and the laws of the order shall provide." About July 11, 1891, George W. Lithgow, husband of the plaintiff, became a member of this order, but his certificate of membership was not received and countersigned until August 17, 1891, and was never delivered to him, for the reason that on the morning of July 22d, eleven days

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after his entrance as a member into the defendant order, he was found alongside the public road with a pistol shot wound in his head, from which he died four days afterwards. A certificate was subsequently obtained by his widow, by whom all the proofs of the death of her husband were submitted, in the manner pointed out by the by-laws of the association, to the board of trustees of the defendant company; the decision was "that said death claim is not on the face a valid one," and the plaintiff was notified that she would have the opportunity to appear before the board within sixty days and present such evidence as she might have to establish the justness of her claim. This she declined to do, and action was subsequently brought.

The defendant offered in evidence its by-laws, containing a provision requiring the submission of claims to the decision of the board of trustees, and providing that no benefit should be payable when the death was the result of suicide within two years after admission. These offers were objected to, for the reason that the by-laws were not endorsed on or attached to the certicate of membership, and were therefore incompetent under the Act of May 11, 1881. This objection the Court sustained. (First assignment of error.)

The defendant submitted, *inter alia*, the following points:—

1. One who becomes a member of an organization, such as the Knights of the Maccabees, is chargeable with knowledge of its laws and rules, and is bound by them, and cannot refuse obediance to them unless they are illegal or require the performance of acts which the law forbids. *Answer*. This is correct as an abstract principle, but will not, in the face of the Act of May 11, 1881, make unattached or unendorsed by-laws a part of the policy; and for the purposes of the present case the point is refused. (Eighth assignment of error.)

2. That under the terms of the endowment certificate, upon which this suit is brought, the "provisions of law" printed on the back of the said endowment certificate are a part of the plaintiff's contract, and under the provisions of the fourth paragraph thereof, the power to pass upon the validity of all death claims is vested in the board of trustees of the said defendant association, subject to appeal to the supreme tent, as therein provided, and the jurisdiction of these officers, or this tribunal, is conclusive, and no suit at law or equity can be maintained in this case, and the verdict of the jury must be for the defendant. *Answer*. This is refused *pro forma*, and reserved, as I have explained to you; you will treat it as refused absolutely; that is a question for the Court to determine, and this is a question which is reserved in the form of verdict that I send out with you. (Ninth assignment of error.)

Verdict for plaintiff; the Court subsequently discharged a rule for judgment *non obstante veredicto*, and entered judgment for plaintiff. The defendant took this appeal, and filed assignments of error, *inter alia*, as above indicated.

J. W. Donnan, (with him *A. Donnan* and *James Q. McGiffin*), for appellant.

If the defendant in this case is to be classed with life insurance companies, then this act would exclude all reference to the by-laws, except such as are printed upon the back of the policy.

Pickett *v.* Ins. Co., 144 Pa. 79.
Hebb *v.* Kittanning Ins. Co., 138 Id. 174.
Norristown Title Co. *v.* Hancock Ins. Co., 132 Id. 385.

But that it cannot be so classed is apparent upon an examination of its constitution and by-laws. It has no capital stock, no profits to be divided, and does not agree to pay any fixed sum to the insured, but is only the agent of the members of the different lodges for the collection of assessments which the members agree to pay upon the death of any fellow members. The obligation of the company is to pay over the proceeds of one assessment on the membership of the order, and the beneficiary's right to receive the proceeds of such assessment is subject to a compliance, on the part of the insured, with the laws, rules and regulations of the order governing members and their beneficiaries "which are now in force or may hereafter be adopted by the supreme tent, or the subordinate tent to which he belongs." This stipulation is a part of the contract entered into between the company and the insured, and recognizes the right of the association to change its by-laws from time to time, and agrees that such changes shall be binding upon the beneficiary. Such provisions have been held binding upon all the members of associations, whether admitted subsequently or prior to the adoption of such by-laws.

MacDowell *v.* Ackley, 93 Pa. 277.

Since the entry of judgment in this case, this Court has decided, in Dickinson *v.* Ancient Order of United Workmen, 159 Pa. 258, that a certificate of membership of a beneficial association is not a contract of insurance within the meaning of the Act of May 11, 1881, P. L. 20.

The by-laws of the defendant association, whether endorsed on or attached to the certificate of membership or not, form a part of the contract with the insured, and are binding on its members.

Bacon on Ben. Soc., secs. 69, 79, 81.

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Morawetz on Corp., sec. 491.
16 Eng. and Am. Enc. 41.
Sperry's Appeal, 116 Pa. 391.
Elwell *v.* Chamberlin, 31 N. Y. 619.
Baker *v.* Union Mut. Ins. Co., 43 Id. 287.
Story on Agency, sec. 419.
Riddle *v.* Hall, 99 Pa. 122.
Penna. Gas Co. *v.* Cook, 123 Id. 170.

J. A. Langfitt, (*J. F. McFarland* with him), for appellee.

Defendant's argument avoids the point at issue by assuming that defendant is not an insurance company, and then arguing that its by-laws should have been admitted for the purpose of proving that it was not an insurance company. Such an assumption has no evidence to support it. The burden is upon the defendant to show that it is not an insurance company; that it had no capital stock; that its business was not carried on for profit; that the benefits, by the rule of the organization, "are payable to their own unfortunates, not as an indemnity or security against loss, but as a protective relief in case of sickness or injury, or to provide the means of a decent burial in the event of death," and that their contract "altogether excludes the idea of insurance, or of indemnity, or of security against loss."

Commonwealth *v.* Beneficial Association, 137 Pa. 420, quoted approvingly in Dickinson *v* A.O. U. W., 159 Id. 263.

This much the defendant must show before it can claim that the Act of May 11, 1881, does not apply to it. This it did not show. The peculiar name of the defendant, and the fact that it has subordinate tents or lodges do not prove its purposes.

January 7, 1895. FELL, J. Two questions arose at the trial: first, whether the certificate of membership of the deceased was an insurance policy within the meaning of the Act of May 11, 1881, in which case no defence based on the by-laws could be made, as they were not contained in or attached to the certificate; and, second, whether the provision of the by-laws making the defendant the final arbiter of the right of the beneficiary to recover, was illegal as ousting the jurisdiction of the courts. The second question was reserved, but it appears by the opinion filed that it was left undecided; and judgment was entered on the verdict without disposing of it, for the reason given that the by-laws having been excluded, all defences based thereon fell.

The learned Judge of the Common Pleas did not consider the question involved, as ruled by the decision in Commonwealth *v.* Equitable Beneficial Association, 137 Pa. 412. The latter case arose under a different Act of Assembly, that of April 29, 1874; but the question was whether the defendant was an insurance company or a beneficial association, and the distinction so clearly pointed out in the opinion by CLARK, J., between these two classes of organizations has since been approved and followed in the case of Dickinson *v.* A. O. U. W., 159 Pa. 258, in which the opinion of the Court was delivered by the present Chief Justice. That case arose under the Act of May 11, 1881, and presented the identical question now under consideration, and this case is distinctly ruled by it. It is due the learned trial Judge to say that the opinion in that case was not filed at the time of his decision of this.

The assignments of error touching the refusal of the Court to admit the by-laws in evidence are sustained. As the questions raised by the other assignments were not passed upon in the Common Pleas, we express no opinion concerning them.

The judgment is reversed and a venire de novo awarded. W. C. S.

Jan. '94, 503. May 16, 1894.

Grieve's Estate.

Husband and wife—Widow's exemption—Severance of conjugal relation, effect on—Separation for no fault of the wife not a bar to the claim.

Where a husband has deserted his wife, and the conjugal separation does not arise from any fault of hers, the family relation still exists, and his domicile is hers, so as to entitle her to claim a widow's exemption.

While a wife living in a foreign country, who has never formed part of her husband's family here, is not generally entitled to the exemption, this rule is not applicable where the separation has been brought about by the husband's causeless and wilful desertion of his wife.

Spier's Appeal, 26 Pa. 233, distinguished.

Appeal of Henry Martin, from the decree of the Orphans' Court of Lancaster County, dismissing exceptions to the appraisement of property to the value of $300 to Mary Grieve, widow of Archy M. Grieve, deceased.

The facts of this case were as follows: Archy M. Grieve, the decedent, was married on December 25, 1876, at Pine Grove, in the Dominion of Canada, to Mary Smith. Archy M. Grieve and Mary Grieve lived and cohabited together in that place for five years, during which time three children were born to them. About 1881 or 1882 Grieve deserted his wife, and some time afterwards, during which period she knew nothing of his whereabouts, he wrote to her, asking her to meet him in the Province of Ontario. This she did, the result being that they were reconciled and continued to live together for some time. About October, 1884, he again left her and went to the United States,

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with the understanding on the part of his wife that he would make a home for her there, and send for her, while she should remain in Canada until he did so. He did not, however, provide a home for her in the United States, or elsewhere, nor did he come or send for her, in consequence of which she was obliged to work for the support of herself and family. He occasionally wrote to her until November 1, 1888, after which time she heard nothing from him; but his letters gave no information as to his whereabouts, for they were never mailed from the places at which they appeared to have been written. In 1889 Grieve, who was living in Lancaster, Pennsylvania, married Hannah A. Miller, in Philadelphia, and continued to live with her as man and wife, until his death on the 23d day of August, 1893. Grieve died insolvent, and Henry Martin, one of his creditors, was duly appointed his administrator. Both Mary Grieve and Hannah A. Grieve, each claiming to be his widow, requested the administrator to have appraised and set apart for her, as such widow, property to the value of $300, which she elected to have and retain out of the real and personal estate of the decedent. The administrator accordingly had appraisements made in compliance with each request, which appraisements were both filed, and presented to the Orphans' Court of Lancaster County for confirmation. Both appraisements were excepted to, and the Court sustained the exceptions to the appraisement filed on behalf of Hannah A. Grieve, and confirmed the appraisement in favor of Mary Grieve. Whereupon Henry Martin, as a creditor of the estate, took this appeal, assigning for error, the action of the Court in awarding to Mary Grieve the exemption which she claimed, on the ground that she was an alien, and not a resident of Pennsylvania at the time of the decedent's death, and had never formed a part of his family here, or in the United States.

J. B. Holahan (with him *Martin & Alexander*), for appellants.

Neither the intention nor the language of the Act of April 14, 1851, applies to the case of a wife who has lived in a foreign country for years, separate from her husband, and who has never formed part of his family here.

Spier's Appeal, 26 Pa. 233.
Groves's Estate, 5 C. C. R. 498.
Coates' Estate, 6 WEEKLY NOTES, 367.

A non-resident is not entitled to the benefit of the exemption.

Yelverton *v.* Burton, 26 Pa. 351.
Collom's Appeal, 2 Pennypacker, 130.
McCarthy's Appeal, 68 Pa. 219.

W. U. Hensel (*J. Hay Brown* with him), for appellee.

The appellee was not an alien. The separation was not due to any fault of hers, and his residence in Pennsylvania drew her to that State, and his domicile was hers. It is not the law that the wife of a citizen of Pennsylvania must be naturalized in order to get the benefit of the widow's exemption.

Wright's Estate, 5 C. C. R. 228.
Moore's Appeal, 3 Pennypacker, 110.
Spence's Estate, 5 C. C. R. 494.
Terry's Appeal, 55 Pa. 344.
Simpson's Estate, 22 WEEKLY NOTES, 172.

In the cases in which the exemption was refused, it was always because the wife had by her own fault, misconduct or voluntary act, relinquished the family relation.

Spier's Appeal, 26 Pa. 233.
Dillinger's Appeal, 35 Id. 357.
Odiorne s Appeal, 54 Id. 175.
Hettrick *v.* Hettrick, 55 Id. 290.
Platt's Appeal, 80 Id. 501.
Coates' Estate, 6 WEEKLY NOTES, 367.
Burkett's Estate, 5 C. C. R. 502.

January 7, 1895. McCOLLUM, J. Henry Martin, the appellant, is a creditor and the administrator of the estate of Archy M. Grieve, deceased, and Mary Grieve, the appellee, is the widow of the decedent, and as such claimed and was awarded in the Court below the exemption allowed by the 5th section of the Act of April 14, 1851, P. L. 613.

The decedent and the appellee were lawfully married at Pine Grove, in the Province of Ontario, Canada, on the 25th of December, 1876, and lived together there five or six years, during which time three children were born to them. In 1881 or 1882 he abandoned his wife and children and went they knew not where. After an absence of two or three years he wrote to his wife requesting her to meet him in Hamilton in the Province of Ontario. She complied with his request, and the result of their meeting was that they became reconciled to each other, and about the first of October, 1884, he left "for the States" with the understanding between them that he should make a home for them there and that she should remain in Canada until he came or sent for her. He occasionally wrote to her until November 1, 1888, after which time she heard nothing from him. His letters furnished no satisfactory clue to his whereabouts. As they were never mailed at the places in which they appeared to have been written, they indicated that he was without a residence, or if he had one that he meant to conceal it from her. It now appears that in 1888 he settled in Lancaster, Pa., and that in 1889 he married another woman, who lived with him there until the 23d of August, 1893, when he died. As the appellee was never divorced from him, nor he from

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her, the second marriage was void, and her rights in his estate were not affected by it. All the evidence points to the conclusion that the appellee was a devoted wife and mother, and that she bravely bore the burdens which her husband's malicious and inexcusable desertion of his family imposed. To maintain herself and her children she taught school, gave music lessons and finally became a trained nurse. At the time of his death she, with two of her children, was in Buffalo, N. Y., where she had been for the most of the time for three or four years previous thereto. After she came to Buffalo she was employed in Potter County, Pa., about two months. There was no time after his departure in 1884 that she would not have gladly welcomed a redemption of his promise and rejoiced in a reunited family. It was no fault of hers that she was not a member of his household at his death. It was his illegal acts and bad faith that excluded her from it. In contemplation of law the family relation still existed and his domicile was hers. Why, then, should she be denied the exemption which the law allows to his widow? Surely a refusal of her claim for it must have something more to rest upon than his repudiation of his marital vows and duties. The only case which seems to lend some support to the appellant's contention is Spier's Appeal, 26 Pa. 233. In that case the wife lived in a foreign country and never formed a part of her husband's family here. There is nothing in the report of the case explanatory of their apparent separation, nor anything which suggests that he deserted her. All that appeared was the bare fact that she did not come to this country with him or while he lived, although his home was here for nearly five years before his death. The case cannot therefore be regarded as an authority for the proposition that a husband's causeless and wilful desertion of his wife constitutes a bar to her claim for the exemption provided by the Act of 1851. In the subsequent cases in which the claim was disallowed on the ground of a severance of the family relation, the separation was the voluntary act of the wife, the result of her misconduct, or founded upon an agreement for alimony, and a release of all claims upon her husband's estate.

A careful consideration of the decisions bearing upon the question before us has convinced us that the learned Court below reached a correct conclusion in this case.

Decree affirmed and appeal dismissed at the costs of the appellant. S. H. T.

Oct., '94, 279. October 3, 1894.

In re Voluntary Assignment of Braden.

Fi. fa.—Levy—Sheriff's return—Assignee for benefit of creditors—Constitutional law—National bank stock.

The mere fact that a sheriff has lost a paper containing a list of stocks upon which he has levied, which paper it was intended should be made part of the return to a writ of fi. fa., does not destroy the effect of the levy as between the execution plaintiff and an assignee for the benefit of creditors of the defendant, to whom the assignment was delivered after the fi. fa. had come to the hands of the sheriff.

National bank stock is subject to levy under a writ of fi. fa.

Appeal of Isaac K. Wood, assignee for the benefit of creditors of D. W. Braden, from the decree of the Common Pleas of Greene County.

The facts of this case sufficiently appear in the opinion of the Supreme Court, *infra*.

R. F. Downey, (*F. W. Downey* with him), for appellant.

The lien of an execution expires unless a levy is made before the return day.

Com'th *v.* Contner, 18 Pa. 446.

The testimony here does not show an actual levy, the list of stocks given by Mr. Axtell to the sheriff does not constitute a levy.

McClelland *v.* Slingluff, 7 W. & S. 134.
Henderson *v.* Henderson, 133 Pa. 399.

A levy is a seizure, there must be some possessory act to constitute a levy or it must be asserted by word of mouth.

Duncan's Appeal, 37 Pa. 502.

To constitute a levy on stock of a corporation the sheriff must go to the proper office of the corporation as well as to the defendant himself and notify him of the levy.

Princeton Bank *v.* Crozer, 22 N. J. L. 383.

The sheriff's return can not be aided by parol.

Heinbaugh *v.* Powell, 13 Pa. C. C. 360.
Henderson *v.* Henderson, 133 Pa. 399.
Diller *v.* Roberts, 13 S. & R. 60.
Sawyer *v.* Curtis, 2 Ash. 127.
Kintzing *v.* McElrath, 5 Pa. 467.
Barnes *v.* Billington, 1 W. C. C. R. 38.
Mentz *v.* Hamman, 5 Whar. 150.

The stock in the national bank was not subject to seizure upon fi. fa. At common law shares of stock were not subject to either attachment or execution, and the right to so take them here depends on the Act of March 29, 1819, § 2, but such Act cannot apply to national banks, which are creatures of the national Legislature

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and over which the State Legislatures have no power, except as authorized by Act of Congress; even the right to tax national bank shares depends upon an Act of Congress.

U. S. Rev. Stat., sec. 5219.
McCulloch *v.* Maryland, 4 Wheat. 316.
Osborne *v.* Bank of U S.. 9 Id. 738.
Nat. Bank *v.* Com'th, 9 Wall. 353.
Markoe *v.* Hartranft, 6 Am. Law Reg N. S. 487.
Pittsburgh *v.* First Nat. Bank, 55 Pa. 51.

There is no Act of Congress authorizing a levy upon national bank shares.

J. W. Ray, (*H. B. Axtell* with him), for appellee.

The Act of 1819 applies to national bank stock, such is declared by Act of Congress to be personal property.

U. S. Rev. Stat. 5139.

The evidence shows that the stock was levied upon.

January 7, 1895. DEAN, J. On November 27, 1889, Daniel W. Braden made a general assignment for benefit of creditors of all his estate to Isaac K. Wood. The deed was recorded the same day. On the same day, Jane Howden entered a judgment against Braden for $7,397.-61, and immediately issued execution thereon; the writ came into the sheriff's hands at 11.30 A. M., as shown by the endorsement; the deed of assignment was delivered to the assignee at 1.50 P. M. When the execution came into the sheriff's hands, Braden was the owner of 3 shares of Masonic Building Association stock, of the par value of $10 per share; 20 shares of Telephone Co. stock; 3 shares of capital stock of Farmers' and Drovers' National Bank of Waynesburg, Pa., (new series), par value $50 per share; 35 shares of the same bank of the par value of $25 per share; also a lot of hogs and other personal property on several farms owned by him.

By virtue of his writ, the sheriff, on the 6th and 9th of December following, levied on the personal property on the farms, and sold it, and paid the money into Court; he then advertised the bank and other stocks for sale, the day of the sale being January 11, 1890. Before the sale, Wood, the assignee, presented his petition to the President Judge, averring that Jane Howden, plaintiff, had no lien on said stocks by virtue of the execution, and that the title to the stocks was in him by reason of the assignment, and that because of the disputed title they would not sell for their value. Thereupon, all parties consenting, an order was made staying the execution, and directing the assignee to make sale of the stocks and hold the proceeds until the rights of the several claimants were determined. Accordingly, the assignee sold the stocks for the sum of $1,572.75, and held the fund for distribution. The Court then appointed J. P. Teagarden, Esq., auditor, to take testimony and ascertain liens against the property which produced the fund. On the hearing before the auditor, he found as facts: 1. No memorandum of a levy upon these stocks was made upon the writ by the sheriff. 2. In his return to the writ, he does not state he had levied upon them. 3. He did not have the physical possession of the stocks at any time after the writ came into his hands. 4. He did advertise them for sale, as if levied upon, on January 11, 1890. 5. That Mr. Axtell, attorney for the execution creditor, about December 20, handed to the sheriff a list of the stocks, which the sheriff exhibited to Braden, the debtor, who pronounced it correct.

The sheriff testified, that when Mr. Axtell gave him the list, he called upon Dr. Braden, who acknowledged he was the owner of the stocks specified in it, and that then, he made a levy on these stocks, and according to his recollection, he put the list in the writ, but did not attach or fasten it. He can give no reason for not transferring the list to, or transcribing it on the writ, as part of the levy, except that he forgot to do so; he knows he intended to put it on.

The auditor concludes, that the evidence is sufficient to establish the fact of a levy made by the sheriff on the stocks before the return day of the writ. He therefore finds, that the writ of the execution creditor was a lien upon the stocks, and on the proceeds of the sale in the hands of assignee, and directs that the amount, less costs, shall be paid over by the assignee to her. To this report exceptions were filed by the assignee, which were overruled by the Court, and the report confirmed absolutely, from which decree the assignee takes this appeal.

Appellant's ten assignments of error may be condensed into one without eliminating anything of merit, or weakening the force of the argument. Did the sheriff make a legal levy on these stocks before the return day of his writ? If he did, the fund goes to the execution creditor; if he did not, it goes to the assignee.

As has already been noticed, the writ came into the sheriff's hands at 11.30 A. M. of 27th of November, 1889. By that mere fact, it became a lien upon all the personal property of the debtor until the return day, the 4th of January, 1890. But then, unless an actual levy was made in the interval, the life of the writ expired. By virtue of it, the sheriff, on 6th of December, 1889, did levy and endorse the same, of certain other personal property upon the farms of Braden. On the 9th of same month, he endorsed the levy of still other property. All of this he sold on the 18th,

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19th and 20th of December, and made return thereof. The appellee claims, that he also made a levy on this bank and other stocks about the 20th of December, fourteen days before the return day, and that notice of the sale on the 11th of January, 1890, was published some day of the last week in December, 1889. The fact that the sheriff announced in December he would sell these stocks has no further significance than that it is, to some extent, corroborative of his statement, that he had actually levied on the stock about the 20th of December. It is argued with some force, that it is improbable he would offer for sale property which he had not seized and could not deliver. Mr. Axtell gave a written list of the stocks with their par value to the sheriff to be levied on, who then went to Dr. Braden and inquired if it was correct; he acknowledged he owned the stocks named on the list; the sheriff then made a levy on the stocks, and put the list in the writ. The deputy sheriff testifies, he saw this list of stocks, and thinks it stated the names of the parties and number of the case, headed by a direction from Mr. Axtell to levy. This paper, he says, was kept inside the writ. The proper, as well as the best evidence of a levy, is the endorsement of the officer upon his writ. Whatever custody he may then take of the property, in the interval between seizure and sale, is not important to the creditor; the officer's responsibility commences from the date of the levy. So it seems to us, the fact, that from the date of the alleged seizure, the stocks were left in possession of the debtor, is not significant; the other personal property, of which the levy was endorsed, continued in the possession of the debtor until sale; the levies having been made from lists furnished by him. As to these stocks, he acknowledged he owned them, and that the list was correct. If the levy was made, the sheriff, at his own risk, could leave them in custody of the debtor. No particular formality was legally necessary to constitute a levy. The sheriff might announce his levy on the stocks in the list, to the debtor, and then inclose the list with his writ, to be afterwards attached to or more securely made part of it. This would constitute a sufficient levy or seizure, for the sheriff thereby became answerable for the stocks, the same as if he had taken them to his office.

The only question is, was there an actual levy? There is no endorsement on the writ as evidence of it. The list has been lost, but its contents are substantially proven by Mr. Axtell and the deputy sheriff, as well as by the sheriff. He may have endorsed upon it with ink or pencil "levied" before placing it in the writ. If it were now produced with such an endorsement, with the writ, that would be sufficient endorsement of a levy. The evidence is clear, the sheriff intended to make a levy when he called upon Dr. Braden, for he had with him the list of the stocks furnished by the creditor's attorney with instructions to levy. As to whether he actually did levy, the evidence is much weaker. But this was all considered by the auditor, with the witnesses before him, and he has found as a fact, that the levy on these stocks was made about the twentieth of December. In this, there is no manifest error. If actually made, the loss of the paper enumerating and describing the stocks, and which it was intended should be attached to and made part of the return to the writ, cannot invalidate the lien of the execution creditor.

It will be observed, that this is not a contention between two execution creditors, in which the junior creditor claims to have been misled by an incomplete record, and then thus misled, on the return day issued his writ, and levied upon property on which there was apparently no prior lien, thus incurring costs by the neglect of an officer. It is simply a question as to whether property, on which the execution creditor, without question, had a lien from the moment the writ came to the sheriff, lost it by the officer's failure to make it effective by endorsement of levy before the return day. It is not necessary to decide what would be the effect of the failure to return and put upon the record a levy on the older writ, before the return day, if the case were between two writs. The misleading record in no way misled this assignee; therefore, we do not pass upon this question.

The cases cited by appellant are not applicable to the facts of this one. In McClelland *v.* Slingluff, 7 W. & S. 134, the paper purporting to be a levy, was never inclosed in or attached to the writ, nor did the sheriff testify he had gone to the debtor, who verified its correctness, and that he then made a levy. In Henderson *v.* Henderson, 133 Pa. 399, it is ruled that mere specific written instructions to the sheriff to levy on certain property, do not constitute a levy. It would have been held otherwise, if the sheriff, in that case, as in this, in pursuance of the instructions, had made an actual levy, and then inclosed the list with his writ.

In this case, there is no attempt to contradict the sheriff's return, it is sought only to supply an omission occasioned by the loss of an important part of the paper before the return day. If he had lost the writ itself, with the endorsement upon it, parol proof could have been invoked to supply them.

The argument of the learned counsel for appellant, that the national bank stock levied upon is not subject to seizure and sale under State laws, and that such a procedure could only be

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authorized by Act of Congress, is ingenious but not convincing. Our understanding of the Constitution of the United States, is, that all powers not therein granted to Congress, are withheld. We do not find anywhere in it, a grant of authority to declare exempt from levy and sale for debts contracted under State laws, the property of debtors, except in bankruptcy proceedings under national bankruptcy laws.

It has been held, that the national Government has power to charter banks as a necessary and useful instrument in its fiscal operations, and to that end may exempt the shares of stocks and issues from taxation. But Congress has not anywhere, in the national banking law, undertaken to declare that investments in the stock of such banks shall not be subject to seizure for debt. There is no analogy between the power to regulate and promote, by congressional enactment, the fiscal operations of the Government, by taxation or exemption from it, and an attempt to protect a debtor's property from seizure in payment of his debts. So we are of the opinion, that the Act of Assembly of 1819, which subjects the stock of any individual in any body corporate to levy and sale, the same as other goods and chattels, authorized this levy.

The decree is affirmed, and the appeal is dismissed at costs of appellant.

H. B.

Oct. '94, 126. October 9, 1894.

Township of French Creek, for use of Pringle v. Moore.

Settlement—Compromise—Finality of—Estoppel—Entry on justice's docket of terms of settlement—Evidence.

A. brought action against a township to recover for material furnished; both parties appeared before the justice, the township being represented by its supervisors, and a settlement was arrived at, which was reduced to writing by the justice, and after being read to and by the parties and assented to, was entered upon his docket. It was as follows: "December 10, 1892, parties appear and settle by defendants giving plaintiff a credit in full of all road tax assessed against the plaintiff for each and every year to this date, including the tax for 1892, the plaintiff to pay the costs taxed." Subsequently, the township brought action against A. to recover road taxes on tax duplicates for the years 1890, 1891 and 1892. The township endeavored to avoid the effect of the settlement by alleging that nothing was taken into consideration before the justice but the work road tax, and that the money tax, for which action was brought, was not then considered:

Held, (*a*), the settlement was conclusive against the plaintiff's claim, whether considered as a judgment or as an agreement; (*b*), that it was not open to the plaintiff to show by parol its understanding of the agreement; (*c*), that the fact that the settlement was not signed by the parties did not affect its binding force, as it had been formally assented to by them before the justice.

Appeal of Seth L. Moore, defendant, from the judgment of the Common Pleas of Mercer County, in favor of the Township of French Creek, for the use of William C. Pringle, plaintiff, in an action brought to recover road taxes.

This action began before a justice, and was removed to the Common Pleas by appeal.

The facts sufficiently appear in the head-note, *supra*, and in the opinion of the Supreme Court, *infra*.

On the trial, MEHARD, P. J., admitted evidence of persons present at the justice's office, that the only taxes there considered were work taxes and not money taxes. The learned Judge refused points of the defendant to the following effect: (1), that the verdict must be for the defendant; (2), that the settlement of December 10, 1892, was final, and the tax sued for in the present action being demandable at that date, and Moore having complied with the settlement by the payment of costs, the plaintiff cannot maintain its action; and in his general charge submitted to the jury, as a matter of fact, "whether the defendant, Seth L. Moore, and the supervisors of French Creek township had a settlement embracing this money tax for which Mr. Pringle seeks to recover in this case."

Verdict for plaintiff and judgment thereon.

The defendant took this appeal, and assigned as error, the refusal of his points, the submission to the jury of the effect of the settlement, and the admission of parol testimony with reference thereto.

W. H. Cochran, for appellant.

The settlement had all the binding effect of a judgment of record, and was a legal termination of the action, and so estops either party from recovering anything that was or could have been included in it, both on general principles, and by the Act of May 20, 1810, §7. Considered as an agreement the settlement could not be varied by parol, there being no allegation of fraud or mistake in drawing.

Hagy *v.* Umberger, 10 S. & R. 342.
Wallace *v.* Baker, 1 Binn. 610.

The docket was the best evidence to show the cause of action before the justice, and it could not be contradicted or varied by parol.

Coffman *v.* Hampton, 2 W. & S. 387.

S. R. Mason, for appellee.

Conceding that the docket entry amounted to a record, it was yet for the jury to determine what was adjudicated.

Kaster *v.* Welsh, 157 Pa. 590.
Chase *v.* Bank, 56 Id. 356.

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January 7, 1895. DEAN, J. This issue involves but little law and less money; the judgment is for $19.12. We suppose the expense of paper books and counsel fees, on each side, will foot up five times that sum.

The defendant was a resident and tax-payer of the township for some years prior to 1892, and had furnished lumber and other material to the road supervisors for repair of bridges and culverts, for the price of which he usually received credit on his road taxes. In December, 1892, Moore claimed there was a balance due him from the township of $14.50, and requested settlement and payment. The supervisors refused, and he entered suit against the township before John Peters, a justice of the peace. On the day of hearing, December 10, 1892, the parties appeared, the township by the road supervisors, and the justice makes this entry on his docket: "Parties appear and settle, by defendants giving plaintiff a credit in full of all road tax assessed against the plaintiff for each and every year to this date, including the tax laid for 1892, the plaintiff to pay the costs taxed. Witnesses all agree not to charge costs in case. This settles all matters at variance."

This entry was read out publicly by the justice, in the hearing of all parties, and both of the supervisors read it. Then Moore paid the costs provided in the settlement, amounting to $1.05.

On March 4, 1893, the township brought suit against Moore before another justice, George J. Patton. In this suit the claim was for taxes on the tax duplicates for years 1890, 1891 and 1892, amounting to $29.60. At the hearing, both parties were represented by counsel, and twelve witnesses were sworn. The plaintiff averred that this demand had not been included in and formed no part of the settlement before Justice Peters in the December previous. The defendant alleged that it was settled in that suit. The justice gave judgment against Moore for the full amount, $29.60, and costs. Moore paid the costs, and appealed to the Common Pleas. On trial there, the learned Judge of the Common Pleas, after a most patient hearing, being of the opinion that as the justice's docket was not a record, it was simply a question of fact for the jury, as to what was embraced in the settlement. The jury found for plaintiff, and from the judgment entered on that verdict, defendant appeals to this Court, assigning for error the refusal of the Court below to instruct the jury that the settlement on the justice's docket of 10th December, 1892, was conclusive against plaintiff's claim.

It is not worth while to inquire whether this entry was a judgment, and, if so, whether it imported verity; it was at least an agreement, by parties, too, fully competent to make it. It is clear and concise in expression, with no possible ambiguity of meaning. They say, "This settles all matters at variance." What were the matters at variance? Moore claimed that he had overpaid his road tax $14.50. The defendant denied this. Both parties met to be heard and have the judgment of the justice on their dispute. When before him, they discussed the matter, exhibited accounts, and made computations, then agreed; the justice reduced their agreement to writing, and read it aloud to them; the supervisors read it for themselves; Moore paid the costs he had agreed to pay, and the parties separated. Nearly three months afterwards, the township brings this suit for the road taxes of 1890, 1891 and 1892. We turn to the settlement to see if this claim was embraced in it. It says: "Settled by defendants giving plaintiff a credit in full of all road tax assessed against the plaintiff for each and every year to this date, including the tax laid for 1892." Thus, in the most positive and most specific terms the debt now sued for was included in the settlement, and, if that settlement be enforced, the debt is discharged.

The supervisors say the present claim was not intended to be included, that this suit is for money tax, while the settlement embraced the work tax only. The defendant swears positively that the settlement was for just what it says, that all the taxes against him at that date were settled.

In the absence of fraud or mistake, agreements will not be set aside; especially is this rule to be invoked when parties have come together, and by formal writing compromised or settled disputes, either to avoid or end litigation. That the parties did not affix their signatures is not material; that would have been evidence of their assent, but all of them admit it was read and formally assented to by them in the presence of the justice. No fraud on part of Moore is intimated, he did not draw the writing; that was done by the justice, prompted by the suggestions of the parties; no mistake in wording the agreement is suggested, it was dictated by and assented to by the parties. Why should it not be enforced? The supervisors say, now, they did not intend what the agreement says; but what did Moore intend when he surrendered his claim for his alleged balance of $14.50, and paid the costs? He says his understanding was it was a full settlement of all taxes assessed up to date of suit, just what the agreement says. If an agreement written in plain language, having a meaning so plain that a child could not mistake it, can be set aside because grown men who are parties to it, months afterwards say they did not understand it, it would be useless to make one.

In all this evidence there is nothing that warrants the opening up of the settlement of this dispute by another suit, and there was nothing for the jury to pass upon. The judgment is reversed.

H. B.

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Oct., '94, 45. May 14, 1894.

Lederman v. Pennsylvania Railroad Company.

Railroad crossings—Negligence—Question for jury—Evidence—Placing gates at crossing—Testimony as to speed of cars—City ordinance regulating speed of trains.

Where it appears that an accident has occurred at a railway crossing at which there was no gate, evidence that shortly after the accident the defendant erected gates at that crossing is admissible as bearing upon the question of negligence.

A witness who was working on the railroad one thousand feet from the scene of an accident (it being in evidence that the brakes had been taken off after the cars passed him) is not qualified to testify as to the speed at which the cars were moving when the accident occurred.

A city ordinance regulating the speed of trains is admissible, and should be considered by the jury in connection with other evidence in the case as bearing upon negligence.

Whether a parent was or was not negligent in allowing a child to be upon the street is for the jury.

Appeal of the Pennsylvania Railroad Company, defendant, from the judgment of the Common Pleas of Lancaster County, on verdict for Julius and Rosa Lederman, plaintiffs.

The case was tried by LIVINGSTON, P. J., and resulted in a verdict for plaintiff for $1,800. The facts are stated, and the assignments of error indicated, in the opinion of the Supreme Court.

H. M. North, (*E. D. North* with him), for appellants.

W. U. Hensel, (*J. Hay Brown* with him), for appellee.

January 7, 1895. MCCOLLUM, J. About a half a mile from Lancaster station two cars were detached from the Seashore express in order to allow the Philadelphia coach of the Columbia train to be connected with it ahead of them. From the point of severance to the station there was a descending grade, and the railway tracks crossed three streets diagonally. When the detached cars were between Lemon and Walnut streets the brake was "thrown off to get a little more momentum and headway," and at the crossing of the latter they ran over and killed the plaintiffs' child. There were no gates at this crossing, but there was an old man there whose duty it was to watch two crossings and see that persons walking or driving on Prince street or Walnut street did not get in the way of the trains. The evidence in regard to the speed of the cars at the point where the accident occurred was conflicting, some of the witnesses estimating it at ten, and others at four miles an hour. The crossings watched, as above stated, were in a populous district of the city and there was a large amount of travel over them. No signal announced the approach of the cars to the crossing unless the waving of the watchman's flag can be regarded as such. In the presence of the undisputed facts and the conflicting testimony to which we have referred, the defendant company requests us to say there was no negligence on its part in connection with the occurrence under investigation. This we cannot do. In view of the great age and consequent infirmity of the watchman, there is room for doubt respecting his fitness for the duty with which he was charged. But waiving this and assuming that he was competent for the work assigned to him, did the company make adequate provision for and have due regard to the safety of persons walking or driving upon the streets in the vicinity of these crossings? As we have already seen the crossings were in a populous district, and there was necessarily considerable travel over them on foot and in vehicles. Can a solitary watchman stationed on a corner bounded by the railway tracks and the intersected streets properly warn persons travelling upon these streets of the approach of a train? To do so he must wave his flag where all persons approaching the crossings can see it, and he must be careful to note that the little box or house on his corner does not obstruct the view from any direction. Ought the company to have maintained gates at these crossings? Ought it to have allowed the detached cars to descend upon them at the rate of ten miles an hour with "the brake thrown off to get a little more momentum and headway"? These were questions to be answered by the jury upon the evidence, and therefore the learned Court below did not err in refusing to affirm the company's third point.

The latter, however, contends that it has a defence to the action in the negligence of the plaintiffs in permitting the child to go upon the streets alone in the manner described in the testimony. But this contention also presented in our opinion a question for the jury, to whom it was referred in appropriate instructions. It is for them and not for the learned Court below, or for us, to say whether the implied permission given by the mother to the child to go to a near neighbor's on the same street to help his play-mate sell "shooting crackers" from a stand erected at his own home constituted negligence which satisfied the company's contention on this point: Long *et ux. v.* Phila. & Reading Railroad Company, 75 Pa. 257, and Dunseath *v.* Traction Co., 161 Pa. 124.

We discover nothing in the rulings upon offers of evidence which calls for a reversal of the judgment. That the company very soon after

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the accident erected gates at the crossing where it occurred was a fact for the consideration of the jury: Penna. R. R. Co. *v.* Henderson, 51 Pa. 315; West Chester & Phila. R. R. Co. *v.* McElwee, 67 Pa. 311, and McKee *v.* Bidwell, 74 Pa. 218. The evidence was particularly pertinent in this case because the jury had been upon the ground, and had seen the gates there. To rebut an inference that the gates were there at the time of the accident it was proper to inform them when they were erected.

Ample opportunity was afforded the company to show the speed of the cars near to and at the crossing. John Keneagy was five hundred feet west of Lemon street, and did not see the cars after they crossed it. He was not very well qualified to speak of their speed, after "the brake was thrown off" and they were nearing the point where the accident occurred.

We are not convinced that the Court erred in overruling the objections to and admitting the ordinance in relation to the speed of railway trains within the city limits, or in the instructions to the jury respecting the consideration they should give to it in connection with the other evidence in the case: Penna. R. R. Co. *v.* Lewis, 79 Pa. 33, and Lane *v.* Atlantic Works, 111 Mass. 136.

Judgment affirmed.

J. D. B., Jr.

Oct. '94, 245. October 5, 1894.

Heydrick v. Hutchinson et al.

Charge of Court—Tone of charge—Judge's comments upon testimony.

While a judge may express to a jury his opinion of the weight of the testimony and its bearing and effect; and, if in his opinion the evidence is not sufficient to sustain a verdict, may give a peremptory instruction, yet whatever he does should be done directly, so that his acts may be fairly brought up for review by the party aggrieved.

When the effect of an instruction is to take from the jury all testimony except that of a particular witness, and to leave to the jury the construction of a paper, properly for the Court, such error is not cured by telling the jury that the whole testimony is for it to pass upon.

A charge whose tendency as a whole is to belittle and prejudice one side, and which is not in expression and tone a judicial presentation of the case, is error.

Appeal of E. J. Hutchinson and William Landen, defendants, from the judgment of the Common Pleas of Venango County, in an action of ejectment brought by J. A. Heydrick.

Ejectment to recover one hundred acres of land in French Creek township, Venango County. The defendant claimed by virtue of a deed from the commissioners of Venango County, who acquired title by a treasurer's sale to them for arrearages of taxes due for the year 1889; the plaintiff's evidence was to the effect that there was personal property on the land liable for the taxes of 1889, and which should have been levied upon. The defendants denied that the personal property upon the land was liable for the taxes of said year, for the reason that the owner of said property was not a tenant of the plaintiff nor an occupier of the land when the taxes were levied, and alleged that the tax collector had used due diligence in ascertaining whether there was property thereon liable for the taxes of said year, before making his return.

Taylor, P. J., charged the jury as follows:—

"This is an ejectment to recover the possession of about 100 acres in French Creek township, the actual possession of which is claimed to be in the defendants here. The plaintiff says he has the right of possession to it. The return of the sheriff to the writ as given in evidence, is *prima facie* evidence that the defendants are in possession of the land. [From the testimony you could hardly think anybody could be in possession of that land. From some of the testimony you might conclude that a man could not be in possession; and could not have property upon the land. It is a most singular thing to me.] (First assignment of error.) [There is no question here that Mr. Heydrick is the owner of that land unless it is raised by the paper offered in evidence by the defendant.] (Second assignment of error.) [There might be some question whether a man signing a paper like that would know whether he owned land or anything else. There is only one excuse, and that would be that they were both so drunk they didn't know what they were doing, or perhaps as Mr. Heydrick says, he was very much bothered and didn't know what was in it. Men ordinarily in their sound minds don't make a paper that would wipe out their title to a hundred acres of land unless there is some reason, and so far as that is concerned, in my opinion, of course it is for you, but in my opinion, judging from the paper itself, it would look as if Patterson, the collector, had got into a scrape and he came to Mr. Heydrick to get out of it, and, as he says, without knowing what was in it he signed it. It will be pretty hard for you to find out what it means when you look at it. There are all kinds of expressions used, but it looks to me as though it was drawn to protect the tax collector after he presumed he would get into trouble, and that paper was procured to relieve him from that difficulty. It is the only way I can put a construction upon that paper and the conduct of the parties if they were sane, but it is for you.] (Third assignment of error.) The land belonged

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to Mr. Heydrick. It was regularly assessed and sold for the taxes of 1889. There was 100 acres, and the defendants here obtained what title there was derived under that sale. [The whole taxes, road, poor, school and county amounted to $6.-16, and that is the amount this land was sold for. When land is of so little value that the whole amount of taxes assessed upon 100 acres amounted to $6.16, men are not looking so carefully after it as where property is of more value.] (Fourth assignment of error.)

"[The plaintiff says that during these years he was living part of the time in the village of Utica, two or three miles from the land, and part of the time upon a farm he had, and he went once in a while down there, but didn't know whether there was any property upon the land at all, that he had rented this land to Mr. Vincent, who was to pay the road and school taxes for the use of the land as long as he remained there.] (Fifth assignment of error.) If that is so that created a tenancy. If there was a bargain between Mr. Heydrick and Mr. Vincent, a contract by the terms of which Vincent agreed to take this property and look after it and to pay the road and school taxes, that created a tenancy between Vincent and the plaintiff. If that was so Heydrick had the right to rely upon that tenancy, looking to that first, for the taxes. Whether Vincent ever paid a dollar or not, it only has a bearing on the question as to whether there was an actual tenancy there. [Heydrick and Vincent both tell you that was so; that he made a bargain and rented this land from 1886 until 1893; pastured from eight to twelve head of cattle on it from April till the last of October or November each year. It turned out in the end perhaps that the cattle belonged to his son.] (Sixth assignment of error.) [In July there was a stack of hay placed there and it remained there till the next year. The other stock was removed during the winter. The cattle were worth $40 and the hay was worth $75. There is no controversy as to the value of that hay. Mr. Vincent and Mr. Heydrick both tell you that was the agreement between them and there is not a shadow of evidence to the contrary. Yarnall says he helped stack the hay. Mr. Adams says one stack remained there till the last part of February, and he says this man Vincent pastured some cattle for him on this land. "I put a fence there and pastured the cattle there. I pastured them there in 1887, 1888 and 1889, that's under an agreement with Vincent allowing me to pasture the cattle there." Under this arrangement he was to fence them from the island.] (Seventh assignment of error.)

"[Upon the part of the defendant a man Bunnel is called. Before he got through and left the stand you were pretty well satisfied that he didn't know what he was talking about or he was swearing very recklessly. If I remember right he swore everybody's cattle run in there, it was general pasture ground for everybody. That was bearing upon the question as to whether the collector was using due diligence. Before he got through, on cross-examination he admitted that during the year 1889 he could not state of a single beast he had seen upon this land, although he had made this assertion, except two of his own cows that had been trespassing there and Mr. Vincent's. They were the only cattle he could tell you of. Another thing, gentlemen, if he was living within sixty rods of that place, and if he could tell within a rod where the line of that farm was, in my opinion, it was not hard for the tax collector to find out whether the property, the cattle and hay, were on the farm or not. The hay was about the middle of this piece of land. There were two stacks there, in plain sight of the road where a man couldn't avoid seeing them if he was going along the main traveled road.] (Eighth assignment of error.)

"[The collector of taxes is bound to use reasonable diligence in looking for property upon land by a sale of which the taxes could be paid. If he uses reasonable diligence and cannot find any personal property upon the land, he may then return it, and a sale of the land under these circumstances, other requirements being complied with, would vest a good title in the purchaser. On the contrary, if there was within plain sight of a public road two stacks of hay, and one of them remained till the next spring, if a tax collector was blind, a jury would be warranted in finding that he didn't use reasonable diligence in finding that property.] (Ninth assignment of error.) [It looks to me as though some one was trying to get title to a hundred acres of land without paying more than a nominal sum of money.]" (Tenth assignment of error.)

Verdict for plaintiff and judgment thereon.

The defendants took this appeal, and filed assignments of error as above indicated.

Robert F. Glenn, for appellants.

The Court practically relieved the jury from the consideration of all testimony except that of Heydrick. It is error to withdraw a question of fact from the jury; though the testimony of the only witness be uncontradicted, the question of his credibility is still for the jury.

Madara *v.* Eversole, 62 Pa. 160.
Bergner *v.* Thompson, 74 Id. 168.
McClurkan *v.* Byers, Id. 405.

The manner of the Court tended to mislead the jury as to the questions that were raised for their consideration.

C. I. Heydrick, (*C. Heydrick* with him), for appellee.

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The evidence was such that the Court below would have been justified in giving binding instructions to the jury to find for the plaintiff, and therefore any mistake of the Judge in reciting testimony, or any comments that he made upon the testimony, could not have been prejudicial to the defendants.

The question is, should the case have been withdrawn from the jury.

Bank *v.* Tinker, 158 Pa. 17.
Mead *v.* Conroe, 113 Id. 220.

January 7, 1895. FELL, J. The specific exceptions to the charge include in the aggregate nearly all that was said in submitting the cause to the jury, and while many of them are not well founded the charge as a whole is fairly open to the objection that its tendency was to belittle and prejudice the defence, and that in expression and tone it was not a judicial presentation of the case. A Judge may express to the jury his opinion of the weight of the testimony and of its bearing and effect, and there are cases in which he should do so. If in his judgment the testimony is not sufficient to sustain a verdict it is his right and it may be his duty, to end the trial by a peremptory instruction. But whatever he does in the course of a trial should be done directly, that his acts may be brought fairly for review by the party aggrieved.

The plaintiff in this case brought ejectment to recover land sold for taxes. The controversy related to the validity of the sale, and that depended upon whether there had been personal property on the land liable to seizure, and whether the collector had made reasonably diligent effort to ascertain this before returning the property for sale. A writing, inartificially drawn, but apparently intended as an exoneration of the tax collector for having made the return, was put in evidence by the defendants to show an admission by the plaintiff which went to establish the regularity of the sale. Referring to this the learned Judge said: "There is no question here that Mr. Heydrick is the owner of that land, unless it is raised by the paper offered in evidence by the defendant." This was not a conveyance of title; it had been given to another party after title had vested in the defendant. It had no bearing whatever upon the case except for the purpose for which it was offered.

The effect of this instruction was to take from the jury all other testimony produced by the defendants and to direct their attention exclusively to a matter which at most only qualified what the plaintiff had testified to, and to leave to them the construction of a writing which was clearly for the Court. Yet the whole testimony was subsequently submitted to them to pass upon. This course, with the comments made upon the witnesses in the charge, was prejudicial to the defendants without giving them the advantage of a distinct ruling. It is conceded that it can be sustained only upon the ground that the Court would have been justified in directing a verdict for the plaintiff. If that had been done the question of the sufficiency of the evidence for the defendants could have been raised for argument and decision. The question is not properly raised here and cannot be considered. There may have been very little merit in the defence, but it was presented in a regular and orderly manner. If it was insufficient to sustain a verdict the case might have been properly withdrawn, but if there was an issue of fact for the jury to pass upon it should have been submitted to them judicially.

The second and third assignments of error are sustained. It is unnecessary to notice the other assignments except to say that they do not seem to be well founded. The judgment is reversed and a venire de novo awarded. H. B.

Jan. '94, 463. April 11, 1894.

Commonwealth v. Lehigh Valley Railroad Company.

Indictment of corporation—Remedy on failure to appear—History of practice of entering judgment by default.

As it is a settled doctrine of the law that a corporation is indictable, it necessarily follows that it can be brought into Court by compulsion if necessary.

The older remedies in case of non-appearance of defendant, venire facias ad respondendum and distringas, extending to outlawry, have fallen entirely into disuse in the civil Courts, and the end sought is there attained by a judgment entered for default. The same remedy is applicable in criminal cases, without express statutory authority but by virtue of the common law of Pennsylvania.

Appeal of the Commonwealth of Pennsylvania from orders of the Quarter Sessions of Luzerne County, denying motions for judgment in default of appearance against the Lehigh Valley Railroad Company and the Wilkesbarre and Eastern Railroad Company.

The facts were thus stated in the opinion of the Court below, RICE, P. J., denying the motions:—

"On May 29, 1893, the constable of Yatesville Borough made return that the defendant company had obstructed a public highway by dumping dirt and stones thereon and using the same for their right of way without having reconstructed the same as they are required to do by law. An indictment was sent before the grand

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jury which was returned a true bill. A rule to show cause why a venire facias should not issue was granted, served on a director of the defendant company, and made absolute. On October 24, 1893, a writ of venire facias issued in the following form:

"'To the Sheriff of said County, Greeting: We command you that you cause the Lehigh Valley Railroad Company to come before our Court of Quarter Sessions of the Peace to be holden at Wilkesbarre in and for said county, on the 15th day of November next, there to answer the Commonwealth of Pennsylvania of a certain indictment for nuisance, and have you then and there this writ. Witness, etc.'

"The sheriff made return to the writ as follows: 'I hereby certify and return that I served this writ on the within named defendant, the Lehigh Valley Railroad Company, on the 27th day of October, 1893, by giving to W. L. Conyngham, a director of said defendant company, a true and attested copy and making known to him the contents thereof, same time giving him, the said W. L. Conyngham, a director of the said Lehigh Valley Railroad Company, defendant, a true and attested copy of the indictment.'

"The defendant company not having appeared, the district attorney, on December 6, 1893, moved for judgment by default. The question is whether the Court is authorized by a statute or by the common law to enter such judgment."

Holding that the Court was not so authorized, he denied the motion. The Commonwealth appealed, assigning as error the refusal to enter judgment against defendant in default.

John M. Garman, district attorney (*C. Frank Bohan*, with him), for appellant.

It is conceded that a corporation is indictable, but it differs from an ordinary defendant in a criminal case, since it cannot be arrested, cannot demand a hearing as other persons charged with crime may, and can only appear in Court by attorney or by its servants. The punishment, too, is only a fine, and, in cases of nuisance, abatement of the same.

The punishment being a fine it may be regarded as a judgment in favor of the public for the injury complained of in the indictment.

Taking this view, if a corporation has been indicted, has been notified of the indictment found, and been served with a copy of the same and notice to appear, when a venire facias is issued it becomes and is a summons. In other words, while the prior proceedings would not come under the head of "personal actions," yet, on service of a venire facias upon a defendant they practically become such, and the law of this State as to judgments will properly apply.

Act of June 13, 1836, sec. 41, P. L. 579.

That a venire facias is a summons and that judgment may be entered in default of appearance has been décided in

Railroad *v.* State, 32 N. H. 215.
State *v.* Western Railroad, 89 N. C. 585.

"When leave is granted to file an information in the nature of a quo warranto, the defendants must be summoned by venire or subpœna, and if they fail to appear must be brought in by distringas," but this was prior to the Act of 1836.

Commonwealth *v.* Sprenger, 5 Binn. 353.

Wheaton, *Darling* and *Woodward*, for appellee, made no oral argument but filed a paper book in which they contended that—

This action does not come within the definition of a personal action.

The proper way to compel the appearance of a corporation on an indictment is by a writ of venire facias and distress infinite.

Regina *v.* Birmingham, etc., Railway Company, 9 C. & P. 469.
Commonwealth *v.* North and West Branch R. R. Co., 5 Kulp, 293 (C. P. Luzerne County.)

January 7, 1895. MITCHELL, J. It is settled and unquestionable that corporations may be indicted at common law, and it necessarily follows that they may be brought into Court by compulsion if necessary, for the law is never powerless to enforce what it commands. Statutes may be imperfect, and proceedings under them, for that reason may be abortive, but it is a settled rule of the common law that there is no right without a remedy.

The question before us, therefore, is really, what is the proper form of remedy in the case of a corporation indicted for misdemeanor, and refusing or neglecting to appear.

By the common law of England, prior to the settlement of this country, an appearance by the defendant was indispensable, both in civil and criminal cases. For want of it the proceedings came to a permanent stop. The end sought was commonly attained indirectly by process of outlawry, by which in civil actions after the outlaw's goods had been forfeited to the crown, satisfaction thereout was awarded to the plaintiff, but the action itself could not proceed to judgment. 3 Stephen's Comm. 533; TILGHMAN C. J., in Downey *v.* Bank, 13 S. & R. 288. In criminal cases of course the difficulty seldom arose, as the defendant was usually in arrest and his corporeal appearance thus being secured the contention was deferred till the next step in the proceedings, when a contumacious prisoner stood mute and refused to plead. Even then the case was halted, and resort was had to the *peine forte et dure* to obtain a plea. Sir JAMES STEPHEN appears to be of opinion that this practice arose

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from the different modes of trial in criminal cases when the ordeal was usual and the jury exceptional, only adopted on the election of the prisoner. Hist. of the Criminal Law, Vol. 1, p. 298. However this may be it is unquestionable that the necessity of an appearance as well as a plea was inexorable. And the reason of this seems to me to lie in the fundamental idea of all common law actions that they must be developed upon a defined issue. Without parties in Court there could be no *lis mota*, and without pleas no issue and therefore no trial. The difficulty, though insuperable, was altogether technical. Hence appearance by attorney was the first solution, and satisfied the requirements of ordinary cases, for it is to be remembered that the usual writ in the commencement of actions was the capias, and the defendant was in Court in custody either of the sheriff or of his bail. The failure to appear was therefore comparatively of rare occurrence, and this rarity in large measure accounts for the tardiness of the invention or adoption of the remedy of judgment by default.

Corporations not being amenable to a capias, the practice in England until altered by statute, 7 & 8 Geo. 4. c. 71, sect. 5, was to compel appearance by venire facias and distringas. Regina *v.* Birmingham, etc., R. W. Co., reported in its successive stages in 9 C. & P. 469; 1 Gale & Dav. 457; 2 Gale & Dav. 236.

A venire facias ad respondendum is in fact a summons. "The practice . . . . was for the sheriff to whom the writ was delivered, to make out a warrant or summons to his officer who thereupon summoned the defendant by delivering to him a copy . . . . and upon the sheriff's return of the names of the summoners, if the defendant did not appear a distringas issued." 1 Tidd's Practice, 155. "As no capias lay it was the only method of proceeding against peers of the realm, corporations and hundredors on the statutes of hue and cry." Id. 112. "The proper process on an indictment for any petty misdemeanor is a writ of venire facias, which is in the nature of a summons to cause the party to appear." Tomlins' Jacob's Law Dict. tit. Process II.

We have therefore to consider the effect in Pennsylvania of a failure to appear after due service of a summons. The ordinary result is to render the party liable to a judgment by default, but the learned Judge below, being of opinion that such judgment rests entirely on statute, and the Act of June 13, 1836, sec. 33, P. L. 578, not applying to proceedings on indictment, refused to enter judgment in the present case.

The Act of 1836 was one of the consolidated statutes reported by the commissioners appointed under the resolution of March 23, 1830, (P. L. 1829-30, p. 408), to revise the civil code, and introduces new practice in regard to judgments by default for want of appearance. The explanatory remarks of the commissioners on the sections concerned make no reference to any change. See report in 2 Parke & Johnson's Digest, title Judiciary, p. 804. In fact the practice was coeval with the Commonwealth, and even antedated it. In the Record of the Court at Upland in Pennsylvania (Memoirs of the Historical Society of Penn. Vol. 7) are numerous instances of such judgments. At the session of March 13, 1676-7, Helm *v.* Oolsen, it is recorded, "the deft. remaining absent the Court doe order that the sd deft. appeare att the next Court day to defend his sd fact, or in case of further default, Judgment to passe against him according to Lawe and merrit," p. 47; in Addams *v.* Gray, "the deft. being default and the plt. makeing the Justness of his debt apeare, the Court ordered judgment to bee entered against the defendant according to the plts declaration," p. 83; in Bacon *v.* Billop, "the deft. being three tymes called did not appeare, and the action haveing been continued three court dayes in wch tyme notwithstanding hee had due notice and did promisse to appeare, hee hath not appeared and the plt. pressing for judgment, the Court thereupon examining the Case doe think fitt to pass judgmt against ye deft." p. 139. These examples from the record of the earliest Court administering English law on the soil of Pennsylvania, throw a strong light on the action of the colonists under Penn's charter, next to be noticed. In the sixth article of the laws agreed upon in England under the Frame of Government promulgated by Penn, it was declared that in all Courts all persons of all persuasions may freely appear in their own way and personally plead their cause; that the party complained against shall be summoned no less than ten days before the trial; and before the complaint of any person shall be received he shall solemnly declare in Court that he believes in his conscience his cause in just. Duke of Yorke's Book of Laws, p. 100. In the laws made at an Assembly held at Philadelphia, March 10, 1683, ch. 66, the foregoing was re-enacted, with the notable addition to the sentence last quoted above, that "if the party complained against shall notwithstanding refuse to appear, the plaintiff shall have judgment against the defendant by default." Id. p. 128. I have not been able to discover in the time and with the books at my command, how far this simple and effective mode of reaching a legal as well as just result agreeing with the practice already in use in the territory, under the government of the Duke of York's charter, as shown by the Record of the Upland Court, was an original invention of the colonists, or was borrowed, adapted or enlarged from some special or

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local practice in England. The latter would seem to be more probable, not only from the analogy of the way in which the actions of assumpsit and replevin, and other common law remedies were enlarged and adapted to new usefulness in Pennsylvania, but also from the fact that the judgment by default came into use about the same time in other colonies, though Judge BELL, who delivered the learned opinion in Boston, etc. R. R. *v.* The State, 32 N. H. 215, 231, regarded it as an original invention in New England. But whatever its origin the practice has continued to the present time. The Act of 1683, ch. 66, *supra*, was declared one of the fundamental laws of the province, Duke of Yorke's Laws, p. 154, was abrogated by the King and Queen in Council, 1693, was put in the Petition of Right, Id. 200, and passed through the usual vicissitudes of re-enactment and abrogation familiar to us in the contests between the early assemblies and the royal authority. It has been with substantial identity the law of the State from the earliest day to the present. See the Acts of 1710, Duke of Yorke's Laws, 337; of 1715, Id. 367; of 20th of March, 1724-5, 1 Dallas's Laws, 223, 1 Smith's Laws, 164, and Purdon's Digest of 1830, tit. Arrest, p. 57, where this Act is given as the statute in force prior to the passage of the Act of 1836.

None of these statutes apply in terms or perhaps by implication to cases of indictment. The Act of May 31, 1718, "For the Advancement of Justice, and more certain Administration thereof," 1 Smith's Laws, 116, provides that if any person indicted for one of certain capital felonies named shall not appear, a capias shall be issued, and if the party be not found proclamation and outlawry follow in prescribed course. The Act of Sept. 23, 1791, 3 Dallas's Laws, 115, also limits outlawry to a few of the more serious felonies, and the existing Act of 31st of March, 1860, P. L. 447, is substantially a re-enactment of the Act of 1791. For the lesser felonies, and for all misdemeanors, therefore, the process of outlawry was practically abolished by these statutes, and if a capias under the general power of the Courts, was not effective, or not applicable, as was the case in regard to corporations, there was no statutory substitute for the ancient process of a venire facias ad respondendum, and distringas. But as already seen, the whole object of the venire and distress infinite, was to secure an appearance, and the whole necessity for an appearance was to get over the technical difficulty in bringing the case to issue. The object and the necessity were the same in the civil and the criminal Courts. The older remedies have fallen entirely into disuse in the civil Courts, and the end sought is now attained by a judgment entered for the default. The presence of the defendant is not required upon the trial of misdemeanors, and the necessity of an appearance is therefore as barely technical as in civil cases. There is no difficulty in applying the same remedy, and we see no reason why the Courts should not recognize the change also in criminal cases without express statute, by force of the common law of Pennsylvania. This was the result reached by the Supreme Court of New Hampshire, in Boston, etc. R. R. *v.* The State, 32 N. H. 215, and the decision was approved and followed by the Supreme Court of North Carolina, in State *v.* Western N. C. R. R., 89 N. C. 584. In the former case it was said by BELL, J., "The foundation of the English common law with its infinite niceties was nothing more than usage; and usage here holds as high a place in our esteem as usage there." The remark is equally true of Pennsylvania. The late Chief Justice SHARSWOOD in a lecture before the Law Academy of Philadelphia, in 1855, traced with great learning, the development of a wide reaching common law "by the silent, gradual, yet all-sufficient power of common usage and consent," citing among other instances the right of a tenant for a term certain to the way going crop, Diffedorfer *v.* Jones, 1782, cited in Stultz *v.* Dickey, 5 Bin. 289; but not to spring grain, Demi *v.* Bossler, 1 P. & W. 224; the non-existence of markets overt, Hosack *v.* Weaver, 1 Yeates, 479; barring dower by a simple deed, Davey *v.* Turner, 1 Dall. 11; and as showing that changes were not confined to the civil Courts, the repudiation of the punishment of the ducking stool, and some other punishments not in accordance with the notions of the people, James *v.* Com. 12 S. & R. 220.

"Every country," says TILGHMAN, C. J., in Guardians of the Poor *v.* Greene, 5 Binn. 554, "has its common law. Ours is composed partly of the common law of England, and partly of our own usages. When our ancestors emigrated from England they took with them such of the English principles as were convenient for the situation in which they were about to place themselves. It required time and experience to ascertain how much of the English law would be unsuitable to this country. By degrees, as circumstances demanded, we adopted the English usages or substituted others better suited to our wants, until at length before the time of the revolution we had formed a system of our own founded in general on the English constitution, but not without considerable variations."

From the earliest days of the province, as we have thus seen, the failure to appear after due service of a summons, has been treated as a contempt of the process of the Court, and the dilatory and cumbrous methods of outlawry and distress to avoid the technical necessity of an appear-

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ance, have been discarded in favor of the shorter, simpler, and more effective remedy of judgment for the default, apparently originating in usage, the fountain of common law, sanctioned by frequent statutory recognition, and extended in its operation from time to time by judicial application. An instance of such judicial extension is found in the adoption of the equity rules by this Court in 1865, whereby subpœnas to appear were abolished, and in their place was substituted the service of a copy of the bill, with a notice endorsed thereon to appear, and that on failure to do so a decree *pro confesso* might be entered thereon, for the default. And a still more recent instance is to be found in Longwell *v.* Hartwell, 164 Pa. 533, where it was held that judgment might be entered by default for want of appearance against a garnishee, although the statute makes no express provision for any such judgment. We therefore conclude that the practice is entitled to recognition as an integral part of the common law of the State. It is true we have found no precedents in the Quarter Sessions, or in criminal cases, but as indictments against corporations were even rarer in early times than they are now, the absence of reported decisions is not conclusive against the practice, and as both the object sought and the technical objection to be avoided are the same, and as in misdemeanors where the personal presence of the defendant is not necessary, the application of the remedy is equally convenient and effective, we see no good reason why the same remedy should not apply in one case as in the other.

The order refusing judgment is reversed, and judgment directed to be entered against the defendant by default for want of appearance.

NOTE.—I am under obligations in this case to a supplemental brief prepared by John Douglass Brown, Jr., Esq., of Philadelphia Bar. J. T. M.

W. D. N.

Jan. '94, 464. April 11, 1894.

Commonwealth v. Wilkesbarre & Eastern Railroad Co.

January 7, 1895. MITCHELL, J. For the reasons given in Com. *v.* Lehigh Valley R. R. Co., (opinion filed herewith) the order refusing judgment is reversed, and judgment directed to be entered against the defendant by default for want of appearance.

W. D. N.

Common Pleas.

C. P. No. 2. June, 1893, 273.

Dale v. Blue Mountain Manufacturing Company.

Practice C. P.—Service of summons on non-resident corporation—Words "manager" or "director" in Act of March 17, 1856. "Principal officer" in Act of June 13, 1836—Where no appearance entered for defendant and judgment for want of affidavit of defence.

To a summons in assumpsit against a corporation, doing no business and having no property in Philadelphia County, and with its principal office in another county, the sheriff of Philadelphia County returned: "Served the B. Company, a corporation under the laws of Pennsylvania, by giving, June 22, 1893, a true and attested copy of the within writ to D. B. F., general manager of the said company, and making known to him the contents thereof":

Held, return defective because it did not set out that D. B. F. was the "principal officer" of the corporation, nor set out facts that would show that a service on a "manager" would be good. Act of June 13, 1836, and Act of March 17, 1856.

The Court will set aside the sheriff's return to a summons if defective.

The only cases in Pennsylvania (except in suits by the Commonwealth) in which a summons can be served upon a "manager" or a "director" of a corporation, even where the property of the corporation is wholly or in part in the county, are where the president, treasurer, secretary or chief clerk do not reside or cannot be found in the county, and the sheriff's return must so show.

The words "manager" or "director" used in the Acts of March 17, 1856, March 21, 1842, and March 15, 1847, are synonymous and mean one of the body of persons appointed pursuant to the charter or by-laws of the corporation to manage its affairs, the acts of the individuals not binding the corporation except when acting as a body.

The term "principal officer" in Act of June 13, 1836, means the chief executive of the corporation whether he be called president, chairman or by any other title.

Where no appearance be entered for defendant, judgment entered against him for want of an affidavit of defence is void, and will be stricken off.

Sur rule to set aside sheriff's return and strike off judgment.

The essential facts are sufficiently stated in the opinion of JENKINS, J.

Francis I. Gowen, James E. Hood and *Charles E. Ingersoll*, for the rule.

Francis Chapman and *S. Spencer Chapman*, contra.

November 17, 1894. JENKINS, J. This was a rule to set aside the sheriff's return and strike off the judgment entered against the defendant.

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The return of the sheriff is: "Served the Blue Mountain Manufacturing Company, a corporation under the laws of Pennsylvania, by giving, June 22, 1893, a true and attested copy of the within writ to D. B. Fisher, general manager of the said company, and making known to him the contents thereof."

The defendant is a corporation under the laws of the State of Pennsylvania. It did not do any business in this county, nor have any property here. Its principal office, at the time of the issuing of the writ in this case, was at Tamaqua, Pennsylvania. The action was in assumpsit. The service of a writ against the defendant within this county in such an action would, therefore, under the Act of June 13, 1836, sec. 41, P. L. 579, Purd. 427, pl. 122, have to be made upon the "president or other principal officer, or on the cashier, treasurer, secretary or chief clerk" of the corporation. The person referred to as the "president or other principal officer" we understand to mean the chief executive officer of the corporation, though called president, chairman, or by any other title.

Under the Act of March 17, 1856, P. L. 388, 1 Purd. 428, pl. 128, "When any action is commenced by any person against any corporation, in any county in which the property of said corporation was wholly or in part situate, it shall be lawful, if the president, treasurer, secretary or chief clerk do not reside or cannot be found in such county, for the sheriff or other officer to whom any process may be directed, to serve the same on any manager or director in such county." The words "manager" or "director," used in this Act, and also in the Acts of March 21, 1842, P. L. 145, and March 15, 1847, P. L. 361, are synonymous, and mean one of the body of persons appointed pursuant to the charter or by-laws of the corporation to manage its affairs, the acts of the individuals not binding the corporation, except when acting as a body.

The return in the present case shows that the writ was served upon Daniel B. Fisher, "general manager."

The return does not set out that Daniel B. Fisher is the "principal officer" of the corporation, nor does it set out facts which show that a service upon a "manager" would be good. Even where the property of a corporation is wholly or in part in the county, the only cases, except in suits by the Commonwealth, in which the writs can be served upon the "manager" or "director," are where the president, treasurer, secretary or chief clerk do not reside or cannot be found in the county, and the sheriff's return must so show: Gilbough *v.* Keller, 3 WEEKLY NOTES, 78; Hunt *v.* Association, 17 Id. 423; Insurance Co. *v.* Fuller, 81 Pa. 398. We therefore consider that the sheriff's return in this case shows no sufficient service. If the return shows a defective service, it should be set aside: Winrow *v.* Raymond, 4 Pa. 501.

There was no appearance for the defendant, and judgment was entered against it for want of an affidavit of defence. As defendant was not in Court, such judgment is void and should be stricken off: Insurance Co. *v.* Fuller, *supra.*

The rule is therefore made absolute.

F. B. M.

C. P. No. 4. March, 1894, 1096.

Ross v. P. W. & B. R. R. Co.

Practice — Affidavit of defence — Negligence — Damages.

Where a statement alleges a contract by the defendant to carry goods to a certain terminus and that the defendant in violation of the agreement so negligently carried the same that the goods were damaged to a certain amount, an affidavit which denies negligence and states the cause of accident which resulted in the injury to the goods, is sufficient.

The amount of damages sustained through alleged negligence of a defendant is in issue without any defence being made specially thereto, except where the negligence is admitted and the value of the property or amount of loss is disputed.

Rule for judgment for want of sufficient affidavit of defence.

The statement set up that the plaintiff delivered certain household goods to the Northern Central Railway Co., to be carried from Baltimore to Greenville, N. H., under a contract by which the said railway company should transport the goods, and at the end of its line deliver the same to a connecting carrier; that in pursuance of the said contract the said company delivered the said goods to the defendant, which received the same in good order and, in consideration of freight, agreed to carry them to the termination of its road, but in violation of said agreement so negligently carried them that the plaintiff sustained damage to the extent of $1,700.

The affidavit of defence admitted injury to the goods, but set up that they were injured without any negligence on the part of the defendant, by reason of a coupler breaking and dragging along the track, jamming into a crossing and derailing the car in which the goods were.

Horace L. Cheyney, for the rule.

Edwin J. Sellers, contra.

No affidavit is required in actions for negligence.

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Krause *v.* Penna. R. R. Co., 19 Phila. 436.
Hirst *v.* Whitesides, 1 Dist. Rep. 621.
Osborn *v.* Bank, 154 Pa. 134.

The carrier is entitled to the benefit of the insurance.

Phoenix Ins. Co. *v.* Erie Co., 117 U. S. 312.
Ins. Co. *v.* Union Co., 138 Id. 388.
St. Louis Ry. *v.* Ins. Co., 139 Id. 223.
Wager *v.* Ins. Co., 150 Id. 99.

November 28, 1894. ARNOLD, J. The affidavit of defence law is wise and just, and its effect most salutary; but we must be careful not to bring it into contempt by abuse or misuse. The plaintiff charges the defendant with negligence as a carrier, and the defendant not only denies that it was negligent, but goes further and gives the particulars of an accident which caused the injury to the plaintiff's goods. To require the defendant to allege more than this is to revive the subtleties, intricacies and technicalities of special pleading, from which we are happily delivered by the Procedure Act of 1887. The affidavit of defence, in the present case, is sufficient to carry the case to a jury, as it is not the province of Courts to decide cases of negligence and liquidate the damages on a motion day.

The amount of damages is in issue without any defence being made thereto, except in cases where the negligence is admitted and the value of the property or the amount of loss is disputed.

Rule discharged.

H. B.

Quarter Sessions.

Q. S. Aug. 1894, 425.

Commonwealth v. Simons.

Constitutional law—Constitution of U. S., Art. I., sec. 8, par. 4; Art. IV., sec. 2, par. 1—Inter-State Commerce—Police Power—Discrimination against non-residents—Act of April 18, 1891, P. L. 17; ordinance of Philadelphia, April 11, 1893.

The effect of Art. IV., sec. 2, of the Constitution of the United States is to declare that whatever rights or immunities are granted by a State to its own citizens, or whatever qualification is attached to a restriction imposed by it, upon the exercise of rights by its own citizens, the same measure must be applied to the exercise of the same rights by all citizens of the United States within the boundaries of the grantor or restrainor State.

The police power does not enable a State to debar the citizens of other States from engaging in any business which the State leaves open to its own citizens.

The Act of April 15, 1891, P. L. 17, forbidding peddling without a license, providing that nothing therein "shall prevent any citizen of this Commonwealth" from peddling the products of his or her farm or garden, and empowering cities of the first class to fix by ordinance the amount of the fee to be paid for a license, is unconstitutional as a discrimination against citizens of other States and as a restraint upon inter-State commerce.

Rule for a new trial.

The defendant, a citizen of New Jersey, was indicted for peddling in the City of Philadelphia the products of his own farm without a license in violation of the Act of April 15, 1891, P. L. 17, and the ordinance of the City of Philadelphia based thereon. The jury rendered a verdict of guilty.

Robert S. Clymer, for the rule.

Samuel A Boyle, assistant district attorney, and *George S. Graham*, district attorney, contra.

November 30, 1894. HARE, P. J. An Act of Assembly approved April 15, 1891, P. L. 17, 18, makes it "unlawful for any person to hawk, peddle or vend, upon the highways, streets, lanes, alleys, avenues, roads or pavements of any city of the first class, any fish, fruit or vegetables, except a license therefor shall have been previously obtained," as provided in the Act. It further provides that licenses shall only be granted to citizens of the United States, and for one year; that a separate license shall be taken out for each and every wagon, cart, dray, wheelbarrow, or any vehicle used for the purpose aforesaid; "and every vehicle shall be conspicuously marked with the name of the licensee, and numbered the same as the license which was granted for the same."

The Act further empowers and requires the councils for the cities of the first class "to fix by ordinance the amount to be paid for a license under this Act, and the time the same shall be paid, and shall also describe and regulate the manner of payment thereof into the treasury of the said city."

The penalty prescribed for a violation of the provisions of the Act is imprisonment "for not more than five days, or a fine of not more than $100, or both or either, in the discretion of the Court: Provided, that nothing contained in this Act shall prevent any citizen of this Commonwealth from vending, hawking or peddling the products of his, her or their farm or garden."

Under the authority of and in obedience to this Act of Assembly, the councils of the City of Philadelphia passed an ordinance, which was approved April 11, 1893 (City Ord., 1893, pp. 216, 217, 218). This ordinance substantially re-enacts the provisions of the Act of Assembly, and, in addition, provides, in section 4, that application for license shall be made to the commissioner of markets and city property, who is "authorized, upon payment to him, for the use of the city, of the sum of $15 for each wagon

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or other vehicle drawn by two horses or other animals, or $10 for each wagon or other vehicle drawn by one horse or other animal, or $5 for each barrow or hand-cart, to grant a license."

In section 5 the ordinance provides: "That all farmers vending the produce of their own farms shall, on appearing before the commissioner of markets and city property, and satisfying him, under oath or affirmation, that they are farmers selling the produce of their own farms only, be entitled to receive a license without charge therefor, providing they are residents of the State of Pennsylvania. All non-residents of this State shall be liable to the penalties of section 4."

It further provides that for a violation of any of its provisions, the offender, on conviction, shall be liable to such penalty or penalties as are imposed by law.

The defendant, who resides in Camden, was indicted for selling the produce of his farm in the streets of Philadelphia contrary to the provisions of the above ordinance. The case went to the jury, who found him guilty, and he now asks for a new trial, on the ground that the ordinance is invalid under the first clause, sec. 2, Art. IV., of the Constitution of the United States, which reads as follows:—

"The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States."

The extent and limitations of this clause are not altogether clear, but it is unquestionably broad enough to cover the case in hand. As was said in The Slaughter House Cases, 16 Wallace, 36, 77, the purpose was "to declare to the several States that whatever those rights and immunities as you grant or establish them to your own citizens, or as you qualify or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction." So interpreted the clause is well suited to the end in view, which was to render local self-government compatible with the equality which should prevail among the members of a nation. The laws made by the several States might and would be different, but their operation would none the less be the same as to every citizen of the United States who came within their scope, or whose interests were involved. It is by virtue of this principle that an inhabitant of Pennsylvania who travels or sojourns in any State of the Union, finds himself on a level with the people by whom he is surrounded, and subject to no restriction that does not weigh on them. So long as he remains in his own State he is guarded by her laws, and, when he crosses the frontier, may appeal to the above clause against the denial of such justice as the laws of the State into which he passes award to her own citizens. A resident of New Jersey, consequently, becomes, on crossing the Delaware, as much a citizen of Pennsylvania, for all the purposes of trade and commerce, as if he had been born and was domiciled in Philadelphia. A clause declaring that the occupants of farms in this State shall be unconditionally entitled to vend their produce in the streets, while denying a like privilege to residents of New Jersey who fail to procure a license, is, therefore, contrary to the Constitution of the United States, and invalidates the entire Act and every ordinance that may be enacted with the view of carrying it into effect.

The conviction of the defendant is also, I think, contrary to the Article of the Constitution empowering Congress to regulate commerce with foreign nations and among the States, which impliedly forbids local legislation tending to impair the uniformity which the grant to Congress was designed to promote. The States may, by virtue of the police power which is reserved to them and generally withheld from Congress, adopt measures for the preservation of health and order, although they operate incidentally on commerce, and might be taken by Congress under the commercial power, but no State can, by virtue of the police or any other power, preclude the inhabitants of other States from engaging in a branch of trade that is left open to her own citizens. Commerce, as Chief Justice MARSHALL pointed out in Gibbons *v.* Ogden, 9 Wharton, 1, includes intercourse, and cannot be free unless the inhabitants as well as the wares of each State have an unimpeded access to the marts of every other. An ordinance rendering a Jerseyman who hawks or peddles the produce of his farm in Pennsylvania without purchasing a license, liable to fine and imprisonment, while no such liability is imposed on farmers residing in Pennsylvania, manifestly sins against this rule, and is equally invalid, whether it be regarded as a police regulation or as a tax, because the effect is the same in both cases, and vitiates the means: Ward *v.* Maryland, 12 Wallace, 418; Passenger Cases, 7 Howard, 283; Brown *v.* Maryland, 12 Wharton, 419; Welton *v.* Missouri, 91 U. S. 275.

Summed up the case is substantially as follows: The ordinance establishes two classes; one consisting of farmers residing in Pennsylvania, the other of those dwelling elsewhere, and exempts the former from the license tax which is imposed on the latter. In so doing, it not only discriminates against the citizens of other States, but operates as a restraint on inter-State commerce, and consequently is invalid.

The rule for a new trial is made absolute.

H. B.

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WEEKLY NOTES OF CASES.

VOL. XXXV.] *FRIDAY, FEB. 1, 1895.* [No. 21.

Supreme Court.

Oct. '94, 306. November 9, 1894

O'Neil et al. v. American Fire Insurance Company.

Constitutional law—Delegation of legislative power—Insurance—"Standard policy"—Act of April 16, 1891, P. L. 22.

Legislative power is vested in the legislative branch of the government and cannot be delegated; and while a law complete in its terms may depend for its going into effect upon the action of some person other than the Legislature, yet an Act which as passed delegates the right or power to insert in it terms or parts which have not been passed upon by the Legislature, is unconstitutional and void.

The Act of April 16, 1891, P. L. 22, providing for a uniform policy of fire insurance, directing its use and enacting penalties for the failure to use it, is a delegation of legislative power and therefore unconstitutional in that—

(1) It does not fix the terms and conditions of the policy whose use it commands.

(2) It delegates the power to prescribe the form of the policy and the conditions and restrictions to be added to and made part of it to a single individual.

(3) The said individual appointee is designated only by his official title; he is the person who may happen to be the insurance commissioner at the time when the form of the standard policy is to be prepared.

(4) The appointee is not required to report his work to the appointing body, but simply to file, in his own office, the form devised; which does not become part of the statute in fact, is not recorded in the statute book, and no notice of it can be found in the records of the Legislature.

(5) The Act was approved in April, 1891, and the appointee had until the following November to prepare and file the form of policy, over which, when filed, the Legislature had no control whatever. It did not consider, and had no knowledge of, the form which it required all companies doing business in the State to adopt and use under heavy penalties.

Appeal of H. D. O'Neil and the Dollar Savings Bank, plaintiffs, from the judgment of the Common Pleas No. 2, of Allegheny County, refusing to take off a non-suit entered in an action against the American Fire Insurance Company to recover upon a policy of fire insurance issued by said company.

On the trial of this cause, plaintiff gave in evidence a policy of the American Insurance Company, dated November 2, 1892, to H. D. O'Neil, owner, and the Dollar Savings Bank, mortgagee, on property 602 and 604 Locust street, McKeesport. The policy was what is known as a standard policy and contained, *inter alia*, the following provisions:—

"If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all encumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described, and the several parts thereof, were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify. . . . .

"In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

"This company shall not be held to have waived any provision or condition of this policy, or any forfeiture thereof by any requirement, act or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required."

The plaintiff also gave evidence showing the following case:—While the policy was in force the building insured was entirely destroyed by fire. The defendants were immediately notified of the loss, and within a few days, Smith, the secretary of the Artisans' Insurance Company, which had also issued a policy on the premises, and Allewelt, an adjuster of the defendant company, visited the ruins, in company with the owner. After examining the premises, at the suggestion of Smith and Allewelt, the three of them went

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to the office of Campbell, the local agent of the companies, where these officers of the companies offered $1600 in settlement of the loss, and this O'Neil refused to accept; at this time there was no denial of liability, no request for formal proofs of loss; the only question was as to the value of the loss. The officers then proposed to have arbitrators appointed to determine the amount of the loss, and this was agreed to by O'Neil, each party selecting one arbitrator or appraiser. When the arbitrators met, the party chosen by the companies refused to proceed unless an agreement in writing was signed. No such agreement was called for by the policy, and the agreement produced varied from the terms and requirements of the policy as regards the appraisement. For these reasons the insured refused to sign the paper. Thereupon the appraiser for the insurance companies refused to proceed, and although requested by the insured, refused to make the appraisement called for by the policy. After this refusal the defendant refused to pay the amount of its policies.

The defendant moved for a non-suit, on the ground, (1) that there was no evidence of the furnishing of proofs of loss as required by the policy, and no evidence of a waiver thereof; (2) that there was no evidence of the waiver of the appraisal required in case of disagreement as to amount of loss; (3) that no authority had been shown in Allewelt to waive any of the provisions in the policy; (4) that no authority existed in any officer of the defendant to waive any provision of the policy unless the waiver were written upon or attached to the policy, and there was no such writing in evidence. The Court sustained the motion, saying in entering judgment:—

"The motion that has been made is one that asks the Court to say that taking all the testimony that the plaintiffs have given to be true, with all the proper inferences that can be drawn from it, they cannot recover.

"The contract of insurance is made on a policy in each case that is prescribed by the State and State authorities. It is the same policy that is in force in the State of New York and has been for some years. I have grave doubts myself as to the constitutionality of a part of this Act of Assembly, viz: putting into the hands of the insurance commissioner power that it is even questionable whether the Legislature has to legislate.

"The Act of Assembly that has been passed gives the insurance commissioner power to prescribe a form of policy which every insurance company in the State, or doing business in the State, is bound to adopt under pain of a penalty, and every man getting insurance has to take that form of policy. If it be a bad form, probably the best thing to do is to enforce the Act, and have the attention of the public called to it, so that it can be changed or repealed. I have myself a very decided opinion in regard to it. I look upon it as infamous.

"In the past, companies doing business in the State, many of them not having offices here, or not resident, were in the habit of putting clauses in their policies which virtually made an insurance policy only security if the company saw fit to pay it—unreasonable, unjust, inequitable provisions, and provisions so many of them that hardly any ordinary lawyer who was not an expert in the insurance business could get the run of all of them.

"The Courts of this State had held those provisions to be void in many cases, on the ground that virtually they were a trick of the company to hoodwink and cheat honest people insuring their property. The evil was so great that legislation seemed to be required, and the Legislature passed an Act in 1891 authorizing and directing the insurance commissioner of this State to provide a form of policy which all insurance companies were bound to adopt. He did so, and they have to follow it or run the risk of incurring penalties. Not one of them has yet undertaken, I believe, to ignore it.

"The conditions put in that policy go beyond almost any policy that ever was exhibited in the Courts before. Numerous provisions were put in that the Court had declared void because they were so unjust and inequitable. The basis of the policy seems to be an assumption that every man who insures his property is necessarily a rogue, and will undertake to cheat the company, and that the poor, honest companies must be protected against the villainy of the people who pay their money and get insurance.

"It seems to be framed in the interest of dishonest companies and insurance brokers, and puts an honest insurance company and honest officers of a company at a very great disadvantage, but we hold for the present that it is a valid law and a valid form of policy, and that its provisions are to be enforced when they come into Court, and until the Supreme Court declares that they are not to be enforced—not to be held to mean what they say—every man ought to understand that when he has an insurance policy upon his property it is an exceedingly poor security. He will get paid if the company sees fit to pay him."

The Court in banc refused to take off the non-suit, and the plaintiff took this appeal, assigning as error the refusal to take off the non-suit.

W. B. Rodgers, (*J. H. Beal* with him), for appellants.

Where a loss is total no formal proofs are required.

Insurance Co. *v.* Dougherty, 102 Pa. 568.

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Roe *v.* Insurance Co., 149 Id. 94.

The company having had immediate notice of the loss, and its officers having visited the premises and entered into negotiations for the payment of the loss and arranged for an appraisement without demanding technical proofs of loss, could not raise this question on the trial.

Woods on Ins., Sec. 458.
Snowden *v.* Ins. Co., 122 Pa. 502.
Roe *v.* Ins. Co., 149 Id. 94.
Whitmore *v.* Ins. Co., 148 Id. 418.
McFarland *v.* Ins. Co., 134 Id. 599.

The requirement as to appraisement was not binding but revocable at any time, and could be revoked, even after appraisers were appointed, and by bringing suit.

Mentz *v.* Ins. Co., 79 Pa. 478.
Assurance Co. *v.* Hocking, 115 Id. 407.

The company refused either to proceed with the appraisement or pay the loss; this was a waiver.

Snowden *v.* Ins. Co., 122 Pa. 502.
Bonnert *v.* Ins. Co , 129 Id. 558.

The Act of April 16, 1891, P. L. 22, did not change the construction or effect of the language of the policy and render it other than what it was construed to be by the decisions made prior to its passage.

The contract derives none of its validity from the legislative Act. Although the form is thereby prescribed it is none the less the contract of the parties. It is from their consent that it derived its binding effect. The provisions of the contract in relation to proofs of loss and appraisement are still inserted wholly for the benefit of the insurer. And if it chooses to do so, it has just the same right to waive those provisions, as though the Legislature had not prescribed the form of the contract.

Ins. Co. *v.* Curry, 13 Bush, 312.
Reed *v.* Washington Ins. Co., 138 Mass. 572.

The power of the insurance commisssoner to prescribe a contract being a delegated one, the terms prescribed by him must be reasonable or they are invalid.

Pittsburgh's Appeal, 115 Pa. 4.
Baltimore *v.* Radecke, 49 Md. 217.
Minnesota *v.* R. R Co., 134 U. S. 418.

The provisions here as to proofs of loss, appraisal and waiver are unreasonable.

The Act of April 16, 1891, P. L. 22, is unconstitutional. All legislative power is vested by the Constitution in the General Assembly and it cannot delegate the power.

Cooley, Const. Limitations (6th ed.) 137.
Parker *v.* Comth., 6 Pa. 507.
Case of West Philadelphia, 5 W. & S. 281.
State *v.* Commissioners, 37 N. J. Law, 12.
State *v.* Young, 29 Minn. 474.

This Act is an attempted delegation to the insurance commissioner of the power to make a law.

The entire matter as to the *extent* and *character* of the terms and conditions of the contract is left to the judgment, the wisdom and discretion of the commissioner. It is *his* judgment that determines what this part of the *law* shall be, and not the judgment of the Legislature.

When the commissioner has prepared the form of contract, that contract becomes part of the Act itself, and must be read into it. Because it is a departure from the *form prescribed by the commissioner* that is prohibited and made punishable. So that we must embody this contract in the Act in order to know what it is that we are commanded to do.

The Act is unconstitutional because it attempts to oust the jurisdiction of the Courts and to deprive the parties of a trial by jury.

People *v.* Haws, 37 Barb. 440.
Mentz *v.* Ins. Co., 79 Pa. 478.
Assurance Co. *v.* Hocking, 115 Id. 407.
Home Ins. Co. *v.* Morse, 87 U. S. 445.
Barron *v.* Burnside, 121 Id. 186.

It violates Art. III., § 7, of the Constitution in that it changes the rules of evidence relating to agency.

By prescribing a formal contract to be made by parties *sui juris* as to their own private business it violates Art. I., § 1, of the Constitution.

Godcharles *v.* Wigeman, 113 Pa. 437.
Comth. *v.* Perry, 155 Mass. 117.
Millett *v.* People, 117 Ill. 294.
Coal Co. *v.* People, 147 Id. 66.
Ry. Co. *v.* Wilson, 4 Tex. App. 322.
State *v.* Fire Creek Coal Co., 33 W. Va. 188.
State *v.* Goodwill, Id. 178.
People *v.* Gillson, 109 N. Y. 389.
In re Jacobs, 98 Id. 98.
Ex parte Kuback, 85 Cal. 274.
State *v.* Scougal, 2 S. Dak.
Peddlers' License, 22 WEEKLY NOTES, 35.

Edwin Z. Smith, (with him *J. S. Ferguson* and *E. G. Ferguson*), for appellee.

A power to regulate details may be delegated, although its exercise be a quasi legislative action.

Sutherland on Statutory Construction, 68.
Wayman *v.* Southard, 10 Wheat. 1.

As the measure left the Legislature it was not a dead letter, but a very living law. It declares that from and after a certain date but one form of fire insurance policy shall be used in the State; that it shall contain certain provisions specified and others to be formulated by the insurance commissioner, and shall be filed by him before a time certain. That every insurance company doing business in the State shall use it or suffer a heavy penalty. Here surely is no

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lifeless statute, to be galvanized into being by the act of the insurance commissioner, but a living law, wanting only the final touches of the officer in whose department and under whose charge it is to operate. It is his exercise of incidental discretion that is to put the law in operation, but the law exists *proprio vigore* independent of his subsidiary action.

While the Legislature cannot delegate the law making power, it may leave large discretion to the officers who are to carry the laws into effect.

State *v.* C. M. & St. P. Ry. Co., 38 Minn. 298.
Georgia R. R. *v.* Railroad Comrs., 70 Ga. 694.
Martin *v.* Witherspoon, 135 Mass. 175.

The Legislature had the power to promulgate in its own statute a standard form of insurance policy. Such action was well within its powers, either as in regulation of contracts, as a measure of public policy, or as in the direction and supervision of the business of the insurance companies. To the commissioner of insurance, by Act of April 4, 1873, (P. L. 20), creating an insurance department, establishing his office and defining its duties, large powers are granted as to the direction of the insurance business in this State, the supervision of the corporations conducting it, and the enforcement of all penalties and forfeitures prescribed by law in case of the unlawful carrying on of said business. What then more natural and proper than that the "incidental discretion" of preparing a standard form of insurance policy and of promulgating the same, should be entrusted to the executive officer, whose duty it would be to enforce its use, and in whom was vested full supervisory power over the corporations who were to use it?

This case is within the principle of Locke's Appeal, 72 Pa. 491. The form of contract, though prescribed and its use compulsory, takes its effect not only from the law but also from the consent of the parties entering into it, and parties to a controversy may voluntarily use a tribunal other than the Courts to settle preliminary questions of amount of damages.

Armstrong *v.* W. Mfgrs. Ins. Co., 22 Ins. Law Journal, 795.

The rules of evidence, if altered, are altered likewise by the consent of the contracting parties.

The Act is not unconstitutional as prescribing a form of contract to be made by parties *sui juris* as to their own private business.

Godcharles *v.* Wigeman, 113 Pa. 437, and the other authorities cited on this point by appellant, all apply to cases where attempts were made by legislative enactment to interfere with persons *sui juris* in the making of their own business contracts. The distinction between the legislation in this class of cases and in the one before us is clear and valid. The Legislature has a right to supervise and regulate the business of the corporations to whom it has granted a monopoly. They are the wards and dependents of the State, which may prescribe for, and compel, them to use a uniform contract, providing the same be reasonable and just.

Commonwealth *v.* Vrooman, 35 WEEKLY NOTES, 97.

The use of the standard policy being compulsory on companies, the former rule of interpretation—that certain requirements of the policy as to proofs of loss and appraisement might be held to be waived by the acts of the company, being for their benefit—cannot be applied to the contract under consideration.

Mitchell *v.* St. Paul German Ins. Co., 21 Ins L. J., 1003, (Mich.)
Armstrong *v.* W. Mfrs. Ins. Co., 22 Ins. L. J. 795, (Mich. 1893).
Moore *et al.*, *v.* Hanover Ins. Co., 23 Ins. L. J. 466 (N. Y. Ct. of Appeals).
Quinlan *v.* P. W. Ins. Co., 133 N. Y 356.
Wilcox *v.* Continental Ins. Co., 85 Wis. 193.
Bourgeois *v.* N. W. Ins. Co, 86 Wis. 606.
Shapiro *v.* Ins. Co., 22 Ins. L. J. 310.
Steele *v.* German Ins. Co., 93 Mich. 81.
Wierengo Ins. Co., 98 Id. 621.

January 7, 1895. WILLIAMS, J. The compulsory non-suit entered in this case must stand or fall with the Act of sixteenth April, 1891, P. L. 22, entitled, "An Act to provide for a uniform contract or policy of insurance to be made and issued by all insurance companies taking fire risks on property within the State."

The action is upon a policy in the form prepared by the insurance commissioner under the directions of that Act. At the trial the plaintiff gave his policy in evidence and then offered the testimony of witnesses for the purpose of showing a waiver by the company of the conditions in the policy relating to proofs of loss and an appraisement of the value of the property destroyed. These offers were objected to upon the ground that the conditions were prescribed by a statute and could be waived only in the manner which the statute provided. The learned Judge of the Court below assumed, with evident reluctance, the constitutionality of the Act of 1891, sustained the objection to the evidence offered, and left the plaintiff to stand upon the letter of what was thus held to be a statutory form of contract. The compulsory non-suit was the logical result.

This appeal brings us face to face with the question whether the provisions of this policy are to be construed as those of a voluntary contract entered into by the parties, or as the requirements of a positive statute imposed upon the parties by the law-making power.

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The answer to this question must depend on whether the Act of 1891 is a valid exercise of legislative power. The words legislative power mean the power or authority, under the Constitution or frame of government, to make, alter, and repeal laws; 13 Am. and English Ency. of Law, 222. Under the Constitution of this State this power is vested in, and must be exercised by, the legislative branch of the government; Parker *v.* The Commonwealth, 6 Pa. 507.

It is a power that cannot be delegated. This principle was stated with great vigor by Chief Justice GIBSON in the Borough of West Philadelphia, 5 W. & S. 283, in these words, "Under a well balanced Constitution the Legislature can no more delegate its proper function than can the judiciary." It is suggested that Parker *v.* The Commonwealth is an overruled case. While this is true it is equally true that the cases that overrule it distinctly recognize the principle on which it was decided. They deny only the applicability of that principle to the facts then before the Court. The question raised in Parker *v.* The Commonwealth was the constitutionality of a local option law, and it was held to be unconstitutional because the reference of the question of its going into effect in a given locality was thought to be a delegation of legislative power. In subsequent cases and particularly in Locke's Appeal, 72 Pa. 491, it was held that inasmuch as the law with all its provisions and its penalties was complete when it left the Legislature, and the only question submitted to the electors of the locality was whether they desired this law to become operative in the sub-division of the State, in which they lived, such submission did not amount to a delegation of legislative power. No provision or requirement of the law was left to be supplied in order to make it complete in all its parts, but the vote of the electors served to give expression to their wish in reference to the subjection of the locality they represented to its already finished provisions. It has frequently been held that local questions may be submitted in this manner to those who are to be directly affected by their division.

The division of a county is such a question, and a law submitting the question to a popular vote and making the division depend on the result of the vote was sustained in Smith *v.* McCarthy, 56 Pa. 359. So is the location of the county seat: Commonwealth *v.* Painter, 10 Pa. 214. So also is the granting of licenses to sell intoxicating drinks: Locke's Appeal, 72 Pa. 491. Such laws are in form, and in substance, laws *in præsenti* to take effect *in futuro* upon the ascertainment of the wish of those most directly affected thereby.

The effect of our cases is to settle firmly the rule that the law must be complete in all its terms and provisions, when it leaves the legislative branch of the government, and that nothing must be submitted to the judgment of the electors or other appointee of the Legislature except an option to become or not to become subject to its requirements and penalties.

In the light of this line of well considered cases let us examine the Act of 1891 in order to get its provisions before us. Section first declares, "That the insurance commissioner shall prepare and file in his office on or before the fifteenth day of November, 1891, a printed form in blank, of a contract or policy of fire insurance, together with such provisions, agreements or conditions as may be endorsed thereon or added thereto and form a part of such contract or policy; and such form when filed shall be known and designated as the standard fire insurance policy of the State of Pennsylvania." Section second provides among the other things for the incorporation of the provisions of the standard policy into the contracts of insurance made on property within the State by foreign insurance companies. Section third makes the use of this standard form of policy obligatory on all fire insurance companies doing business in this State from and after the first day of May, 1892. Section fourth provides the penalties to be imposed upon any insurance company, its officers or agents or either of them, for failure to comply with the requirements of the Act or with the form of the policy which the insurance commissioner may devise and file in his own office.

It may be well to say in this place that we do not now deny the power of the Legislature to direct the form of a policy of insurance against fire. We held in Commonwealth *v.* Vrooman, decided in October last, that the business of insurance against loss by fire was by reason of its nature, its magnitude, and the temptation to improper practices which it presented, a proper subject for legislative regulation and control. The power to prohibit technical and unjust conditions intended to open the way to vexatious litigation and to defeat the just expectations of the insured belongs to the police control which Commonwealth *v.* Vrooman asserted. The question is not, therefore, one of power over the subject, but of the manner in which the conceded power must be exercised. Upon this question our judgment is with the appellant for reasons that we will state as concisely as possible and without any attempt at elaboration. The Act of 1891 is a delegation of legislative power because:—

First. The Act does not fix the terms and conditions of the policy the use of which it commands.

Second. It delegates the power to prescribe the form of the policy, and the conditions and

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restrictions to be added to and made part of it to a single individual.

Third. The appointee clothed with this power is not named but is designated only by his official title. He is the person who may happen to be insurance commissioner when the time comes to prepare the form for the standard policy for insurance against fire.

Fourth. The appointee is not required to report his work to the body appointing him, but simply to file in his own office the form of policy he has devised. It does not become a part of the statute in fact, is not recorded in the statute book, and no trace of it can be found among the records of either branch of the Legislature.

Fifth. The Act was approved in April, 1891. The appointee had until the following November to prepare and file the form of policy over which when filed the Legislature had no control whatever. They did not consider, they had no knowledge of, the form which they required all companies doing business in the State to adopt and the use of which they compelled by heavy penalties.

The elementary books divide a statute into three parts, the declaratory, the directory and the vindicatory. In this statute the Legislature furnished the first and third. It delegated the preparation of the second. It declared in effect the need of a standard form of policy. It provided punishment for the failure to use such form when provided; but it turned the preparation of the form over to its appointee and gave him six months in which to do his work and file a copy of it in his own office. Whoever might be interested in knowing the directory part of the statute and understanding what it was he was required to do, had to go beyond the Act of Assembly and inquire of the appointee of the Legislature what it was he had filed in his own office, of which the people of the Commonwealth were bound to take notice at their peril!

It will not do to say that the preparation of the form was an unimportant matter of detail, or an act partaking of an executive or administrative character. It was the sole purpose of the Act. It was the only subject named in its title. The enforcement of the standard form of policy was the only object of its penalties. Take out the form prepared by the insurance commissioner and to be found in some pigeon-hole in his office, and the Act is without meaning or effect; it is completely eviscerated.

We do not see how a case could be stated that would show a more complete and unconstitutional surrender of the legislative function to an appointee than that presented by the Act of 1891. By its provisions the Legislature says in effect to its appointee, "Prepare just such a policy or contract as you please. We do not care to know what it is. The Governor shall have no opportunity to veto it. File it in your own office and we will compel its adoption, whether it is right or wrong, by the punishment of every company, officer or agent, who hesitates to use it." We do not take time to examine the voluminous conditions loaded upon the back of a very simple and concise contract of insurance. The assignments of error do not bring them before us for this purpose. The learned Judge of the Court below gave them careful consideration and he was of opinion that they were unjust and oppressive. Speaking of the form of the standard policy as a whole he said, "I look upon it as infamous." Again he said, "The conditions put in that policy go beyond almost any policy that ever was exhibited in the Courts before. Numerous provisions were put in that the Courts had declared void because they were so unjust and inequitable." Speaking of its general character, and effect he said: "It seems to be framed in the interest of dishonest companies and insurance brokers and puts an honest insurance company and honest officers of a company at a very great disadvantage."

This is a very serious arraignment of the "standard policy," to which we refer without comment of our own, for the purpose of showing the impolicy of such delegation of legislative power as might make it possible to fasten upon the people of the Commonwealth a form of contract open to such grave objections.

It is not to be supposed that a law really mischievous in its operations could pass both houses of the Legislature unchallenged. If by reason of any complication of circumstances this should happen in any given case, then the people have a remaining safeguard in the veto power possessed by the Governor. The Act of 1891 steered past both legislative discussion and executive veto, and vested in the insurance commissioners the power to fill in its directory provisions, and supply the form of insurance contract it was to enforce, without even the knowledge of the Legislature or the Governor of a single one of its many provisions that were to be bound by fines and penalties on insurers and insured all over the Commonwealth. Our conclusion is that the Act of 1891 is void because clearly unconstitutional. The compulsory non-suit is set aside and a procedendo awarded.

H. B.

Oct. '94, 307. November 9, 1894.

O'Neil et al. v. The Artisans Insurance Company of Pittsburgh.

Appeal of H. D. O'Neil and the Dollar Savings Bank, plaintiffs, from the judgment of the

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Common Pleas No. 2, of Allegheny County, refusing to take off a non-suit entered in an action against the Artisans Insurance Company of Pittsburgh, to recover upon a policy of fire insurance issued by said company.

The case was tried with the foregoing, was in all respects similar in its facts, and was argued upon appeal at the same time and by the same counsel.

January 7, 1895. WILLIAMS, J. This case is on all fours with the case of O'Neil *et al., v.* American Fire Insurance Company; and for the reasons stated in the opinion just filed in that case the compulsory non-suit entered in this case is taken off, and a venire facias de novo awarded.

H. B.

Oct., '94, 122. October 25, 1894.

Stoughton v. Manufacturers' Natural Gas Co.

Insurance — Standard policy — Assignment clause, subrogation—Measure of loss—Res adjudicata.

The assignment or subrogation clause of the standard policy of fire insurance relieves the insurer who has paid his policy from the burden of showing his equity to be subrogated to the rights of the insured against the person primarily responsible for the loss, and converts it into a legal right, which must prevail unless a counteracting equity is shown by the other party.

Ordinarily as between the insurer claiming subrogation and the insured, the amount of the recovery against the person whose tort caused the loss represents the entire loss suffered by the insured.

Dictum in Ætna Ins. Co. *v.* Confer, 158 Pa. 598, explained.

Appeal of W. R. Stoughton, from the decree of the Common Pleas No. 1, of Allegheny County, upon a petition presented by the Phœnix Assurance Company of London, and the Western Assurance Company of Toronto, praying distribution of a sum in the hands of the sheriff, being the proceeds of an execution issued on a judgment obtained in an action brought by the said Stoughton in part for the use of said companies against the Manufacturers' Natural Gas Company.

The Phœnix Assurance Company of London and the Western Assurance Company of Toronto, presented a petition setting forth that a verdict had been rendered in the case above entitled March 13, 1893, for $5,675.89, and judgment entered thereon; that a dispute had arisen between petitioners and W. R. Stoughton as to the amount of said judgment petitioners were entitled to, and that the amount had been paid to the sheriff; that the cause of action was a claim for damages against the gas company, defendant, for the destruction by fire of certain houses and personal property of said Stoughton, which were covered by policies of insurance held by Stoughton, being one of $2,000 on a house, made by the Phœnix Co., and three made by the Western Co., being $800 on said house, $300 on another house, and $1,500 on personal property; that said Phœnix Company paid to said Stoughton on its policy $1,980.64, and the other company paid on its policies $792.25, $300 and $1,454.50 respectively, aggregating $4,527.36; that, at the time of said payments, said Stoughton assigned and transferred to said companies said several amounts by subrogation receipts, (copies of which were attached to petition), transferring all claims against any person arising from such loss, and subrogating said companies to his rights to the extent of the amount named in said subrogation receipts; that said action was carried on for the benefit of petitioners as well as said Stoughton, he being entitled to any loss he had sustained over and above the amount covered by the policies; that petitioners actively participated in prosecuting the suit, and that it was carried on with the understanding that Stoughton was to have whatever was recovered over the sum of $4,527.36; that Stoughton claimed the whole of the fund, but that petitioners believed they were entitled to the sum of $4,527.36 out of the fund.

And prayed that $2,676.21 be decreed to the Western Assurance Company, and $2,081.29 to the Phœnix Company.

W. R. Stoughton filed an answer setting up that his property was worth at the time it was destroyed by fire the sum of $9,972.77, and that his whole loss by said fire much exceeded that amount, and that he furnished proofs of loss to said companies showing his loss to be $9,972.77; that said companies then paid him the several sums alleged by them; that said policies being in the standard form contained the following clause:

"If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment."

That said companies having claimed that the fire was caused by negligence of other parties, he gave them subrogation receipts as alleged, said receipts being in the form prescribed by the insurance department; that he thereupon brought an action against the Manufacturers' Natural Gas Company to recover for the loss occasioned by

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the fire both to property insured and other property not covered by the insurance, upon the allegation that it was caused by their negligence and recovered a judgment for $5,575.89; that said action was marked in part for the use of said companies, but they were not parties to it in any other sense; the answer denied that there was any understanding that the companies should receive whatever might be recovered to the extent of the amounts paid to him, if it were meant that they were to receive the same before he was compensated for his loss; admitted that petitioners took an active part in the prosecution of the suit; averred that in addition to his loss by fire he had expended the sum of $1,192.88 for counsel fees in the prosecution of said suit, and that he was advised that he was entitled to the whole of said judgment, less the amount, if any, which the same and the payments of the said insurance companies exceed his loss.

The Court made the following decree:

"And now, to wit, March 22, 1894, this cause came on to be heard, on petition and answer, as set down by consent of parties, and was argued by counsel, and the Court being of opinion that the equitable plaintiffs are entitled to receive of verdict and judgment to the extent of the several sums assigned to them by W. R. Stoughton, the legal plaintiff, to wit, the Phœnix Assurance Company, $1,980.61, and the Western Assurance Company, $2,546.75 (but not to interest prior to verdict); it is hereby adjudged and decreed that the amount remaining in the sheriff's hands, to wit, the sum of $4,771.53, being the amount of debt and interest of judgment, less $1,192.88 paid by consent of parties to J. M. Garrison, Esq., (or $5,964.41 less $1,192.88), be distributed to, and the sheriff is directed to pay said sum of $4,771.53 as follows: To the Western Assurance Company of Toronto, $2,-140.97; to the Phœnix Assurance Company of London, $1,665.03, and to W. R. Stoughton the balance of said sum, viz, $965.53, said payments to be made at the expiration of twenty days from this date unless an appeal shall in the meantime be taken to the Supreme Court. By The Court."

W. R. Stoughton took this appeal, assigning as error the above decree.

John D. Shafer, (*Alexander Gilfillan* with him), for appellant.

The insured suffers damage to the extent of $9,972.77 through fire, he receives the amount of insurance, less discount, viz, $4,527.36, and recovers from the wrong-doer $5,675.89. If the policies of insurance had not contained the clause relating to subrogation under which the subrogation receipts were given by appellant to the companies, they could not have claimed any right of subrogation or any right to interfere in his suit on paying him the full amount of the policies. To have subrogation they must first have paid, and have paid the whole amount of his loss, whether covered by insurance or not, and they could not ask for subrogation or any interest in the suit until after they had done so.

Ins. Co. of N. A. *v.* Fidelity Co., 123 Pa. 523.
Forest Oil Co.'s Appeal, 118 Id. 138.
Com. Union Ass. *v.* Lister, L. R. 9, Ch. App. 483.
National Fire Ins. Co. *v.* McClaren, 12 Ontario, 682.

The object and effect of the subrogation clause is to give the insurer a right to subrogation concurrently with the payment by him, without proceedings to obtain it, and the right to interfere in the conduct of the suit against the wrong-doer, although the insurance might not cover the whole loss. The assignment provided for is merely the formal declaration of the allowance of subrogation. Still it is subrogation that is provided for and not assignment in the ordinary sense. If the latter were meant there would be no occasion to say anything about subrogation.

The necessary consequence of regarding the matter as a simple assignment is that if a verdict be recovered against the wrong-doer for the full amount of the loss, and one-half of it only can be collected from him upon execution, the insurer who has paid one-half of the total loss will take all the money and the owner lose the other half.

This is not subrogation, nor does it bear any considerable resemblance to it. If this was meant it was worse than superfluous to say that the company should be *subrogated* to the insurer's right to recover; it was misleading.

If the clause in question has this effect, the contract of insurance, which must now contain this clause, has to that extent ceased to be a contract of indemnity, nor under the law can any such contract be made.

An interpretation of this clause which produces such results ought not to be adopted when it admits of a reasonable interpretation which produces no such radical changes in the contract as heretofore commonly made, but gives the insurer a right to subrogation in cases in which the law left him without remedy.

The verdict against the wrong doer does not fix the amount of the loss as between the insured and the insurer. It is *res inter alios acta*.

National Fire Insurance Co. *v.* McClaren, *supra*.
Ætna Ins. Co. *v.* Confer, 158 Pa. 598.

James Bredin, for appellee.

A fire policy is a contract of indemnity, the payment of a loss, whether partial or total, gives the insurer an equitable title to what may afterwards be recovered from other parties on account of the loss. On such payment by the insurer, vol-

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untarily or otherwise, the assured becomes a trustee for the insurer to the extent of the amount paid, and by necessary implication makes an equitable assignment to him of the right to recover against the party by whose immediate act the damage was occasioned, and the insurer may bring an action in the name of the assured, for his own benefit, with or without the consent of the assured, and cannot be affected by a release by the assured.

Philips on Ins., sec. 1723.
Sheldon on Subrogation, secs. 229 and 230.
Wood on Fire Ins., secs. 473 and 474.
Flanders on Fire Ins., 648.
Hart *et al.*, *v.* Western R. R., 13 Metc. (Mass.) 99.
Conn. Ins. Co. *v.* Erie R. W. Co., 73 N. Y., 399.
Monmouth Ins. Co. *v.* Hutchinson, 21 N. J. Eq. 107.
Liverpool and Great Western Steamship Co. *v.* Phœnix Ins. Co., 129 U. S. 398.
Bean *v.* R. R. Co., 58 Me. 82.
Hall *v.* Railroad, 13 Wall. 367.

If the insured had proceeded against the wrong-doer company, a recovery against it for the loss by fire would, when paid, have reimbursed the insured, and, his claim being satisfied, no recovery could have been had against the insurance companies.

Ins. Co. of N. A. *v.* Fidelity Co., 123 Pa. 526.

The fact that the action against the gas company was not brought by the insured until after the companies had paid him the amount for which they were liable, does not change the legal effect of the recovery against the wrong-doer. It did reimburse him for his entire loss, and the companies, in equity, as well as under their assignments, are entitled to receive thereof the amount paid by them to the insured, and which he could not have demanded of them if the action against the gas company had been first prosecuted and the judgment against it collected.

Darrell *v.* Tibbitts, L. R. 5 Q. B. D. 560.

The insurers in this case having paid the full amount of the insurance were entitled even without the assignment to sue in the name of the assured or to be joined with him as equitable plaintiffs in an action against the wrong-doer, they were, therefore, proper parties to the action and were bound by the judgment therein.

Greenleaf on Evidence, sec. 523.
Peterson *v.* Lothrop, 34 Pa. 223.
Giltinan *v.* Strong, 64 Id. 242.

Co-parties to an action as well as antagonists may be concluded by the verdict—as to matters directly in issue.

Lloyd *v.* Barr, 11 Pa. 41.

The assignment provided for by the standard policy is intended to provide by contract and put in legal form that to which the insurer was already entitled in equity.

Jauuary 7, 1895. MITCHELL, J. The plaintiff brought his suit against the gas company for his whole loss, and *prima facie* the verdict must be considered as representing the whole loss. That was the question at issue, and it has been determined by the tribunal which has authority to conclude it. In this case there is nothing to rebut this presumption.

Subrogation is based upon equity, and no doubt the statute, in directing through its standard form of insurance policy the subrogation of the insurers to the rights of the insured against the party primarily responsible for the loss, meant that it should be administered on equitable principles. But the effect of the statute is to put such subrogation on the footing of a legal right, which must prevail unless a stronger equity be shown against it. In the first instance it relieves the insurer who has paid his policy, from the burden of showing his equity to subrogation, because it is now an express legal right given by the statute and the contract of the parties. If it is not to prevail, the burden of showing why, must be assumed by the other party. Such burden has not been met by the appellant. There may be cases where the wrong-doer would not be liable for the plaintiff's whole loss, as where after an interval of time, or the intrusion of some other agency, an additional loss occurs of which the wrongful act is not the proximate cause and yet which would be covered by the insurance. Such an instance is suggested by Haverly *v.* R. R. Co., 135 Pa. 50. In those cases the verdict would not be the measure of the plaintiff's loss, and therefore of the insurer's right to subrogation out of it, but such cases are exceptional and should be proved. The presumption, at least for the purpose of distribution, is that the verdict represents the whole of the loss. As said by our brother WILLIAMS, in Ins. Co. *v.* Fidelity Co., 123 Pa. 523, "if the insured had proceeded against the gas company a recovery against it for the loss by fire would, when paid, have reimbursed the insured, and his claims being thus satisfied no recovery could have been had against the insurance company." What was said in Ætna Ins. Co. *v.* Confer, 158 Pa. 598, 605, upon the non-conclusiveness of the judgment as to the loss, was said in illustration of the policy of this Court not to express any opinion upon the merits of a case before it on the sufficiency of an affidavit of defence, and is sustained by the consideration of the exceptional cases already referred to. There is nothing shown in the present case to take it out of the general rule.

Judgment affirmed.

H. B.

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Oct. '94, 17. November 12, 1894.

Pennsylvania Co. et al., Executors v. Leggate.

Wills—Power to convey—Residuary legatees, notice to—Conversion.

The testator having authorized a sale of all his real estate as soon as practicable, directed a sale of the unimproved parts "as soon as may be," and from this last direction he excepted those parts which his executors might think would improve in the near future, and those which he was of opinion would improve, properties in Pittsburgh and Chicago. These though unimproved were not to be sold under the specific direction as to that class, but to be retained by the executors with the productive real estate and sold when practicable:

Held, the power of sale as to all remained in the executors, and there was in the will no evidence of an intention that their judgment as to the time of sale should be controlled except by the direction which the testator gave.

Appeal of the Pennsylvania Company for Insurances on Lives and Granting Annuities, trustee and executor under the will of John H. Shoenberger, deceased, and Andrew Long, J. M. Brownson and Anthony J. Antelo, co-executors, plaintiffs, from the judgment of the Common Pleas of Allegheny County, in an amicable action in which Alexander Leggate was defendant.

The facts of this case as they appeared by a case stated, were as follows:—

John H. Shoenberger died in the city of New York on the 12th day of November, 1889, having left a will, the eighteenth and nineteenth paragraphs of which were as follows:—

"18. All the rest, residue and remainder of my estate, both real and personal, I give, devise and bequeath to my trustee and executors hereinafter named, and to their successors in trust to hold the same, and as soon as practicable to convert the same into money, and to pay over to the corporation of the 'St. Margaret Memorial Hospital' hereinbefore provided to be incorporated, the sum of two hundred and fifty thousand dollars to be added to the permanent fund of said corporation for the maintenance of said hospital as a free institution, and to pay over the balance of my said residuary estate after the payment of all bequests and devises hereinbefore made in this my will in equal shares to the following named persons, their heirs, legal representatives, or assigns. . . . .

"19. I hereby authorize, order and direct my trustee and executors hereinafter named and appointed in relation to my property, real and personal, in the States of Pennsylvania, Ohio, Kentucky and Illinois for the purposes of this my will, or otherwise to sell and dispose of all or any part or parcel of my real estate within the limits of said States of Pennsylvania, Ohio, Kentucky and Illinois, and not hereinbefore specifically devised, at public auction or private sale on such terms as to cash or credit, or part cash and part credit as to them shall seem most advantageous to my estate, and to execute deeds of conveyance therefor; and in the meantime to lease the same and to collect the rents and profits therefrom. It is my wish, and I so direct that as soon as may be for the best interest of my estate, my trustee and executors hereinafter named, their successor or successors, shall convert into money and productive securities all my unproductive real estate, excepting that portion hereinbefore specifically devised, and also excepting such portion of my real estate as in the opinion of my said trustee and executors would be likely in the near future to enhance in value, and excepting especially my eight-acre lot in the city of Pittsburgh, on part of which the said 'St. Margaret Memorial Hospital' is to be erected, and my real estate situate in and adjoining the city of Chicago, Cook county, Illinois."

He appointed the plaintiffs trustee and executors for Pennsylvania. They, by agreement dated the 17th day of March, 1894, sold and Alexander Leggate bought a piece of ground in Pittsburgh, being a part of the land covered by the exception, "especially my eight-acre lot in the city of Pittsburgh, on part of which the said 'St. Margaret Memorial Hospital' is to be erected, and my real estate, situate in and adjoining the city of Chicago, Cook county, Illinois." Upon tender of the deed, Alexander Leggate refused to take the deed of the trustee and executors upon the ground that they had no authority under the will to sell without an order of Court.

The Court (Stowe, P. J.), delivered the following opinion: "Being of opinion, that under the facts stated and admitted to be true in this case, the plaintiffs have not the power to convey the title to the premises therein described in fee simple, and that the power to make such conveyance is not in conformity with the terms of said will therein recited, judgment is directed to be entered for defendant with costs."

The plaintiffs appealed.

James H. Reed (with him *P. C. Knox* and *Edwin W. Smith*), for appellant.

If this land comes within the provisions of the eighteenth section of the will then the executors can convey; there is a conversion; there is a blending of real and personal estate with the imperative direction to convert into money and distribute, which has been held to constitute conversion upon the death of the testator.

Page's Estate, 75 Pa. 87.
Roland *v.* Miller, 100 Id. 47.

An absolute direction to sell and divide the proceeds is an equitable conversion.

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Allison *v.* Wilson's Exrs., 13 S. & R. 330.
Morrow *v.* Brenizer, 2 R. 185.
Allison *v.* Kurtz, 2 W. 185.
Gray *v.* Smith, 3 Id. 289.
Hay *v.* Mayer, 8 Id. 203.
Simpson *v.* Kelso, Id. 252.
Alexander *v.* McMurry, Id. 504.
Selfridge's Appeal, 9 W. & S. 55.
Willing *v.* Peters, 7 Pa. 287.
Fisher *v.* Harris, 10 Id. 459.
Silverthorn *v.* McKinster, 12 Id. 67.
Martindale *v.* Warner, 15 Id. 471.
Brown's Appeal, 27 Id. 62.
Dundas' Appeal, 64 Id. 325.
Eby's Appeal, 84 Id. 241.
Roland *v.* Miller, 100 Id. 47.

An equitable conversion puts the title into the executors.

Chew *v.* Nicklin, 9 Wright, 84.
Shankland's Appeal, 11 Id. 114.

The first paragraph of the nineteenth section is not effective without reading it in connection with the eighteenth section. There is in the former section no devise to executors, no direction as to distribution; the two sections must be read together.

Brolasky *v.* Gally's Executors, 51 Pa. 509.
Pennsylvania Company for Insurances on Lives *v.* Bauerle, 143 Ill. 478.

There is no temporary bar upon the conversion or disposition of the real estate, there is merely a suggestion by the testator that all the land which he had devised to the executors, or unproductive real estate should, as soon as may be, be converted into money or productive securities. There is no greater restriction on the disposition of the land covered by the exceptions than there is on any other land devised to the executors under the eighteenth clause. In the worst aspect of the case for the plaintiff the effect of the exceptions to the nineteenth paragraph of the will can only be that it makes the time of the sale a matter within the discretion of the trustee and executors. The direction to sell is positive and imperative.

P. L. 1834, p. 73, sec. 13.
Chew *v.* Nicklin, 45 Pa. 84.
Williams' Appeal, 73 Id. 285.
Dundas' Appeal, 64 Id. 325.

John Wilson (*William M. Hall, Jr.*, with him), for appellee.

The plaintiffs have not power to make, at their discretion, without decree of Court binding on the residuary legatees, a title in fee simple to the premises. This same will was under investigation in the Supreme Court of Illinois relative to the power of the trustee and executors as to the Chicago real estate mentioned in paragraph 19, and the Court there held that "the five residuary legatees mentioned in paragraph 18 of the will were entitled to notice and should be parties to the bill, for the tract of land is a part of the residuary estate, the proceeds of which after certain specified payments, they are entitled to receive from the trustee and executors in equal shares."

Pennsylvania Co. *et al. v.* Bauerle, 143 Ill. 459.

The power to decree such a sale is vested by statute in Pennsylvania in the Orphans' Court, which alone, in this case, has jurisdiction as a Court of chancery.

Act 18 April, 1853, sec. 1, P. L. 503.
Burton's Appeal, 57 Pa. 213.
Act 3 April, 1851, sec. 1, P. L. 305.

It is clear that the trustee and executors have the power to sell, that they are directed to sell, as soon as they deem best and at their discretion, all real estate but that excepted, and especially excepted is the eight-acre lot in Pittsburgh. The Act of 24th February, 1834, section 13, P. L. 73, Purd. Dig. p. 521, does not alter the situation of the trustee and executors. This Act does not apply: (1) Because the executors have not been given "a naked authority only to sell," but the land has actually "been devised to them to be sold;" and (2), because the whole question of doubt is as to whether the testator has not exercised the right reserved to him under the Act to direct against a sale at the executor's discretion which can, therefore, be consummated only upon application to the Orphans' Court.

To establish a conversion a will or deed must direct a sale absolutely, or out and out for all purposes, irrespective of contingencies and independent of all discretion.

Bleight *v.* Bank, 10 Pa. 131.
Peterson's Appeal, 88 Id. 397.
Perot's Ap., 102 Id. 235.
Mellon *v.* Reed, 123 Id. 1.

Examined in the light of the above propositions, this will, in the eighteenth and nineteenth paragraphs thereof, seems to contemplate four classes of land: (1), land specifically devised; (2), land to be "as soon as practicable" converted into money; (3), land likely in the near future, in the opinion of the trustee and executors, to enhance in value, the time for the sale of which is left to the discretion of the trustee and executors, and is indefinite in duration; and (4), the land in Pittsburgh and in Chicago.

As to this Pittsburgh land, there is nothing which "directs a sale absolutely, or out and out for all purposes independent of all discretion," that gives "direction to sell," that is "positive and irrespective of contingencies," that leaves nothing to the discretion of the executors and trustee, or directs a sale at a "time certain." It follows, therefore, that the land probably descended as land and not as money, and that the executors

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and trustee in order to pass a good title must preclude these residuary legatees in some way.

January 7, 1895. FELL, J. The single question raised by the case stated is whether under the will of John H. Shoenberger his executors have power to convey land in Pittsburgh sold by them to the defendants. The 18th section of the will provides:—

"All the rest, residue and remainder of my estate, both real and personal, I give, devise and bequeath to my trustee and executors hereinafter named and to their successors, in trust, to hold the same, and as soon as practicable to convert the same into money, and to pay over to the corporation of the 'St. Margaret Memorial Hospital' hereinafter provided to be incorporated the sum of two hundred and fifty thousand dollars, to be added to the permanent fund of said corporation, for the maintenance of said hospital as a free institution, and to pay over the balance of my said residuary estate after payment of all bequests and devises hereinbefore made in this my will, in equal shares to the following named persons, their heirs, legal representatives, or assigns," etc.

The 19th section provides:—

"I hereby authorize, order and direct my trustee and executors hereinafter named and appointed in relation to my property, real and personal, in the States of Pennsylvania, Ohio, Kentucky and Illinois, for the purpose of this my will or otherwise, to sell and dispose of all or any part or parcel of my real estate within the limits of the said States of Pennsylvania, Ohio, Kentucky and Illinois, and not hereinbefore specifically devised, at public or private sale, on such terms as to cash and credit, or part cash and part credit, as to them shall seem most advantageous to my estate, and to execute deeds of conveyance therefor; and in the meantime to lease the same and to collect the rents and profits therefrom. It is my wish, and I so direct, that as soon as may be for the best interest of my estate, my trustee and executors hereinafter named, their successor or successors, shall convert into money and productive securities all my unproductive real estate, excepting that portion hereinbefore specifically devised, and also excepting such portion of my real estate as in the opinion of my said trustee and executors would be likely in the near future to enhance in value, and excepting especially my eight-acre lot in the city of Pittsburgh, on part of which the said 'St. Margaret Memorial Hospital' is to be erected, and my real estate situate in and adjoining the city of Chicago, Cook county, Illinois."

The land sold the defendant is a part of the eight-acre lot in the city of Pittsburgh that remained after the conveyance in trust to the hospital of the portion devised to it, and it comes within the exception in section 19. It is not specifically devised, and it is a part of the residuary estate of the testator.

It is directed by the 18th section that the whole residuary estate, real and personal, shall be converted into money as soon as practicable, and paid over to the legatees mentioned. There is an imperative direction for a sale and distribution. In order to accomplish it there is a devise of the realty to the executors for the purpose of sale. If this section stood alone there could be no doubt as to the power which is questioned.

The power of sale expressly given by the 19th section is unnecessary, as such a power is implied in the 18th section. The thought of the testator expressed in the last paragraph of the 19th section does not seem to have been to withdraw any of his real estate from the direction to sell, but to express his wish as to the time when the unimproved portion of it should be sold. He had already in the 18th section directed a conversion as soon as practicable, and in the first paragraph of the 19th section given a full and express power of sale. The authority to lease in the meantime would indicate a doubt on his part whether it would be practicable to sell all at once, and from it also would be inferred a discretion as to the time of sale. Having then expressly directed a sale of all as soon as practicable and in the meantime authorized a leasing until sold, which applied only to the productive part, he expressed a wish as to his unproductive real estate. That wish, coupled with a direction, was that "As soon as may be for the best interest of my estate" the executors "shall convert into money and productive securities all my unimproved real estate." From this direction he excepted (1) portions specifically devised; (2) such portions as in the opinion of the executors would be likely in the near future to enhance in value; (3) the eight-acre lot in Pittsburgh; (4) the real estate in Cook county, Illinois.

The first exception of land specifically devised was unnecessary, and need not be noticed. The others are of unproductive real estate from the general direction "to sell as soon as may be" all of that class; and they were relegated to the other class, the productive real estate, which was to be sold when practicable under the authority conferred by section 18 and the first clause of section 19. The exception was not from the authority to sell but from the direction to sell.

It is manifest that the testator had a clearly defined wish with regard to the time of the sale of his real estate, which he directed his executors to carry out. Having given a direction for the sale of all as soon as practicable he directed a sale of the unimproved parts "as soon as may

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be," and from this last direction he excepts those parts which his executors might think would improve in the near future, and those which he was of opinion would improve, the Pittsburgh and Chicago properties. These though unimproved were not to be sold under the specific direction as to that class, but to be retained by the executors with the productive real estate and sold when practicable. The power of sale as to all remained in the executors, and we find in the will no evidence of an intention that their judgment as to the time of sale was to be controlled except by the direction which the testator gave.

We are of opinion that under the facts as stated the plaintiff had power to convey to the defendant a title in fee simple.

The judgment is reversed, and judgment is now entered for the plaintiff for eighteen hundred dollars with interest to be computed according to the case stated. W. C. S.

Oct. '94, 303. October 17, 1894.

Cameron v. Coy.

Real estate—Title—Will—Construction of.

In construing wills it is the testator's actual intent that must govern, and where that is clear all technical rules of construction must give way.

A. devised to his son Hugh ninety acres of land, and to his daughter Martha the rest of his farm, and in a later part of the will declared that "if either Hugh or Martha should die leaving no issue, then their estates should descend, in equal shares alike, to the two married sisters and Hugh or Martha or survivors, that is the three survivors of the four shall have equal shares alike of said estate or estates." Hugh died before any of his sisters, leaving a widow but no children, and his executor sold the ninety acres devised to him under an order of Court to pay debts. During Hugh's lifetime Martha had released to him all her interest in the above land, and after the sale the other sisters accepted part of the purchase money. In a case stated to determine whether the purchaser at the Orphans' Court sale took a valid title:

Held, 1, that it was not necessary to determine whether at the death of Hugh his estate was defeated by the coming into existence of the devise over to the three surviving sisters, as Martha's interest, if any, was released to Hugh by her deed, and the other sisters were equitably estopped from contesting purchaser's title by acceptance of part of purchase money.

2. Therefore the purchaser took a good title in fee.

Appeal of George A. Coy, from the judgment of the Common Pleas of Indiana County, in favor of John G. Cameron upon a case stated.

By the case stated it appeared that Cameron entered into an agreement in writing to sell to Coy a certain tract of land in Indiana County, purchased by him at an Orphans' Court sale. Coy agreed to pay the amount mentioned, provided Cameron could make a good title. The facts upon this point were agreed upon as follows:

"It is agreed that this land was owned by James Simpson in his lifetime, who by his last will and testament, bearing date the twenty-fifth day of April, 1857, devised the same to his son, Hugh Simpson, in the following language: 'I also give, bequeath and devise to my son Hugh Simpson ninety acres of the old place to be taken off of the northeast part of the place, so as to include the mansion house and barn.'

"The testator had a daughter Martha, intermarried with J. S. Amond; a daughter Esther intermarried with John Gilmore, and a daughter Mary Jane intermarried with John Simpson. To his daughter Martha he gave the balance of the tract, which he supposed to be about fifty acres.

"The will contains the following provision: 'Now my will is that if either Hugh or Martha should die leaving no issue, then their estate or estates shall descend equal shares alike to the two married sisters and Hugh or Martha or survivors, that is, the three survivors of the four shall have equal shares alike of said estate or estates.'

"James Simpson died in the early part of 1866 and his will was duly proved in the register's office in and for Indiana county on the 17th day of April, 1866, and recorded in Will Book, Vol. 3, page 278. A copy of which said will and probate is hereto attached and made part of this case stated.

"Hugh Simpson died in the year 1868, leaving a widow but no children, in possession of said land, having first made his last will and testament, wherein, among other things, he made, constituted and appointed Andrew Wiggins his executor, to whom letters testamentary were in due form of law granted by the register of wills in and for Indiana county, on the 24th day of October, 1868.

"Andrew Wiggins, executor of the last will and testament of Hugh Simpson, deceased, presented his petition to the Orphans' Court of Indiana county, setting forth that the personal estate of said testator was insufficient for the payment of his debts, and prayed the Court for an order for the sale of his real estate for that purpose, being the ninety acres, more or less, above described.

"Which prayer of the petitioner was granted and the land was sold by said executor to John G. Cameron, the plaintiff, to whom a deed was made by said executor, bearing date of October 2, 1870, recorded in Deed Book 'A,' Vol. 37, page 10. J. S. Amond and Martha his wife, by deed dated December 24, 1867, released to Hugh Simpson all their interest in the above stated land.

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"Esther Gilmore is still living. Mary Jane Simpson died after her father, leaving surviving several children who are now in full life.

"If the Court is of the opinion that Hugh Simpson by the will of his father, took an absolute estate in fee simple, in the above described ninety acres of land, and that the said plaintiff, John G. Cameron, has by his deed from the executor of Hugh Simpson, deceased, acquired a title to said land in fee simple, then judgment to be entered for the plaintiff, but if not then judgment to be entered for the defendant. The costs to follow the judgment and either party reserving the right of appeal.

JOHN G. CAMERON,
Plaintiff.
J. N. BANKS,
Attorney for defendant.

"It is further agreed that John G. Cameron, the plaintiff, purchased the above described 90 acres of ground at Orphans' Court sale as above stated for the price or sum of $3,036. That it only required part of this money to satisfy the debts of Hugh Simpson, deceased. That Mrs. Esther Gilmore and Mrs. Mary Jane Simpson, with the other heirs, received and receipted the executor of Hugh Simpson, deceased, for their respective shares of this balance.

J. N. LANGHAM,
Attorney for plaintiff.
J. N. BANKS,
Attorney for defendant."

The Court, WHITE, P. J., filed no opinion, but directed judgment to be entered for the plaintiff.

Defendant thereupon appealed, assigning for error this action of the Court.

John N. Banks, for appellant.

While the word "issue" is ordinarily a word of limitation, it will not always be so construed.

Stambaugh's Estate, 135 Pa. 585.
Cockin's Appeal, 111 Id. 26.

The word children is primarily a word of purchase, and the word "issue" is frequently used in the same sense.

Ingersoll's Appeal, 86 Pa. 240.
Mannerback's Estate, 133 Id. 342.

It is difficult to reach the conclusion that the testator contemplated giving Hugh a fee simple in the 90 acres if at the time of his death he had no issue living capable of inheriting his estate and his sister Martha survived him.

J. N. Langham, for appellee.

The word "issue" in a will is always held to be a word of limitation, unless it clearly appear from the context that it was used in a different sense.

A devise in fee and upon a failure of issue, then over, creates a fee tail, which, by Act of April 27, 1851, is enlarged into a fee simple.

Eichelberger *v.* Barnitz, 9 Watts, 447.
Clark *v.* Baker, 3 S. & R. 470.
Lawrence *v.* Lawrence, 105 Pa. 335.
Smith's Appeal, 23 Id. 9.
Matlack *v.* Roberts, 54 Id. 148.
Carroll *v.* Burns, 108 Id. 386.
Bassett *v.* Hawk, 118 Id. 94.
Cockin's Appeal, 111 Id. 26.
Reinoehl *v.* Shirk, 119 Id. 108.
Cochran *v.* Cochran, 127 Id. 486.

After the death of Hugh Simpson, the land was sold at Orphans' Court sale for the payment of his debts. There was a considerable surplus after the debts were paid arising from this sale, and the heirs of Hugh Simpson, who are the same as the legatees under the will of James Simpson, accepted this surplus and receipted the executor of Hugh Simpson for the same.

January 7, 1895. MITCHELL, J. The rule which was adopted by our earlier cases from the English authorities, and perhaps may still be called the general rule, is that the words "die without leaving issue" presumably refer to an indefinite failure of issue, but this presumption will yield to a contrary intent apparent from the whole will. Middleswarth's Admr. *v.* Blackmore, 74 Pa. 414. And this Court has frequently said with great emphasis that it is the testator's actual intent that must govern, and where that is clear all technical rules of construction must give way to it. Reck's Appeal, 78 Pa. 435; Woelpper's Appeal, 126 Id. 562.

The testator here devised to his son Hugh, describing no estate, and therefore under the statute giving him a fee. But in a later part of the will he declared that "if either Hugh or Martha should die leaving no issue, then their estates shall descend equal shares alike to the two married sisters and Hugh or Martha or survivors, that is the three survivors of the four shall have equal shares alike of said estate or estates." If it were open to question here, there would not be much difficulty in reaching the conclusion that the testator had in mind a definite failure of issue, to wit, at the time of Hugh's or Martha's death, and that upon the happening of such contingency by the death of Hugh his estate was defeated by the coming into existence of the devise over to the three surviving sisters. But there is no one entitled to raise that question. During the lifetime of Hugh, Martha released to him all her interest in the land. The devise as to her third therefore united with his estate whatever that may have been. The devise as to the other two-thirds remained in the other sisters, but when Hugh died and the Orphans' Court proceeded to sell his land as a fee simple, the two sisters ratified that assertion

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of Hugh's title by accepting their share of the purchase money. The plaintiff, Cameron, became the purchaser, and he bought a title in fee, presumably at its full value, as the Orphans' Court confirmed the sale. The sisters, as is agreed in the case stated, accepted part of the purchase money, and would thereby be equitably estopped from contesting plaintiff's title in ejectment or otherwise, and under the will of James Simpson, the common ancestor, there is no one else who can do so. Plaintiff therefore has shown a good title in fee, and judgment was properly entered in his favor.

Judgment affirmed. W. M. S., Jr.

Jan. '94, 27. April 9, 1894.

Patterson v. Neuer.

Statute of limitations—Acknowledgment of debt —What is necessary in order to toll the running of the statute.

The bar of the statute of limitations may be removed by an oral promise or acknowledgment, but such acknowledgment must identify the debt, specify the amount thereof, or furnish a basis from which it could certainly be ascertained, and be equivalent to an unqualified promise to pay.

Several insufficient acknowledgments will not constitute a sufficient one.

Appeal of W. W. Neuer, from the judgment of the Common Pleas of Luzerne County.

The facts relating to the nature of the claim are sufficiently stated in the opinion of the Supreme Court, *infra*. The action to enforce this claim was brought twelve years after it matured, and the statement was filed eight years after the writ was served.

The plaintiff, in order to remove the bar of the statute of limitations, testified to three conversations with defendant within six years of the suit, as follows:—

At a meeting at Bradford in 1878, defendant said, "Patterson, I will pay you every cent. I wish I had come here a little sooner, I could make lots of money. I will make lots of money before I leave, and I will pay you every dollar. You need not be afraid."

Q. Where did this conversation occur? A. In the post-office at Bradford.

Q. In the daytime? A. In the daytime.

Q. Was that the time he said he would pay you? A. He told me then he would pay me every cent.

Plaintiff further testified in regard to the second conversation as follows:—

Q. When did you next meet him after coming back from Bradford and where? A. Met him different times, but not to have any conversation particularly about this; it was on this west side of the Square here.

Q. What time was that? A. Why, it was about seven o'clock.

Q. What time of the year? A. I come back in the spring of 1880.

Q. How long after you came back was it you had this conversation? A. Well, it was the next winter.

Q. About the next winter? A. Yes, sir.

Q. Was it in the winter of 1880? A. Yes, sir.

Q. What conversation did you have there with him? A. 1881, I think it was; I think it was in 1881. Well, I met him here. He stopped me on the street and asked me if I had got any money. I told him I had. Well, I told him that I had, and he told me he would like to have some money for to send out to his son at Tucson, Arizona, on the lot that I had bought from him. I says, "—— ——, what is the matter with you—you want money? I don't intend to pay you another damn cent over here. You have humbugged me long enough, and I won't stand it any longer." Well, he says, "You need not be a bit afraid of me, I will pay you everything I owe you." I says, "It don't make any difference." I told him, went all over this work I had done for him where he owed me the bill. Said I, "I worked hard and up through the mud when there was no streets up to your house. When I couldn't get a man, I took off my coat and did the work myself." I says, "You never give me a damn cent." He told me, he says, "You need not be a bit afraid, I will pay you every cent; you need not be a bit afraid." I says, "I don't care, I will not pay you anything," and I went out.

And as to the third conversation, as follows:—

Q. Who was in the house when you went in? A. There was no one in the room. It was in his own office.

Q. What conversation did you have there at that time? A. I told him, I says, "I come down —I took a notion and come down to give you some money; if you can make anything out of it, it is all right."

Q. How much did you pay him then? A. Somewhere about three hundred dollars; a little over, I think.

Q. What was said then by you and him in reference to this matter, if anything? A. Well, he told me he did not see why I should be afraid. "You saw the minerals and everything," he says.

Q. What did he have reference to? A. The minerals that Stanley had sent him from Arizona, from Tucson; that is where he represented to me. "Well," says I, "if you can make any money out of it, all right, for," says I, "I want mine." "Well," he says, "you will get it very soon." So I told him I had some money, and I

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counted it out. I had the money with me and I counted it out and give it to him, and it was put on the contract. It was in the neighborhood of three hundred dollars. I told him I ought not to do it, but I hoped he would make something out of it and would pay me. He says, "No fear of that, he would pay every cent I owe you," and I repeated the same thing I did over here; told him about the hard work.

Q. When you paid this money, you said you paid it on the lot? A. Yes.

Q. How much was claimed to be due on the balance on the lot? A. There was two hundred and fifty dollars still due.

Q. What did he say in reference to that balance? A. He told me he would have the deed made and he would give me credit for the two hundred and fifty dollars on that lot.

Q. He would credit you with the two hundred and fifty dollars on what he owed you? A. Yes, sir; and he said he would pay the rest just as soon as ever he could.

Q. What was the date of this conversation when you paid that three hundred dollars? A. About the 6th of February, 1882.

Defendant denied these conversations.

Defendant requested the Court to charge the jury that "under all the evidence in the case, taken in connection with the plea of the statute of limitations, there must be a verdict for the defendant." *Refused.* Verdict for the plaintiff for $1,420 and judgment thereon. Defendant appealed, assigning for error the refusal of the above point.

William S. McLean, for appellant.

There was no such identity of the debt as is required to take the case out of the statute of limitations.

Kensington Bank *v.* Patton, 14 Pa. 479.
Suter *v.* Sheeler, 22 Id. 308.
Wolfensberger *et al. v.* Young, 47 Id. 516.
Palmer *v.* Gillespie, 95 Id. 340.
Wesner *v.* Stine *et al.*, 97 Id. 322.
Lawson *v.* McCartney, 104 Id. 356.
Landis *v* Roth, 109 Id. 621.
Chapman's Appeal, 122 Id. 331.
Lowrey *v.* Robinson, 141 Id. 189.

The amount of the debt was not fixed, and hence could not be revived by the alleged acknowledgment.

Suter *v.* Sheeler, 22 Pa. 308.
Shitler *v.* Bremer, 23 Id. 413.
Wolfensberger *et al. v.* Young, 47 Id. 516.
Johns *v.* Lantz, 63 Id. 324.
Miller *v.* Baschore, 83 Id. 356.
Landis *v.* Roth, 109 Id. 621.

A promise, to take the case out of the operation of the statute of limitations, must be an unqualified promise to pay.

Kensington Bank *v.* Patton, 14 Pa. 179.
Linderman *v.* Pomeroy, 142 Id. 168.
Keener *v*, Zartman, 144 Id. 179.
13 Am. and Eng. Enc. of Law, 754.

Edward A. Lynch, (*John T. Lenahan* with him), for appellee.

There was sufficient evidence to take the case out of the statute of limitations.

Patton's Exrs. *v* Hassinger, 69 Pa. 311.
Titman *v.* Titman, 64 Id. 480.

January 7, 1895. McCollum, J. This is a very stale claim, and the only support it has is in the uncorroborated testimony of the plaintiff, which is contradicted in every material feature by the testimony of the defendant. It is for services alleged to have been rendered by the plaintiff for the defendant twenty-two years ago, under a verbal agreement between them. The suit to enforce it was brought twelve years after it matured, and the statement of it was filed eight years after the writ was served. The gross laches in the prosecution of the claim, and the circumstances surrounding it, raise a serious doubt concerning the merits and integrity of it. Among the matters which contribute to this doubt, we note the relations and course of dealing between the parties before, during, and after the period in which it is alleged the services sued for were performed. The plaintiff was employed by the defendant as a carpenter nearly four years. In the last year he was so employed, he was paid $4 a day, and in the preceding years $3 a day, for his labor. The claim he now makes is for supervising the construction of certain buildings for the defendant in the fourth year, and is in addition to the $4 *per diem* paid to him for work during that period. He alleges that for supervising the construction of defendant's buildings he was to receive five per cent. of their cost, and for an occasional inspection of the work on the Leavenworth Block, for the proper performance of which the defendant was responsible, he was to receive $200. His whole claim for this alleged supervision and inspection is $1,650, with interest thereon from May 1, 1872. In November, 1875, the plaintiff bought of the defendant a lot in Wilkesbarre, which he finished paying for on the 29th of January, 1884. The payments on the lot were made annually, and they amounted to more than the alleged indebtedness of the defendant to the plaintiff at the time of the purchase. It strikes the ordinary mind as somewhat singular that the defendant should pay or agree to pay the plaintiff thrice as much for his services the fourth year as he paid him for like services during the preceding three years, and that the plaintiff should contract for and make payments on account of the lot as above stated, and in the meantime allow the statute of limitations to bar the alleged indebtedness of the defendant to him. It must be conceded, we think, that the undis-

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puted facts in the case have a decided tendency to discredit the plaintiff's claim and to substantiate the defendant's denial of it, and while the evidence was sufficient to carry the case to the jury on the question of the alleged contract and the services thereunder, the preponderance of it against the claim was so great that the allowance of the defendant's motion for a new trial would have been entirely proper. But assuming that the indebtedness once existed, as claimed, was there proof of such an acknowledgment of its existence as the law deems a sufficient answer to the plea of the statute of limitations? In considering this question we note the trend and result of the decisions without entering upon an extended citation and review of them. The statute of limitations, as a defence to an action, is no longer viewed with suspicion or thought to be unconscionable. It is now almost universally regarded by the Courts as a statute of repose, and is liberally construed by them. In England and in many of the States in this country, a written acknowledgment or promise is essential to remove the bar of the statute. In Pennsylvania, however, an oral promise or acknowledgment is sufficient if it has the qualities demanded by the decisions in relation to it, although ROGERS, J., in delivering the opinion of this Court in Kensington Bank *v.* Patton, 14 Pa. 479, said that the law on the subject would not be upon a proper footing until a written acknowledgment or promise was required. To remove the bar of the statute there must be a clear and definite acknowledgment of the debt, a specification of the amount due, or a reference to something by which such amount can be definitely and certainly ascertained: Miller *v.* Baschore, 83 Pa. 356. Any uncertainty, either in the acknowledgment or identification of the debt, is fatal: Landis *v.* Roth, 109 Pa. 621. Is the acknowledgment or promise shown in this case sufficient to remove the bar of the statute? The learned Judge of the Court below thought the conversations which the plaintiff testified he had with the defendant in the winter of 1881, contained an acknowledgment by the latter of the claim in suit, and a promise to pay it, and he rightly conceded that there was no acknowledgment or promise previous to that time which had the qualities required by the decisions on the subject. In order to determine whether the conversations referred to contain an acknowledgment sufficient to take this stale, extraordinary, and admittedly barred claim out of the operation of the statute, they must be considered separately. If either of them contains such an acknowledgment, recourse to the other is unnecessary. If it does not appear in either conversation, it cannot be inferred from both. In other words, several insufficient acknowledgments will not constitute a sufficient one. It is claimed that in the first conversation referred to, the defendant said to the plaintiff, "You need not be a bit afraid of me; I will pay you everything I owe you; I will pay you every cent." But these words do not contain an admission that the defendant owed the plaintiff the claim in suit. They do not constitute an acknowledgment or promise which is "so distinct and palpable in its extent and form as to preclude hesitation." They do not import more than the words, "I will pay you all I owe you," which were held in Miller *v.* Baschore, *supra*, insufficient to remove the bar of the statute. Nor do we think there is anything in the conversation detailed by the plaintiff which plainly refers the alleged promise of the defendant to the claim in suit. What the plaintiff said about his claim was "vague, shadowy and uncertain," and manifestly the outcome of anger aroused by the defendant's request for a payment on the lot. It furnished no basis for holding that the alleged promise was to pay $1,650, with nine years' interest thereon, for work done during the year in which the defendant paid him for his services more than he had before, or has since, received for them. It is well to remember in this connection that the plaintiff was testifying to a conversation which occurred twelve years before, and in which, according to his account, he was an angry participant.

Subsequent to the conversation we have considered, the plaintiff made a payment on the lot, and said to the defendant, "If you can make any money out of it, all right, for I want mine," to which the latter replied, "You will get it very soon, ... no fear of that, he would pay me every cent I owe you, . . . would give me credit for the $250 on that lot," and "he would pay the rest just as soon as ever he could." But in this conversation as in the preceding one, there is a failure to specify the amount of the debt, or furnish any basis on which the amount of it could be definitely and certainly ascertained. We think therefore, that the plaintiff failed to show on the trial such an acknowledgment or promise as is required to remove the bar of the statute.

The specification of error is sustained.

Judgment reversed and venire facias de novo awarded. W. M. S., JR.

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Oct. '94, 23, 24. October 26, 1894.

American Tube & Iron Co. et al., v. Baden Gas Co. et al.

Hays's Appeal.

Dorrington's Appeal.

Corporations—Subscriptions to stock—Stock issued as full paid—Presumptions—Burden of proof.

A partnership was engaged in the business of producing oil and was the owner of valuable territory, plant, patents, contracts, etc. The members decided to organize a corporation under the Natural Gas Act of 1885. By an agreement the capital stock of this company, which amounted to $500,000, was issued to the members of the old partnership who received and held among them $175,000 of the said stock and returned to the treasury of the company the remaining $325,000 to be sold for the purpose of securing capital to operate the company. The company having subsequently become embarrassed and all its property, rights, and franchises having been sold under an execution, a bill was filed by its creditors to compel the payment in cash of so much of the par value of the $325,000 of stock as might be necessary to discharge the claims of creditors. The bill contained no allegation of any fraudulent purpose of the parties to this transaction nor any averment of fraud in fixing the price of the property sold:

Held, that while the method adopted may have been an irregular and mistaken mode of reaching the purpose in view, the good faith of the parties was to be judged by the facts before them when the arrangement was made, and the subsequent demonstration that the property was less valuable than they supposed was immaterial;

Held, also, that in the absence of any suggestion of fraud the burden of proof was not shifted to the defendants to establish the good faith of the transaction;

Held, also, that in the absence of fraud the sale could not be disregarded and the subscriptions to the capital stock treated as unpaid at the instance of subsequent creditors of the corporation who stood in no better position than the corporation itself.

Appeals of W. S. B. Hays and of J. K. Dorrington, two of the defendants, from the decree of the Common Pleas No. 2, of Allegheny County, in a suit brought by the American Tube & Iron Co. and other creditors against the Baden Gas Co. and a number of individual stockholders in the said company.

The facts are stated in the opinion of the Supreme Court. Exceptions to the report of W. A. Woodward, Esq., master, having been dismissed by the Court, in an opinion by EWING, P. J., and a decree entered against the individual defendants, holding them liable for unpaid subscriptions to the capital stock of the Gas Company, these appeals were taken.

P. C. Knox and *D. T. Watson*, (with them *James H. Reed*, *T. D. Carnahan* and *Johns McCleave*), for appellants.

West McMurray, (*C. C. Dickey* with him), for appellees.

January 7, 1895. WILLIAMS, J. This bill was filed by creditors of the Baden Gas Company, a corporation organized under the Act of 1885, known as the Natural Gas Act. The relief prayed for, and obtained under the decree appealed from, is an adjudication that the defendants are liable to the receiver for the amount of the capital stock of the Baden Gas Company subscribed for by each of them, and that they pay the same over in money for the benefit of the plaintiffs and other creditors of the corporation, which is admitted to be insolvent. The defendants admit the fact that they were subscribers to the capital stock of the Baden Gas Company, but insist that their subscriptions were paid in full, in property transferred by them to the corporation, immediately after its organization. The liability of the defendants depends therefore upon their allegation of actual payment; and this can be intelligently determined only upon a careful consideration of the facts and circumstances attending the organization of the Gas Company, and their legal value.

The fourth finding of fact made by the learned master, adopted by the learned Judge of the Court below, and conceded on all hands to be correct, informs us that the defendants and others who composed the Baden Gas Company had been previously associated in business under the firm name of the Allegheny Oil Company. The master then proceeds in this finding to tell us that, "The Baden Gas Company was organized to take the place of the said Allegheny Oil Company, and the said subscribers soon after their incorporation proceeded to sell and transfer the gas property and interests of the said Allegheny Oil Company and $300,000 of their subscribed stock to the said Baden Gas Company for a price equal to the corporate stock of the latter company, to wit, $500,000."

In the fifth finding of fact we are informed that the gas property and interests so transferred consisted of between four and five thousand acres of gas leases including two large producing gas wells, certain rights of way, ordinances for the introduction of gas into the Boroughs of Freedom, Baden, Sewickley, Osborne, Glenfield, West Bellevue and Bellevue, and contracts for the supply of gas, and certain patents relating to the business of transporting gas. All this property belonged to the Allegeny Oil Company and was transferred by that company and the persons comprising it to the Baden Gas Company. The findings from the seventh to the eleventh inclusive inform us of the plan adopted for the organization of the corporation and the transfer to it of the property of the Allegheny Oil Company described in the fifth finding. The corporation was to be organized under the Natural Gas Act in order to secure the rights and fran-

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chises conferred by that Act. Its capital stock was fixed at $500,000. The price of the property to be transferred to it was fixed at the same sum. The stock was to be paid for with the property, or the corporation was to pay for the property with its stock, which is exactly the same thing; but this arrangement was made subject to the condition that but $175,000 of the stock so issued should be retained by the members of the firm of the Allegheny Oil Company, while the remaining $325,000 of it should be returned or contributed to the corporation to provide it with a working capital in order to enable it to develop its leases, lay additional pipe lines, and embark in the business of supplying natural gas as a fuel to the City of Allegheny and the towns along its line.

The seventh finding assures us that the $325,000 of capital stock set apart to provide a working capital was actually turned into the treasury of the corporation and used in the manner contemplated. Shares amounting at par to $55,000 were sold for cash at eighty cents on the dollar and the proceeds used in the business of the corporation. The balance of the stock was used in the extension of its lines to Allegheny City; and at the date of the filing of this bill not one share out of the entire amount remained in the treasury undisposed of. But in the execution of the sale from the oil company to the Baden Gas Company and in the payment of the subscriptions to the capital, a clumsy device was resorted to. A half million of dollars was apparently raised on a note signed by the members of the oil company and placed to the credit of the treasurer of the corporation in the Fifth National Bank as payment for the stock. It was checked back to the treasurer of the oil company as payment for the property bought by the corporation from the oil company.

The property was then conveyed, the stock issued and disposed of as already stated, and the note taken out of bank. Not a dollar in actual money was used in the transaction, and what end was accomplished by all this idle ceremony it is impossible for us to see. But if it did no good, we cannot see, in the absence of any finding of fraud intended or practiced, that it did any serious harm. We are to look at it in the light of all that was done in connection with the organization of the corporation for the purpose of gathering therefrom the real character of the transaction. Neither unnecessary formalities nor clumsy devices, nor palpable mistakes in methods, should prevent us from looking down to the true character of a transaction and determining the rights of parties in accordance with the facts rather than the forms or appearances they may seem to wear.

Let us turn then from the method of organization to the facts showing the situation of the parties, their general plan for the development of their property, the necessity for obtaining corporate powers, and the provision made for a working capital with which to enter upon the proposed corporate enterprise. The corporators had been partners. As such they had been engaged in procuring leases and drilling wells in search for oil. In this search they had not been successful, but two of the wells drilled by them proved to be valuable gas wells. This, taken in connection with other developments in the same general region, was well calculated to induce the belief that they were the possessors of a large and valuable gas territory that should be promptly developed and utilized or its value would steadily decline by reason of drainage from the operations of others. They could not utilize their gas without transporting it to a market. They could not transport it to advantage except as a natural gas company possessing the powers conferred by the Act of 1885. This determined them to organize a corporation under the provisions of that Act for the production and transportation of natural gas, and to transfer their gas wells and leases, covering over four thousand acres, to the corporation. When this had been decided on the first question to present itself was how shall the partnership convey its property to the corporation so as to secure to its members the same relative interest in the stock of the corporation they now have in the partnership property? The next question was how shall we secure the necessary working capital to enable the corporation to go forward with the work of producing, transporting and selling natural gas?

In a general way these questions were answered by the adoption of the scheme which the master and the Court below have characterized as a sham. The value of the property, rights of way, municipal grants, and patents held by the firm was set down at $175,000. The working capital needed at $325,000. To meet both purposes the capital stock of the corporation was fixed at $500,000. It was all to be issued as paid up stock in exchange for the property conveyed to the corporation subject to the agreement that all except the $175,000 was to be contributed to the treasury to be sold as a means of raising the money needed for a working capital. Now let it be conceded that this was neither the safest nor most business-like way of securing a working capital. Let it be conceded further that the use of the note in the Fifth National Bank and the ceremony of first crediting and then debiting the treasurer with a half million of dollars without the handling of a dollar in money, was an unfortunate device liable to be misunderstood and calculated to excite suspicion. The question

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remains nevertheless for our consideration, was it the method actually adopted for the accomplishment of the ends in view? There is no suggestion by the master that it was fraudulently intended or that it was not faithfully carried out. On the contrary he finds in the twelfth finding of fact that the "Baden Gas Company never made any calls upon its subscribers for any payment upon their stock but treated the bank credit transaction set forth as payment in full upon the said stock." It is evident, therefore, that whether wise or unwise the scheme we have outlined was that which these parties actually adopted and upon which they acted in good faith.

In the seventh finding of fact we learn also that the whole amount of the $325,000 contributed in stock as a working capital was sold or used in the extension of the pipe lines of the corporation and the prosecution of its business in producing and transporting natural gas. The learned master, however, lost sight of his own findings of fact, for in his first finding of law he says: "I cannot however see anything but an idle performance in the use of these notes, credits and checks, or in any temporary shuffling of money had that been done;" and then from the fact that these notes, credits and checks were used he draws the conclusion on which the decree recommended rests, in these words: "I hold therefore that those transactions did not affect any payment whatever upon the stock subscribed by the defendants." In other words because an "idle performance" was unnecessarily resorted to, the meaning and understanding of the parties who were unwise enough to indulge in it must be disregarded and they must be punished by being compelled to pay a very large sum of money for having failed to adopt a better method for effecting a legal and honest purpose. The learned Judge who made the decree seems also to have been misled by his indignation at what he characterized as "a thin pretext and a sham," although he had no difficulty in recognizing the real character of the transaction. In the opinion first filed by him he says, referring to the arrangement between the firm known as the Allegheny Oil Company and the corporation, "this was in legal effect and in fact a sale to the gas company of this property included in the agreement for $175,000 of paid up stock and not for $500,000 the nominal consideration."

Again in the second opinion he repeats this statement and says that "the property was in fact taken for payment of $175,000 of the stock subscribed and the remaining $325,000 was to be put on the market as paid-up stock and sold for whatever it would bring." This means, of course, sold for the benefit of the gas company, and to provide it with a working capital. In what respect then have the defendants failed in the performance of their undertaking to the Baden Gas Company? The shares of stock nominally issued to them, but to be returned into the treasury of the company for sale for its benefit, have been so returned by them and have been actually disposed of by the company in the prosecution of its enterprises and the extension of its pipe lines. The shares of stock which they were to retain as the price of the gas wells, leases, patents, rights of way, and other property of the Allegheny Oil Company were paid for in full in accordance with the written agreement entered into by the parties and delivered to the defendants as paid up stock. The gas company has no claim on the defendants therefor resting in contract, and there cannot be found in the bill or the findings any averment of fraud in fixing the price of the property sold, or the total amount of the gas company's stock or the general plan of organization. The uselessness and clumsiness of the machinery employed are characterized by such expressions as idle ceremony, thin pretext, sham, shuffling, and the like; but the real purpose stood out so plainly that neither the master nor the learned Judge failed for a moment to grasp it fully. The scheme was to turn over all the gas wells, leases and property connected therewith to the gas company for $175,000; and provide it with the means of prosecuting the gas business by putting into its treasury paid-up stock, or what should be sold as paid up stock, to the amount of $325,000 more. This may have been bad financeering, but that is not enough to support this decree. It may have been an irregular and mistaken method for reaching the purpose in view, but that does not change the fact that the property was agreed to be taken, and was in fact taken, as full payment of the stock subscriptions made by the defendants. The learned Judge felt the stress of the situation and found relief in the proposition, "that the facts in evidence connected with the fact that within a few months it was demonstrated that the property was of very small value, threw on the defendants the burden of showing clearly that the sale from themselves to themselves was in good faith on a reasonable belief of the value of the property." But what has the fact, that after some months spent in development of their territory the corporation found itself disappointed in its productiveness and a heavy loser in consequence, to do with the good faith of their purchase, or the reasonableness of the price? These are to be judged of by the facts before them when the arrangement was made. The character of the gas wells already opened, the extent of the territory covered by the leases, its relation to other developments, its nearness to an adequate market, and

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the probable duration of the supply within reach, were the considerations that would affect the judgment of buyers and sellers and of the business public as to its value. The subsequent disappointment must therefore be left out of the case and the transaction examined in the light in which it was seen when the agreement was entered into. When this is done, and the absence of any suggestion or finding of fraud is remembered, it is not easy to see what there is in the case to shift the burden of proof, or to require the defendants to establish the good faith of a transaction which the plaintiffs have not attacked. The bill proceeds on the theory that the subscriptions to the capital stock are wholly unpaid. The proofs show that they were paid exactly in accordance with the agreement, and that this payment had been recognized by the corporation from the first. The decree finally made seems to rests on the conclusion of the Court below that although paid they were paid in property which was taken at too high a price. It is true that no such thing was alleged in the bill, or shown by the proofs, but if the value of the property is to be determined in the light of subsequent events, a light which the parties did not have when this sale was arranged, the conclusion of the learned Judge is a reasonable one. The trouble with it, however, is, that it rests on the intrinsic value of the property as ascertained by actual developments made after the sale, while the real question relates to the apparent value as indicated by the circumstances existing at the time of the sale. We do not differ from the learned Judge in the conclusions to be drawn from the evidence so far as they give character to the transaction. We agree that the evidence shows a sale of the property of the Allegheny Oil Company to the Baden Gas Company for $175,000; and that the arrangement in regard to the remaining $325,000 was not for the benefit of the stockholders as individuals but of the corporation, and was intended to enable the company to provide itself with funds for the prosecution of its business. We quite agree also that the evidence shows the $175,000, the par value of the stock taken by the corporators, was actually paid in property in accordance with a written contract entered into between the corporation and the partnership for the sale of the wells, leases, and other property of the oil company to the corporation. We should also agree with the learned Judge that the property was sold at more than its actual value, if that value was to be determined by subsequent results rather than by the prospects as they appeared at the time of sale. But if the parties were mistaken in relation to its value, we do not see how in the absence of any averment of fraud in the transaction, the sale can be disregarded and the subscriptions to the capital stock treated as unpaid. The proofs show that they were paid exactly in accordance with the agreement under which they were made, and until that agreement is attacked as fraudulent the creditors stand in no better position than the corporation itself. The decree is reversed so far as it requires payment of the stock subscriptions or any part thereof. It is allowed to stand as to costs.

And now, October 26, 1894, this appeal came on to be heard and was argued by counsel, whereupon on consideration thereof it is ordered, adjudged and decreed that the decree be reversed except in so far as it relates to the payment of costs, and that the bill be dismissed.

DORRINGTON'S APPEAL.

January 7, 1895. WILLIAMS, J. This appeal is from the same decree that has been considered in the appeal of W. S. B. Hays *et al.*, just decided. The questions raised are the same in both cases. As these have been sufficiently discussed in the opinion filed in that case, it is unnecessary at this time to do more than refer to what is there said, and to direct that the same final decree made in that case be entered also in this.

J. D. B., Jr.

Oct. '94, 288. October 10, 1894.

In re Contested Election of School Directors of Little Beaver Township.

Elections—Act of June 10, 1893, P. L. 419—Ballots.

At an election for township officers a printed "paster" was prepared for electors to paste over the right hand column of the official ballot provided under the Act of June 10, 1893. Upon this "paster," under the head of school directors, were printed the names of two persons who received the majority of votes cast.

Held, that this was an alteration of the official ballot, which invalidated the votes cast for the candidates in question, and that such votes could not be counted or returned.

Appeal of Albert McCowin and R. J. Miller, from the decree of the Quarter Sessions of Lawrence County, revoking and cancelling certificates of election as school directors of Little Beaver Township issued to appellants.

The Court found the following facts from proofs adduced in the case: At a general election held in the township on February 20, 1894, an official ballot was prepared for the electors, under the Act of June 10, 1893, P. L. 419, by the

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county commissioners. Some other person or persons had prepared and distributed to intending electors a slip which was gummed on the reversed side so as to admit of its being affixed to the right hand column of the ballot, which column is left blank for insertion of such names as each individual elector may prefer, as follows:

Judge of Election. [Mark One.]
John P Taylor
Inspectors. [Mark One]
Joseph Bringman
Collector of Taxes. [Mark One.]
J. C. Fullerton
School Directors. [Insert Two.]
Albert McCowin
R. J. Miller
Supervisors. [Mark Four]
Wm. Dressell
S. L. Riddle
R. F. Marshall
L. H. Caskey
Treasurer. [Mark One.]
John O. Caskey
Poor Director. [Mark One.]
J. H. Gealy
Auditor. [Mark One.]
D. A. Robertson
Town Clerk. [Mark One]
P. J Foertch
Assistant Assessors. [Insert Two]

There were two school directors to be elected. Those whose names were in the other columns of the ballot were A. G. McGinnis, who received 44 votes; W. A. Kenney, who received 62 votes; John M. Scott, who received 25 votes; M. L. Andrews, who received 13 votes; J. Q. Adams, who received 1 vote.

The appellants, Albert McCowin and R. J. Miller, received 90 and 80 votes respectively, and certificates of election were issued to them.

More than twenty-five qualified electors petitioned the Court, setting forth the foregoing facts, to revoke the certificates issued to appellants.

An answer having been filed, the Court, HAZEN, P. J., granted the petition, holding, *inter alia*, that—

"The law does not authorize or permit the use of a blanket slip, such as was used in this case, by which the titles of other offices, designation of spaces and directions are obliterated, and other spaces provided by the elector, are substituted." And made a decree accordingly:

"It is therefore ordered, adjudged and determined, that W. A. Kenney and A. G. McGinnis, having received a majority of all the lawful votes cast at the general election held in Little Beaver Township, Lawrence County, Pennsylvania, on February 20, 1894, for the office of school director for said township, were duly elected to said office. That the return of the election officers for said township, showing the election of Albert McCowin and R. J. Miller to said office is incorrect, and the certificates of election issued by said election officers to said Albert McCowin and R. J. Miller for said office are cancelled and revoked."

Which were assigned as error.

J. Norman Martin, (*Charles E. Mehard* with him), for appellants.

The question in this case is determined by construction of the Act of June 10, 1893, P. L. 419.

Section 14 of said Act provides what shall be printed on the face of the official ballot, and *placitum* 4 of section 14 provides that "there *shall* be left at the right . . . . of the list of candidates . . . . blank spaces . . . . in which spaces the voter *may insert* the name of any person whose name is not printed on the ballot as a candidate for such office, and such insertion shall count as a vote without the cross mark," etc.

1. Blank spaces are to be left. Then the slip used would not obliterate anything.

2. There is nothing in the Act of June 10, 1893, forbidding the use of such a slip.

3. The voter *may insert* the name in the blank spaces; if he does it *shall* count as a vote without a cross mark; clearly it will count as a vote should he see proper to make a cross mark. When he pastes on the blank spaces he inserts within the meaning of this section.

Sec. 14 and sec. 27 are *in pari materia*. They must stand together. Under the latter section a ballot shall be rejected for two reasons, (a) when the voter marks more names than he is entitled to vote for, and (b) or if for any reason it is impossible to determine the voter's choice, his ballot shall not be counted for such office. *His ballot* is the official ballot given to him and by him marked, or filled by insertion, by writing, printing or pasting thereon in such manner as to designate his choice. If his choice can be determined his vote must be counted. Elections shall be free and equal. Const. Art. I, sec. 5. But they are not free and equal if the voter, using the appliances that the law directs, is not permitted to express his choice in a manner that is not forbidden by the law.

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Statutory provisions for marking ballots and inserting names are merely directory. If the intention of the voter can be ascertained from an examination of the ballot his vote must be counted. "It has been the tendency of all Courts and legislative bodies to construe election statutes with the utmost liberality in favor of the ascertainment of the expressed will of the voter, and whenever the statutes do not most explicitly declare that particular informalities shall avoid the ballot, their provisions are considered directory." 3 Dist. Rep. 131. The leading English case on the question is Woodward *v.* Sarsons, L. R. 10 C. P. 733. The rule is there laid down to be, that the voter must not mark the paper "so as to make it impossible by seeing the paper itself, or by reference to other available facts to identify the way in which he voted." The question for the election officer is, on looking at a ballot, how did the man who cast this ballot intend to vote, and when he has determined by examining the paper, his only duty is to record his determination.

Apply the foregoing to the case in question. The election officers knew for whom the votes were cast; they counted them and issued certificates of election to Albert McCowin and R. J. Miller. When the examiner appointed by the Court examined the ballots, he had no difficulty in determining for whom the persons who used the pasters intended to vote. There is no question as to their intentions. They expressed their intentions so clearly there could be no mistake. The intentions of a majority of the voters being clearly expressed and counted by the election officers, their certificates, issued in obedience to the clearly expressed choice of the majority, made in a manner not forbidden by law, should stand as undisputed evidences of title to the offices in contest.

Malcolm McConnell, for appellees.

The Act of 1893 provides for a secret ballot—for the exclusive use of uniform ballots—the free posting and publication of the names of candidates before election—the voting in a room where electioneering and solicitation of votes is forbidden, etc.

Dewalt *v.* Bartley, 146 Pa. 529.

January 7, 1895. STERRETT, C. J. The controlling question in this case is whether, upon the undisputed facts, the votes in controversy which were counted by the election officers for the appellants Albert McCowin and R. J. Miller, respectively, for the office of school director, etc., should not have been rejected, for the reason that they were not cast according to the provisions of the Act of June 10, 1893, entitled "An Act to regulate the nomination and election of public officers," etc., P. L. 419.

The Court found that, "at the general election held in Little Beaver Township on February 20, 1894, it was required that two persons be elected to the office of school director in said township. Ballots, of which a sample is attached to the petition, containing the list of offices and names of all persons duly nominated for this and other offices were provided by the county commissioners, furnished to the election officers, and by them to the voters as required by law. Many of the electors procured at other places printed slips or tickets of the form shown in the second specification of the petition, including a list of township officers to be voted for with directions to mark names of candidates for the respective offices, prepared with adhesive paste on the reverse side, and of the size and form the same should have appeared on the official ballot, if the persons named had been duly nominated for the respective offices. They affixed said slip-tickets upon the right-hand column of the official ballot which was devoted to blank spaces, and when so affixed the titles of the offices, directions for insertion of names and the spaces indicated and defined by lines provided in the official ballot for township officers, were covered and obliterated and the titles of offices, directions for marking, spaces and names provided therein on the prepared slip-ticket substituted therefor. Cross marks were also made in the squares opposite certain names, to the right of the names. The election officers counted, as votes for the respective persons, the names on said slips having the cross marked opposite their names. Seventy-six (76) ballots so cast were counted for Albert McCowin, and seventy-five (75) ballots so cast were counted for R. J. Miller. The return of the election officers then showed that for the office of school director, A. G. McGinnis had fifty-four (54) votes; John M. Scott twenty-five (25) votes; M. L. Andrews thirteen (13) votes; W. A. Kenney sixty-two (62) votes; Albert McCowin ninety (90) votes; R. J. Miller eighty (80) votes; J. Q. Adams one (1) vote.

Certificates of election were accordingly issued to appellants; but the Court below, holding that the seventy-six and seventy-five ballots counted as aforesaid for them respectively were illegally cast, adjudged and determined that W. A. Kenney and A. G. McGinnis, having received a majority of all the lawful votes at said election for the office of school director, etc., were duly elected to said office.

The question presented for our consideration is whether the learned Judge erred in construing the Act of 1893 and ruling as he did against appellants.

The first section of the Act declares: "That all ballots cast in elections for public officers

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within this Commonwealth shall be printed and distributed at the public expense," etc., as thereinafter provided; and section 27 declares "None but ballots provided in accordance with the provisions of this Act shall be counted."

After specifically directing the manner in which the names of the candidates of each political party shall be arranged on the official ballot, etc., section 14 declares: "There shall be left at the right of the groups of candidates for presidential electors, and of the list of candidates for other offices (or under the title of the office itself for which an election is to be held in case there be no candidates legally nominated therefor), as many blank spaces as there are persons to be voted for, by each voter, for such office, in which spaces the voter may insert the name of any person whose name is not printed on the ballot as a candidate for such office, and such insertion shall count as a vote without the cross mark hereinafter mentioned."

The Act also provides for delivery of one official ballot, by the proper election officer, to each qualified voter as soon as he is admitted within the rail; and the next, or 22d section, provides that on receipt thereof, "the voter . . . . shall prepare his ballot by marking . . . or by inserting in the blank spaces prepared therefor any name not already on the ballot;" etc.

The "marking" mentioned in the last quotation is applicable only to candidates whose names are printed on the official ballot. They cannot be legally voted for in any other way than by marking as specified in said section. In the case of a substituted nomination, filed with or transmitted to the county commissioners after the ballots have been printed, said commissioners are required by the 12th section to "prepare and distribute with the ballots suitable slips of paper bearing the substituted name, together with the title of the office, and having adhesive paste upon the reverse side, which shall be offered to each voter with the regular ballot and may be affixed thereto."

The only prescribed mode of voting for persons, "whose names are not already on the ballot," is "by inserting (their names) in the blank spaces prepared therefor" in the right hand column of the official ballot. It is the "name" only that is to be thus inserted, not the title of the office to be filled, etc. The latter is already printed there and constitutes part of the ballot prepared for the use of voters. The name or names, as the case may be, cannot be inserted anywhere in said right-hand column, but only in the appropriate blank spaces prepared therefor. The voter is not authorized to insert anything in any part of said column, save and except in the blank spaces prepared for names not already on the ballot.

The manner of inserting is not prescribed. It may therefore be done in any appropriate way, such as by writing, stamping with metallic or rubber stamp, or by covering the proper blank space, in whole or in part, with a slip-ticket or sticker, securely attached to said space by adhesive paste or other suitable material, on which ticket or sticker is printed or written a name or names "not already on the ballot."

Everything necessary or proper to be done by the voter in order to record the free and unconstrained expression of his choice of persons to fill the respective offices, is thus provided for; and the manner in which said right of choice shall be exercised is specifically pointed out. If he desire to vote for any of those whose names are printed on the official ballot, he must do so by "marking," as directed by the Act. If he wishes to vote for persons whose names are not already on the ballot, he can do so by "inserting" their names in the blank spaces prepared therefor; but he has no right to insert anything else in said blank spaces or in any other part of the right-hand column.

In so far as the mode of voting is thus specifically prescribed by the Act, all other modes are, by necessary implication, forbidden. *Expressio unius, est exclusio alterius.* The ordinary rule, as has been stated by recognized authority, is that where power has been given to do a thing in a particular way, then affirmative words, marking out the way, by necessary implication prohibit all other ways. To hold, as we are virtually asked to do by appellants, that by virtue of the authority given the voter to insert, in the blank spaces provided therefor, names not already on the official ballot, he may so use a previously prepared slip-ticket, given to him by an outside party, as to entirely cover the right-hand column of the official ballot, and thus effectually obliterate or conceal everything printed thereon, would not be construction, but judicial legislation of the worst type. Moreover, the use of such a blanket ticket or sticker would tend to defeat the main purposes of the Act.

The right-hand column is part of the official ballot. In addition to the requisite number of blank spaces for the insertion of names not already on the ballot, the respective titles of the different offices to be filled and instructions as to the number of names that may be inserted underneath said titles respectively, are intended as guides not only for the voter but also for the election officers. To permit the voter to procure, from outside parties, a slip-ticket or sticker, corresponding in size with said column, and paste the same over the printed matter, as well as the blank spaces thereon, would be contrary to the letter as well as the spirit of the Act. But

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it is enough for us to know that no authority can be found in the Act for doing any such thing.

We have no doubt as to the correctness of the conclusion reached by the Court below, and hence the decree should be affirmed.

Decree affirmed and appeal dismissed with costs to be paid by appellants.

W. D. N.

Jan. '93, 457. April 17, 1894.

Dubois Cemetery Company v. Griffin, Burgess, and Brady et al., Members of Town Council of Dubois Borough.

Streets and highways—Opening of—Dedication—Findings of master—Overruled by Court, when justly—Act of April 5, 1849, sec. 1.

Where there is no disagreement between the Court and master as to the facts established, but only as to their legal effect, the Court is quite as competent as the master to pass upon such effect, and there is no presumption in favor of the master's finding.

In a proceeding to enjoin a borough council from laying out and opening a road the master found that "the weight of the evidence" showed that the street had never been accepted by the borough. There was evidence that R., who laid out the street originally, over his land, declared that he did so for public use, and on more than one occasion applied to the borough authorities to put and keep it in order, and that public money was spent in so doing. The Court held that an acceptance of the road was established by a preponderance of the testimony:

Held, that this finding would not be disturbed.

The road ran along the northern edge of a cemetery of which it originally formed a part, but no lots had ever been sold within its limits, nor did its taking as a street interfere with any of the lots sold, nor access to them by the regular laid out paths:

Held, that R.'s dedication of the road did not interfere with the rights of the parties to whom he had sold lots.

The cemetery company into whose possession the cemetery had passed subsequently to the dedication of the road by R., purchased another lot on the northern line of the road, which they made part of their cemetery, and closed the road:

Held, that the opening of the road by the borough council was not a violation of the Act of April, 1849, forbidding the opening of a street through a burial ground or cemetery.

Appeal of the Dubois Cemetery Company, complainant, from the decree of the Common Pleas of Clearfield County, dismissing a bill in equity filed by the Dubois Cemetery Company against G. L. Griffin, Burgess, and J. F. Brady *et al.*, members of Town Council of Dubois Borough, for an injunction to restrain the borough authorities of Dubois from opening up an alley through the cemetery property of the complainant.

The facts of this case as found by KREBS, P. J., in the Court below, were as follows: That in July, 1872, John Rumbarger was the owner of a tract of land, then situate where the Borough of Dubois is now in part located, containing 175 acres more or less, which upon the incorporation of Dubois as a borough was included within the borough limits; that in June, 1877, John Rumbarger laid out a portion of these premises into burial lots and for cemetery purposes. This cemetery plot was bounded along its entire eastern side by what is called Main street, or what is a prolongation of Main street, then in the towns of Rumbarger and Dubois, which street and town of Rumbarger was originally plotted and laid out by John Rumbarger upon his 175 acres. On the three remaining sides the cemetery plot was bounded by other lands of Rumbarger, part of the 175 acres, and subsequently Rumbarger sub-divided the remainder of the premises into lots and blocks, and he and his heirs or executors have had conveyances made in conformity with a regular plan, so that before and since the death of Rumbarger sales were made upon a systematic plan along Main street and the eastern and western side of this cemetery property. On the 25th of May, 1880, Rumbarger conveyed by deed to W. N. Prothero, a lot or piece of ground, about an acre in all, on the northern side of the cemetery lot, the boundaries of which called for the northern line of the cemetery lot as it then stood. This acre of land was sold on March 28, 1881, to Henry Prothero, and by mesne conveyances came into the possession of the Dubois Cemetery Company, August 7, 1890, all of the conveyances calling for the same boundaries. Up to 1881 or 1882 the cemetery ground was separated from the lot known as the Prothero lot, and from the other lands of John Rumbarger, by an old rail fence, which fence was the line of the cemetery lot, on the northern side. In the year 1881 or 1882, John Rumbarger, being still the owner of the premises, built a picket fence, some twenty-five feet distant from the old fence, on the south side, inside the cemetery plot, beginning at Main street and running north so as to cut a line of cemetery lots. July 25, 1883, Rumbarger sold to Patrick Reynolds a lot containing three acres north of the cemetery lot, and separated from the Prothero lot only by State street, which Rumbarger had laid out. The deed for this Reynolds lot called for a line parallel with the cemetery fence and twenty-five feet northeast of it. At the time of this conveyance it appeared that Rumbarger pointed out this twenty-five feet as forming an alley way; and the draft furnished by Rumbarger to Reynolds with his deed had it laid down opposite the Reynolds property as far south as State street, and at that date it was

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opened and fenced on both sides between State and Main streets. It also appeared that at the request of Rumbarger the borough council directed the street commissioners to do work upon this alley, and such work was done. Subsequently the original cemetery plot came into the possession of the Dubois Cemetery Company, their deed calling for this alley on the northern side, and when they purchased the Prothero lot, their deed, following the description in the deed from Rumbarger to W. N. Prothero, did not cover the twenty-five feet between the line as fixed by that deed and the picket fence. August 7, 1890, the Dubois Cemetery Company having acquired title to both the cemetery lot and the Prothero lot, closed the alley between them, claiming that it was included in the land sold to them. On February 19, 1891, the town council of Dubois Borough passed an ordinance, laying out this alley as Cemetery alley, the terms of the ordinance covering four feet of ground within the lines and deeds of the Prothero lot. Whereupon the cemetery company brought this bill in equity to restrain the laying out of this alley under order of council. The answer of the borough council averred substantially that the alley had been laid out, opened and dedicated to public use by John Rumbarger, and that the company complainant had no title to the ground covered by said alley. D. S. Herron, Esq., to whom the matter was referred as master, found the facts substantially as set forth above, but held that there was no sufficient proof to warrant the conclusion that the alley was ever laid out and dedicated to the public by the present or any former owner of the cemetery property; and that there was no dedication by the sale to purchasers of lots, calling for such alley or street, or if there was, it was a dedication to the grantees and not for public use. He therefore recommended that the prayer of the bill be granted. To this report of the master, the Town Council of Dubois Borough excepted, and the Court having found the facts as above set forth, found as a matter of law, *inter alia*, as follows:

First. That there was a dedication of a space of ground twenty-five feet, more or less, wide, extending from Main street to the western end of the cemetery plot, as including the addition plotted by Vosburg, and lying between the lands sold to Patrick Reynolds and the cemetery plot, west of State street, and between the Henry Prothero lot and the cemetery lot, between State street and Main street, to the use of the public by John Rumbarger; and that such dedication did not violate any rights of lot holders in the cemetery.

Second. That the borough council of Dubois had accepted the same as one of the highways of the borough, and that it could not have been vacated except by legal proceedings only had to that end.

Third. That the cemetery could not by the purchase of the Prothero lot, and annexing it to the cemetery, acquire the right to close the alley. That the alley, having been opened and dedicated to public use by Rumbarger, and accepted by the borough authorties, could not be closed by the cemetery company even if the description in their deeds covered the alley way in dispute. Much more have they no right to close it, when these conveyances do not cover the twenty-five feet set apart by Rumbarger; and that the Act of April 5, 1849, forbidding the opening of a road through a cemetery was not applicable to the case.

Fourth. That so much of the borough ordinance as undertakes to cut off four feet from the southern side of the Prothero lot, and extending from Main street to State street, is without due authority and therefore illegal. The Court, therefore, dismissed the bill except as to this four feet. Whereupon the Dubois Cemetery Company appealed, assigning for error, *inter alia*, the following findings of fact by the Court:

That John Rumbarger had built a picket fence so as to cut off a tier of cemetery lots (about 1881 or 1882) and that at the time he sold the Reynolds lot he pointed out this alley, and furnished a draft showing it, at which time the alley was open and fenced off. That at the request of John Rumbarger work was done upon the alley under order of the borough council. That the deeds of the cemetery did not cover this alley as a portion of their land. Also the first, second, third and fourth conclusions of law as found by the Court and given above, and the final decree dismissing their bill.

Thomas H. Murray, for appellant.

The report of the master upon the facts and his findings thereon should be adopted unless the obvious weight of testimony is against it.

Bugbee and Tolles Appeal, 110 P. 331.
Bugbee and Tolles Appeal, 22 WEEKLY NOTES, 1.
Hottenstein's Appeal, 2 Grant, 301.

If the picket fence was not put up by Rumbarger until 1883, as found by the master, instead of 1881 or 1882, as found by the Court, the work done on the alley prior to 1883, is no evidence of a dedication by Rumbarger or acceptance by the borough.

An intent on the part of the owner to dedicate is absolutely essential and unless such intention can be found in the facts and circumstances of the particular case no dedication exists. The dedication must be under such circumstances as to clearly indicate all abandonment of the soil by the owner exclusively to the public.

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2 Dillon Mun. Corp. 499.
Griffin's Appeal, 109 Pa. 150.
Irwin *v.* Dixion, 9 Howard, 10.
Com. *v.* Newburry, 19 Mass. 57.
Weiss *v.* South Bethlehem Borough, 26 WEEKLY NOTES, 433.

There was no evidence that Rumbarger intended to dedicate an alley by building this picket fence, and the master did not so find. The declarations of Rumbarger were only that he would at some time open an alley as an outlet to the persons who should buy lots from him, and no such sales were made before 1884.

So far as Reynolds' deed called for the alley, it was intended for his personal use, and did not affect the ground along another lot, and dedicate it to the public.

Hall *v.* McCaughey, 51 Pa. 43.
McCarty *v.* Kitchenman, 47 Id. 239
In re Twenty-ninth Street, 1 Hill, 189.
In re Opening of Brooklyn Street, 21 WEEKLY NOTES, 56.

David L. Krebs, (with him *Allison O. Smith* and *George A. Lukehart*), for appellees.

Dedication is simply a question of intent, and the evidence is sufficient to prove it.

Schenley *v.* Com., 36 Pa. 62.
McKee *v.* Perchment, 69 Id. 342.
Davis *v.* Sabita, 63 Id. 90.
McCall *v* Davis, 56 Id. 431.

User by the public, and the expenditure of public money for repairs, will imply a binding acceptance, where dedication is proved.

Com. *v.* Moorehead, 20 WEEKLY NOTES, 485.
2 Dillon on Mun. Corp., 2d Edit. 505.

January 7, 1895. McCOLLUM, J. If John Rumbarger, in the exercise of his lawful right, laid out and opened on the strip of land in dispute a street or alley for public use, and the municipality accepted and maintained it for the use to which he dedicated it, no one will contend that he could thereafter exclude the public from it and appropriate it to a use destructive of or inconsistent with the dedication. What he could not do in this respect the appellant cannot do, because it has no greater right in the alley than he had after the dedication and acceptance. Its rights in the subject of this litigation are such as its grantors acquired by the deed of April 26, 1890, from Rumbarger's executor, and the deed of May 15, 1890, from Henry Prothero. These rights by virtue of their deed of August 7, 1890, passed to the appellant, but as the grantors owned 48-50ths of the capital stock of the corporation there is no room for a contention that the grantee has rights in the disputed territory which they did not have under the above mentioned deeds to them. The boundaries called for by the deed of April 26, and the deed of May 15, are in exact accord with the appellee's contention; the former calls for an alley on the northern side of the cemetery plot between Main street and State street, over the land in dispute, and the latter adopts the description in the deed of May 25, 1880, from Rumbarger to W. N. Prothero, who conveyed to Henry Prothero on the 28th of March, 1881. This description does not include any portion of the cemetery lot, but it makes a line of that lot a boundary of the Prothero lot. This boundary is where the rail fence was when the deed was made to W. N. Prothero and is twenty-five feet from the picket fence afterwards built by Rumbarger. The strip of land between this boundary and the picket fence is not included in Rumbarger's deed to Prothero or in his executor's deed to the appellant's grantors. These deeds, however, are consistent with the claim that it is a public street or alley. It seems to us, therefore, that the controlling questions are, whether there was a dedication of it to public use by Rumbarger and if so whether there was an acceptance of such dedication by the municipality. The learned Court below in an opinion manifestly founded upon a careful consideration of the testimony and the law applicable to it, answered these questions affirmatively. In the findings and conclusions in reference to the dedication and acceptance of the alley the Court disagreed with the master and it is urged that the findings of the latter should prevail on the ground that he had better opportunity to judge of the credibility of the witnesses and the weight of the testimony than was allowed to the former. The disagreement between the Court and the master on the fundamental question in the case was this: The master thought that the acts and declarations of Rumbarger as related by the defendant's witnesses were not sufficient to establish a dedication, while the Court thought they were sufficient for that purpose and called for a finding that a dedication was made as claimed. It will thus be seen that the disagreement related to the effect of the acts and declarations and did not involve the question whether the acts were performed and the declarations were made as alleged. We think it will be conceded that the Court was quite as competent to pass upon their effect as the master was. The next disagreement we note between the Court and master on an important question in the case relates to the alleged acceptance of the alley by the municipality. The master thought "the weight of the evidence" showed that there was no acceptance, while the Court thought the acceptance of it was established "by the preponderance of the testimony in the case before the master." We have carefully examined and considered all the evidence affecting these disagreements, and are con-

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vinced that the findings of the Court in reference to the dedication of the alley by Rumbarger and the acceptance of it by the municipality are warranted and sustained by the decided preponderance of it. We do not deem it necessary to embody the evidence or any part of it in this opinion. It consists of the declarations of Rumbarger showing his purpose to establish on the land now in dispute a street or alley for public use, of his acts in execution of his purpose and of the acts of the municipal authorities evincing their acceptance of the alley for the use to which he dedicated it. That Rumbarger opened an alley upon the land in dispute, at least seven years before his executor conveyed the cemetery property to the appellant, appears to be conceded, and the principal contention of the latter in reference to it is that he opened it for his own convenience or for the convenience of the persons to whom he might sell lots adjoining it, and not for public use. But this contention is sufficiently answered, we think, by his declarations from time to time, showing his purpose in establishing it, and by his applications to the borough authorities to put and keep it in order. It is manifest from what he said and did, that after it was opened he considered he had no further control of it, and that the duty of maintaining it was on the borough. The work upon it from that time until it was closed by the appellant was done by the borough and this is sufficient evidence of an acceptance of it by the latter as a public alley or street.

For the reasons stated by the learned Judge of the Court below we concur in his conclusion that Rumbarger's dedication of the alley to public use was not an abridgment of or interference with the rights of the parties to whom he had sold lots in the cemetery, nor in violation of the Act of 5th April, 1849, which declares that "it shall not be lawful to open any street, lane, alley or public road through any burial ground or cemetery within this Commonwealth."

In accordance with the views we have expressed we overrule the specifications of error and hold that the appellant cannot close the alley, dedicated and accepted as aforesaid, against the appellees or the public.

Decree affirmed and appeal dismissed at the cost of the appellants.

S. H. T.

Oct. '94, 238. November 2, 1894.

Whitesell & Sons to use of Maul v. Peck et al.

Principal and agent—Attorney-at-law — Satisfaction of judgment—Ratification — Practice —Striking off satisfaction—Appeal—Party to—Terre tenant.

An attorney-at law has no authority to satisfy his client's judgment unless the money represented thereby is actually paid to him, if he go beyond this and accept securities instead of money, the client, when the fact comes to his notice, has his election to ratify or repudiate the unauthorized act of his attorney.

Where an attorney has without authority accepted securities in payment of a judgment and entered satisfaction thereof, the client must make his election to repudiate or ratify the act, promptly, upon acquiring knowledge of the facts, and inaction after such knowledge, or an attempt to realize upon the securities taken, will amount to a ratification of the attorney's act.

Where a judgment binding certain land is satisfied of record, and afterwards the satisfaction is stricken off, the terre tenant has the right to appeal from the order striking off the satisfaction.

Appeal of M. H. Stevenson, from the order of the Common Pleas No. 3, of Allegheny County, striking off satisfaction of the judgment Whitesell & Sons to use of Frederick Maul v. Harry R. Peck, William J. Wallace, Edgar R. Phillips, and The Peck, Phillips & Wallace Co., Limited.

In this case judgment was entered November 10, 1892, and satisfied November 26, 1892. On May 29, 1893, a rule was granted upon defendants with notice to M. H. Stevenson, Esq., to show cause why the satisfaction should not be stricken off. The petition upon which this rule was obtained was filed by Frederick Maul, and contained the following averments:—

"That the whole amount of said judgment, eight hundred ($800) dollars, with interest from October 8, 1892, was, on the 26th day of November last, justly due, owing and unpaid to petitioner.

"That on said day, as petitioner is informed, believes and expects to prove, one M. H. Stevenson, concealing the fact that he had agreed with defendants to pay said judgment, and was legally liable for the full amount thereof (the said Stevenson being financially able to pay the same) induced the attorneys of petitioner, Whitesell & Sons, to enter satisfaction on said judgment, though but one hundred and seventy ($170) dollars was actually paid thereon by said Stevenson, and the balance of debt and interest remained due and unpaid.

"That petitioner had never authorized his said attorneys to accept less than the full amount of

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said judgment in satisfaction thereof, nor has he since ratified or approved said unauthorized entry of satisfaction on said judgment, and is advised that the same is therefore not binding on him."

Answers were filed and a commissioner appointed. By the testimony taken before him the following state of facts appeared:—

On June 8, 1892, The Peck, Phillips & Wallace Co., secured from Frederick Maul through Frank Whitesell, Esq., a loan of $700. Whitesell took as security (1) their common promissory note in the sum of $800; (2) a judgment note in the same sum, signed by The Peck, Phillips & Wallace Co., Limited, and also by each member individually, and (3) an assignment of certain accounts held by The Peck, Phillips & Wallace Co., Limited, amounting to $956.07. Among these was a warrant of the Supreme Commandery of the Junior Order of United American Mechanics for $430. It was claimed by Whitesell that after this assignment Harry R. Peck collected of these accounts about $250, including $50 on the Supreme Commandery warrant, and had applied it to the use of The Peck, Phillips & Wallace Co., Limited, instead of turning it over to Mr. Whitesell.

The $800 *promissory* note was endorsed by Whitesell & Sons to Frederick Maul the same day (June 8, 1892), and the same day the judgment note was assigned by them to Maul, and was entered November 10, 1892, at No. 14 February term, 1893, D. S. B., by Whitesell & Sons, as attorneys for plaintiff.

Shortly before this Mr. Whitesell had loaned to one Osterloh the sum of $400, taking from him a promissory and a judgment note in the sum of $600, on both of which W. J. Wallace, member of The Peck, Phillips & Wallace Co., Limited, was surety.

The promissory note was endorsed by Whitesell & Sons to Frederick Maul, and the judgment note was entered at No. 17 February term, 1893, D. S. B.

The defendants in the $800 judgment claimed that $100 was brokerage, and the defendants in the $600 that $200 was brokerage.

Osterloh was a minor; neither Wallace nor Phillips had any real estate and little or no personalty except their interest in The Peck, Phillips & Wallace Co., Limited. Harry R. Peck had nothing except his interest in The Peck, Phillips & Wallace Co., Limited, and one-half interest in the lot and building.

In the summer of 1892, The Peck, Phillips & Wallace Co., Limited, failed, and in addition to some $2000 unsecured claims, owed the following record debts in the order here given:—

Charles F. Peck, ...	$3,954 67
Charles F. Peck, ...	501 50
Executions from justices of the peace, about, ...	350 00
Whitesell & Sons for use of Maul *v.* The Peck, Phillips & Wallace Co., Limited, ...	800 00
Whitesell & Sons for use of Maul *v.* Wallace & Osterloh, ...	600 00

Executions had issued and levies were made on all except the last.

The first four claims were liens against the one-half interest of H. R. Peck in the lot and building. This lot and building were worth about $4,000, but against them and prior to above judgments were two mortgages.

The street on which the lot fronted had just been improved and curbed, but the assessment, amounting to $181, was in litigation. Taxes for 1892, amounting to $85, were unpaid.

M. H. Stevenson then agreed with Charles F. Peck and H. R. Peck to purchase the realty and with the Peck, Phillips & Wallace Co., Limited, to purchase their personalty, if satisfactory terms could be had with Whitesell as to the $800 and $600 judgments, the defendants therein objecting to the payment of brokerage, which they claimed was excessive.

Stevenson proposed to guarantee payment of both on April 1, 1893, if extended to that time. This was agreed to and all parties met to close the matter up, but Whitesell demanded of Stevenson certain promissory notes, which were refused and the negotiations fell through.

After much negotiating Whitesell proposed to Stevenson, according to his account, that he would accept in payment of the $800 judgment the warrant of Supreme Commandery for $380, that he would hold H. R. Peck for the $250 by him collected of the assigned accounts, and the balance of $170 in cash.

According to Whitesell he expected to receive the full amount of the judgment in cash, and when induced to accept the $170 and undertake the collection of the collateral account, after the entry of satisfaction, he notified Stevenson that he would look to him for whatever sum he failed to collect from them.

On the $600 judgment Whitesell asked $500 in cash, releasing Wallace, the balance of $100 to stand against Osterloh. Stevenson agreed to pay Whitesell $25, a fee which The Peck, Phillips & Wallace Co., Limited, owed him—making in all the sum of $695 in cash.

These different amounts were all figured out by R. H. Jackson, Esq., in Stevenson's office, and in Whitesell's presence. Stevenson thereupon wrote out a check for $690 (it should have been $695) and all three went to the sheriff's office where Whitesell stayed his writ; from there to the prothonotary's office, where Whitesell satisfied the $800 judgment in full, signing

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the record "Whitesell & Sons, Attys. for Plff. and Use Plff.," entered a credit of $500 on the $600 judgment and released Wallace; and from there to Whitesell's office, where he signed a certificate acknowledging that the accounts in his hands, except the Supreme Commandery warrant and such as had been collected by H. R. Peck, were the property of Stevenson, and thereupon Stevenson turned over the check for $690 and paid $5 in cash.

Stevenson and Jackson then returned to the former's office, where all the other parties were waiting. The contract was signed and Stevenson paid over the entire amounts going to the respective parties.

During the entire negotiations Mr. Whitesell claimed to be acting with full authority from his client.

After the satisfaction Whitesell continued his efforts to collect the assigned accounts, and with Maul's consent and in his (Maul's) name, began action on the Supreme Commandery warrant at No. 442 January term, 1893, and endeavored in different ways to collect the $250 from Harry R. Peck.

The Court made the rule absolute.

M. H. Stevenson took this appeal, assigning as error, *inter alia*, that the Court erred in making absolute the rule to strike off satisfactior

John D. Shafer (*M. H. Stevenson*, p. p., with him), for appellant.

The presumption, so far as it affected the defendants in the judgment which was satisfied, was that the attorney acted by authority.

Mooney *v.* Carlin, 1 WEEKLY NOTES, 92.
Miller *v.* Preston, 154 Pa. 64.

But whether in this case the attorney acted by authority or not is immaterial, as the principal had knowledge of the attorney's action in accepting securities instead of money in payment of the debt, and did not promptly disavow it. By neglecting to disavow he made the action his own.

Bredin *v.* Dubarry, 14 S. & R. 27.
Bank *v.* Reed, 1 W. & S. 101.
Kelsey *v.* Bank, 19 P. P. Sm. 429.
Township *v.* Keller, 12 WEEKLY NOTES, 177.

Besides this, the bringing action upon the Supreme Commandery warrant was an affirmance of the attorney's contract.

Smith *v.* Hodson, 4 T. R. 211.

James Bredin, for appellee.

An attorney-at-law, by virtue of his general retainer, has no authority to accept less than the full amount of a judgment in satisfaction thereof.

P. & R. R. R. Co. *v.* Christman, 4 Penny. 271.
Housenick *v.* Miller, 93 Pa. 514.
Lewis *v.* Gamage, 1 Pick. 347.

Or to take anything other than money, and if he take anything else and enter satisfaction, the plaintiff is not bound by the satisfaction, and the Court will on motion set it aside.

Beers *v.* Hendrickson, 45 N. Y. 665.

January 7, 1895. WILLIAMS, J. This judgment was marked satisfied on the record on the 26th day of November, 1892, by Whitesell & Sons, who were the legal plaintiffs therein and the attorney of their assignor Maul. More than eighteen months afterward this entry of satisfaction was struck off by the Court below, at the instance of Maul, who testified on the hearing that he made the application at the suggestion of Whitesell. The learned Judge by whom the order was made failed to put his reasons therefor on the record, but it is probable that he was controlled by the principle that the authority of an attorney-at-law to satisfy his client's judgments does not extend to any cases where the money is not actually paid to him. This is the general rule. Where an attorney in the exercise of his professional judgment goes beyond this and accepts securities instead of money in satisfaction of a judgment, his client may, when the fact comes to his notice, make his election to ratify or repudiate the unauthorized act. He cannot do both. If he acquiesces in the satisfaction of his judgment and proceeds to enforce collection upon the securities received in lieu of money, this is a ratification of the arrangement. If he declines to recognize the arrangement and the entry of satisfaction, refuses the securities taken by his attorney and insists on taking nothing but cash in satisfaction of his judgment, this is a repudiation of the act of his attorney and leaves him unaffected by it.

In this case we learn from the testimony of both the attorney and the client that the fact that the client's judgment had been satisfied on the record, and that securities had been accepted for part of the amount due upon it, upon which it might be necessary to bring suit, was fully communicated to the client soon after the arrangement had been made. Maul did not then disavow the act of his attorney, but appeared to acquiesce therein.

Suits were brought by the same attorney upon these securities. This was done in the name of Maul and with his knowledge and assent. After this had been done, after the insolvency of the Junior Order of the United American Workmen, the maker of one of the securities so taken and sued on had become known, and after the lapse of several months consumed in these proceedings then, but not until then, the client seeks to repudiate the act of his attorney. This is the sole ground of relief set up in his petition, "that

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petitioner never authorized or ratified such satisfaction," but upon becoming aware of what had been done made his election not to recognize it. Upon the testimony of the petitioner and upon that of his attorney it is clear that this comes too late. It comes after a line of conduct, extending over several months, that amounts to ratification and adoption of the act which it is now sought to repudiate, and the rule to show cause why the entry of satisfaction should not be struck off ought to have been discharged upon the testimony of the petitioner himself.

But it is said Stevenson promised to be liable for the ultimate payment of the securities received in part payment of the judgment. If so, the natural remedy would seem to be upon that promise. It cannot affect the question of previous authority, or subsequent ratification by Maul of the act of his attorney.

It is also urged that the defendants in the judgment have not appealed from the order made by the Court below, and that Stevenson is not in a position to do so. The answer to this question is found in the caption to the petition on which this rule was obtained, in which Stevenson is named as the owner of the property bound, the terre tenant holding by title derived from the defendants. The record really presents but one question and that is whether the repudiation of the act of the attorney alleged in the petition is sustained by the testimony. We are clear that it is not, and on that ground our judgment rests.

We feel that we are often put at a disadvantage in the determination of an appeal by the failure of the Court below to state for our benefit the ground on which the decision was made. Parties may sometimes suffer for the same reason. But when a case comes up to us in this way we cannot extend our conjectures beyond the grounds of relief stated on the record, and these raise only the question which we have considered.

The order is reversed, and the rule to show cause why the entry of satisfaction shall not be struck off is discharged. H. B.

Orphans' Court.

Jan., 1894, 192.

Loeser's Estate.

Wills—Testamentary capacity—Undue influence—What testimony is sufficient to procure award of issue.

It is a well-settled rule that unless the testimony as to testator's testamentary incapacity or undue influence exerted on him be sufficient to sustain a verdict against the will, the parties will not be subjected to the delay, expense and trouble of a trial by the award of an issue.

Exceptions to refusal of issue.

The facts are stated in the opinion.

Avery D. Harrington and *Hector T. Fenton*, for contestants.

Robert W. Finletter and *John G. Johnson*, for proponents.

December 8, 1894. HANNA, P. J. It is but natural the contestants feel disappointed with the disposition made by their father of his estate, and are convinced it is most inequitable. But they fail to recognize his right to do as he deemed best with his own property, to prefer one child above another, or disinherit one or more at his discretion. This dominion and power conferred by statute and protected by the law is not to be interfered with for slight cause. And it is not for the Courts to produce an equality where a testator has seen fit to make an inequality, merely to relieve the disappointment and chagrin of legatees whose equal or superior claims, in their opinion, have been unjustly disregarded.

Here it is attempted to set aside the clearly expressed will of testator by alleging that he was of unsound mind and wanting in testamentary capacity at the date of its execution, and that he was induced to execute the testamentary paper through undue influence, exerted mainly by one of his daughters, a sister of the contestants, whereby she became the principal legatee.

The will was executed on June 22, 1892, in the office of testator's conveyancer, by whom it had been prepared according to instructions received from him, in the presence of a well-known member of the bar, and one of the most prominent builders in this city, an old and intimate friend of testator, both of whom became subscribing witnesses, and not only credible, but wholly disinterested.

Although testator was approaching his eighty-third year, it is abundantly shown he was able to visit his conveyancer alone, consult with him, and, after the execution of his will, return to his home unattended, retaining the will in his possession. He lived until Jan. 11, 1894, almost two years thereafter, and, after his death, his will was found in the fire-proof safe in his dwelling, where he had placed it.

After careful examination of the entire testimony, we fail to discover the slightest proof of want of testamentary capacity. It is very satisfactorily shown by the subscribing witnesses, the attending physician, and even by the contestants, that testator, although eighty-five years old at the date of his death, possessed remark-

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able mental vigor, business ability and knowledge of all his affairs. This so clearly appeared that the main force of the attack upon the validity of the will was confined to the allegation of undue influence and improper solicitation charged to have been exercised by the favored daughter of testator.

But here, too, the contestants fall far short of the proof required to entitle them to submit the question to trial by jury.

In the first place, the will now attacked is practically a counterpart of a will executed by testator in 1886, prepared by the same conveyancer, and, after the execution of the present will, destroyed by testator, by tearing and burning, in the office of his conveyancer; and it is not alleged that testator was then of unsound mind, or that any undue or improper influence was used by his daughter in her own behalf.

In the next place, there is not the slightest evidence that the will in contest was prepared through the interference or suggestion of testator's daughter, either directly or indirectly. She gave no instructions to the conveyancer, nor was she present at its execution, nor was it in her possession at any time.

And, finally, there is no proof of any request or solicitation from her to her father that she should be preferred to her sisters or brothers, or that she ever used any deception, artifice or other undue influence to prejudice him against them, and thus secure a larger share in his estate.

In view of these facts, we have reached the conclusion that, under the testimony here produced, such a case has arisen as falls within the well-settled rule that, unless the testimony be sufficient to sustain a verdict against the will, an issue should not be awarded; and it will be unjust to impose upon the parties the delay, expense and trouble of a trial, when such a verdict ought not to be sustained.

The exceptions to the refusal to grant the issue are therefore dismissed, and the issue refused, at the costs of the contestants.

F. B. N.

Oct., 1892, 410.

Kennedy's Estate.

Review of account—When granted, after decree.

A petitioner is not entitled to a review of an account confirmed by the Orphans' Court as a matter of right, unless error of law appear on the face of the record, or new matter arise after the decree; but a review may be granted as a matter of grace for new proof discovered after the decree, unless distribution under the decree has been made. The after-discovered proof must be of such a nature that it could not possibly have been used at the time the decree was made.

Petition for bill of review, and demurrer thereto.

Joseph W. Hunsicker, for petitioner.
Edwin O. Michener, for demurrer.

December 1, 1894. FERGUSON, J. It is settled that a petitioner is not entitled to a review of an account confirmed by this Court as a matter of right, unless there is error of law apparent on the face of the record, or there is new matter which has arisen since the decree. As a matter of *grace* a review may be granted for new proof discovered after the decree, which proof could not possibly have been used at the time the decree was made: Scott's Appeal, 112 Pa. 436; Milligan's Appeal, 82 Pa. 395.

It is evident in this case that the petitioner is not entitled to a review as a matter of right, as it is not alleged that there is any error of law apparent on the record, nor is there any new matter that has arisen since the decree. He is certainly in no position to ask the review as a matter of grace, because the record shows that he was represented at the audit by counsel, and that all of the items of the account which are now objected to were then in it and passed upon and the account confirmed. It further appears that, by virtue of that confirmation, the estate has been distributed, and the petitioner, as the father of the decedent, took one-half thereof. The Act of Assembly which provides for a bill of review is limited to cases in which no distribution has been made, which is not this case. The petitioner not only participated in the audit of the account, but shared in the distribution of the balance. There has been no new discovery of evidence, nor is there anything in the conduct of the petitioner or in the facts of the case to commend the petitioner as a person entitled to the grace of the Court. The account in this case must therefore be considered as conclusive as to all the matters contained in it.

The demurrer in this case is sustained, without prejudice, however, to the right of the petitioner to ask for an account of any assets which have come into the accountant's hands since the adjudication.

F. B. N.

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WEEKLY NOTES OF CASES.

VOL. XXXV.] *FRIDAY, FEB. 8, 1895.* [No. 22.

Supreme Court.

Oct. '94, 84. October 24, 1894.

Willcock v. The Pennsylvania R. R. Co.

Common carriers—Insurance—Public policy—Negligence.

A common carrier cannot by stipulations in a bill of lading render a shipper liable to it for a sum sufficient to cancel its liability to him for a negligent loss of the goods.

It is against public policy to permit a carrier to stipulate for a release from liability for its own negligence or fraud, or to require the shipper to indemnify himself otherwise than by recourse to the carrier's liability as such.

Appeal of the Pennsylvania Railroad Company from the judgment of the Common Pleas No 3, of Allegheny County, making absolute a rule for judgment for want of a sufficient affidavit of defence to a statement in assumpsit wherein S. M. Willcock was plaintiff, and appellant defendant.

The plaintiff was a shipper of sixty barrels of petroleum over defendant's road from Oil City on the Allegheny Valley Railroad, on the 8th day of September, 1888, consigned to Augustine & Hardwood, at Richmond, Virginia. The oil while in transit caught fire, and was burned up and wholly destroyed, at or near Calverton Station, in the State of Maryland, on September 13, 1888. The fire resulted from the ordinary hazard of the business of transporting petroleum oil (that is, it was burned up as a result of a collision between two freight trains). The plaintiff was promptly notified by the carrier of the loss. The action was in assumpsit. The plaintiff filed a statement, which was verified by affidavit, in which it was alleged that "the defendant and its servants, not regarding their duty, so negligently and carelessly conducted themselves that the goods and chattels, by reason of such negligence, became and were wholly lost to the plaintiff." The affidavit of defence set up the facts above referred to, the allegation of negligence not being denied for the reason that the collision was the result of negligence of the defendant's employés. The plaintiff attached to and made a part of his statement the bill of lading under which the oil was shipped, the sixth clause of which (printed in red ink so as to be conspicuous), was as follows:

"*Sixth.* In further consideration of the hazardous nature of such merchandise (whereby the cars, tanks and other property of the line are endangered), and that no extra charge is made for transporting it, the owner, shipper and consignee hereby severally stipulate and agree, that they will cause it to be properly, fully and sufficiently insured from loss or damage by fire, and in the event of such loss or damage, that they will look for compensation or reimbursement therefor only to the said insurance; but if such loss or damage shall occur from any cause which shall be held to render this line or any of its agents liable therefor (which is hereby declared to be contrary to the intentions of the parties thereto), it is hereby further expressly agreed that this line shall have the benefit of such insurance, and the owner, shipper and consignee severally agree that it shall be so inserted in the policy of insurance."

The affidavit of defence set up the loss by fire, and averred that the plaintiff had failed to insure as he agreed to do.

A rule for judgment for want of a sufficient affidavit of defence was entered by plaintiff and made absolute by the Court, whereupon defendant appealed.

George B. Gordon, (*William Scott* with him), for appellant.

Public policy requires no more than that a man shall not be protected in his own knavery.

American Ins. Co. *v.* Insley, 7 Pa. 223.
Orient Ins. Co. *v.* Adams, 123 U. S. 67.
Phœnix Ins. Co. *v.* Erie Co., 117 Id. 312.

It is the unquestioned law that the carrier, as bailee, had an insurable interest in the property.

Richards on Ins, page 35.
Ostrander on Fire Ins., page 155.

It is also clear that he may insure the property to its full value, and recover the same from the insurance company:

Richards on Ins., page 37.
Ostrander on Fire Ins., page 155.

And if he so insures, it is perfectly clear that neither the negligence of the carrier nor its employés, though the proximate cause of the fire, will be any defence to the policy:

Richards on Fire Ins., page 29, sec. 22.

A carrier might lawfully himself obtain insurance against the loss of the goods by the usual perils, though occasioned by his own negligence, he may lawfully stipulate with the owner to be allowed the benefit of insurance voluntarily obtained by the latter. This stipulation does not, in terms or in effect prevent the owner from be-

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ing reimbursed for the full value of the goods; but being valid as between the owner and carrier, it does prevent either the owner himself or the insurer, who can only sue in his right, from maintaining an action against the carrier upon any terms inconsistent with this stipulation.

Mo. Pac. Ry. *v.* Int. Mar. Ins. Co., 84 Tex. 149.
Gulf, Col. & S. F. Ry. *v.* Zimmerman, 81 Id. 605.
Ill. Cent. Ry. *v.* Scruggs, 69 Miss. 418.
Ga. Ry. & Banking Co. *v.* Reid, 9 Ga. 377.
Farnham *v.* C. & A. R. R. Co., 55 Pa. 53.
Patterson *v.* Clyde, 67 Id. 500.

James S. Young, (*S. U. Trent* with him), for appellee.

The stipulation in the bill of lading may be divided into two agreements:—

First. An agreement by the shipper in effect to release the carrier from damages for the loss of the goods, by compelling him to look for compensation to certain insurance which he is required to obtain, and this whether the goods are lost by the negligence of the carrier or not.

Second. An agreement that if the goods should be lost by the negligence of the carrier, whereby it should become liable for damages, that the carrier should have the benefit of the insurance, which the shipper is compelled to obtain, and that it should be so stated in the policy of insurance so obtained.

The first agreement is void because it seeks to avoid the liability of the carrier for his own negligence.

American Express Co. *v.* Sands, 55 Pa. 140.
Powell *v.* Pennsylvania R. R. Co., 32 Id. 414.
Goldey *v.* Railroad Co, 30 Id. 242.
Grogan & Merz *v.* Adams Express Co., 114 Id. 523.

The refusal to permit a common carrier to avoid liability or relieve himself from responsibility for negligence is based on public policy.

P. R. R. Co. *v.* Raiordon, 119 Pa. 577.

The second agreement is void for the same reason. There is nothing to show that the plaintiff received any consideration to obtain insurance.

1. The amount of extra charge that might have been exacted is not fixed, but is purely speculative. It is not a reduction below a fixed rate of freight.

2. Nothing is indicated as to premium.

3. No premium could be exacted because that would be allowing the carrier to compel the shipper to insure. This is contrary to law.

Phœnix Life Ins. Co. *v.* Erie, etc., Transportation Co., 117 U. S. 312.
R. R. Co. *v.* Lockwood, 17 Wallace, 357.
R. R. Co. *v.* Stevens, 95 U. S. 655.

January 21, 1895. WILLIAMS, J. Who shall be deemed a common carrier, and what are the nature and extent of his undertaking, are questions that were settled centuries ago upon common law principles. A common carrier is bound to employ safe and sufficient means of carriage, trustworthy and competent servants, and by himself or his agents to exercise an intelligent supervision over the system of carriage which he employs. He is, therefore, to all intents and purposes an insurer against such perils of transportation as it is his duty to provide against; and these include all the perils of the journey except such as arise from "the act of God or the King's enemies."

Our forefathers brought this definition of the duties of a common carrier with them, when they came to this continent, and its outlines remain substantially the same to this day. Some limitations upon his common law liabilities have been sustained to protect the carrier against unjust and fraudulent claims on the part of customers; but the measure of care due from him to those whom he serves has not been abated in the slightest degree. He is still held to be an insurer against such perils as it is his duty to provide against, and among these are such as arise from the use of defective or inadequate instruments of carriage, and from the employment of incompetent, negligent or criminal servants: Farnham *et al. v.* The Camden and Amboy Railroad Company, 55 Pa. 53.

What are commonly spoken of as limitations of the liability of the carrier and have been upheld by the Courts of this State as such are, when carefully considered, undertakings of the shipper implied from the nature of the contract and enforced against him at the instance of the carrier.

Thus a stipulation that the carrier shall not be liable to the shipper for the loss of certain packages in a greater sum than that named in the receipt or bill of lading, unless the actual value of the package was fully disclosed to the carrier when it was delivered to him so that he might know the amount of risk involved and charge accordingly, has been upheld, because good faith on the part of the shipper requires such full disclosure by him. So also if the contents of a package are perishable, or easily broken, or explosive, so that the danger of loss is increased and the exercise of an unusual degree of care is made necessary, good faith requires the shipper to make the facts known to the carrier; and a failure to do so ought to affect the extent, and in some cases the right of recovery for the loss of goods so shipped.

The carrier is relieved in these cases, not from the duty to exercise care and diligence in the transportation of his customer's goods, but from the consequences of the failure of the shipper to advise him fully of facts and circumstances ma-

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terial to the contract the suppression of which is in effect a fraud upon him. His obligations as a common carrier are not reduced. He is bound to the exercise of great care by the nature of his undertaking. He must not be negligent. It is against public policy that he should be. It is also a violation of his contract which is to carry safely. A stipulation that is intended to protect him in the violation of his contract as a carrier, and in disregarding a settled rule of public policy, will not be sustained. The cases in which this doctrine is recognized and applied in this State are very numerous. Among them may be named the following: Beckman *et al. v.* Shouse, 5 R. 179; Bingham *v.* Rogers, 6 W. & S. 495; Laing *v.* Colder, 8 Pa. 479; Goldey *v.* The Railroad Company, 30 Pa. 242; Powell *v.* The Railroad Company, 32 Pa. 414; Am. Express Company *v.* Sands, 55 Pa. 140; Railroad Co. *v.* Miller, 87 Pa. 395; Grogan *et al. v.* Adams Express Co., 114 Pa. 523; Penna. Railroad Co. *v.* Raiordon, 119 Pa. 577; Western Union Telegraph Co., 128 Pa. 442; Phœnix Pot Works *v.* The Railroad Co., 139 Pa. 284; Buck *v.* The Penna. Railroad Co., 150 Pa. 171.

It is a sufficient answer to an argument in favor of changing the rule in Pennsylvania and permitting carriers to stipulate for a release from the consequences of their own negligence or fraud that the question is not an open one. It has been settled by the cases cited and many others, and we are bound by the rule *stare decisis*.

The attempt to overturn the common law doctrine fixing the liability of carriers was made in England by Act of Parliament. The result is, after several statutes upon the subject, that the carrier may make a contract limiting his liability on two conditions. The first is that the contract be actually signed by the shipper. The second is that the Courts shall adjudge the limitation to be "just and reasonable." This works no substantial change in the law. It makes a contract for carriage of persons or property tripartite. The carrier and the shipper are the ostensible parties, but the public as represented by the Courts of law is the third party and may refuse its consent to stipulations on which carrier and shipper have agreed.

When such a contract comes before the Courts the question is not, what terms have the parties incorporated into their agreement? but, are the terms so incorporated "just and reasonable," so that they ought on grounds of public policy to be enforced?

In determining this question the Courts have been constrained to apply common law principles and hold that to be just or unjust which was so held at common law. Thus in McManus *v.* The Railway Co., 4 H. & N. 327, the contract provided that the live stock shipped over the defendant's railroad should be carried at the risk of the owner, and that the company should in no case be liable for any loss or injury sustained. The contract was signed by the shipper, but the Court held it to be both unjust and unreasonable and refused to enforce it. In Kirby *v.* The Railway Co., 18 L. T. 658, the contract provided that the carrier should not be liable for injury to the goods shipped occasioned by delay, no matter what the cause of the delay might be. The Courts, representing the public, the third party to the agreement, declined to give assent and held the provision relieving the carrier from the consequences of his own negligence to be unjust and unreasonable. Still nearer to the question in the case before us is Peek *v.* The Railway Co., 10 H. L. Cases, 473. The carrier in that case had a contract with the shipper containing a stipulation that he should not be liable for loss of the goods unless their value was declared at the time of the delivery of the goods to him, and they were then insured to their full value by the shipper. This was held to be neither just or reasonable and its enforcement was refused.

The Courts of England have thus held in substance that the public have a greater interest in the transportation of persons and property than any individual shipper, and that public policy requires of a common carrier the exercise of constant care over his vehicles or means of transportation, and over his servants and employés in charge of them. They further hold that it is against the public good that he should be allowed to contract for immunity from the consequences of his own negligence or fraud, or the negligence or fraud of his employés; and that stipulations to that effect are incapable of enforcement because unjust and unreasonable.

The Supreme Court of the United States holds to the same doctrine upon this subject as the Courts of Pennsylvania: Railroad Co. *v.* Lockwood, 17 Wall. 357; Steamship Co. *v.* Phœnix Ins. Co., 129 U. S. 397.

The public is interested in securing the highest measure of safety in the transportation of passengers and goods, and to this end public policy requires that common carriers be held to the highest measure of care in the conduct of their business. Greenhold in his treatise on Public Policy, 573, says, "It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the essential duties of his employment; and to assert that he may do so seems almost a contradiction in terms."

The carrier and the shipper do not stand on equal terms. The latter cannot afford to refuse that which the carrier demands as a condition to

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the transportation of his goods, and in ninety-nine cases out of every hundred if he does so refuse he will find himself discriminated against until his business is ruined and he has nothing left to ship. The rule that stipulations, insisted on by carriers or other persons who stand in such a position towards their customers as enables them to compel compliance with their demands or destroy their customer's business, should be judged of by their fairness and be held void whenever they are unreasonable or oppressive, is one of very general acceptance. Public policy compels its acceptance in all civilized countries.

The learned counsel for the appellant cite Phœnix Ins. Co. *v.* Erie Transportation Co., 117 U. S. 312, as tending to sustain their contention. But an examination of that case shows that it was begun by libel filed by the insurance company asking subrogation to the rights of the shipper against the carrier.

The first question to be determined was therefore what could the shipper recover upon the facts of that case? He had contracted that any insurance he might obtain should enure to the benefit of the carrier. He obtained insurance on the goods shipped, suffered a loss, and was paid the insurance money. The question presented on these facts was whether the right of the shipper to recover against the carrier was not extinguished to the extent to which his loss had been paid by the insurer? If so, subrogation must necessarily be refused, and it was refused for this reason. This point was elaborated in Provident Insurance Company *v.* Morse, 150 U. S. 99, in which it was said that in case of loss the carrier is primarily liable to the shipper, and the position of an insurer is substantially that of a surety. The insurer can recover therefore, after payment of a loss, by subrogation to the rights of the shipper, and upon no other ground; so that whatever amounts to an extinguishment of the right of action of the shipper against the carrier must defeat the insurer's right to subrogation. The general proposition that the surety who pays the debt of his principal succeeds only to the rights of the creditor whom he pays is beyond all doubt; and in Phœnix Insurance Company *v.* Erie Transportation Company it was held to be applicable to contracts that, as we have seen, are tripartite, having the public as a third though unnamed party.

In the case at bar the carrier inserted in its bill of lading a stipulation that the owner, shipper, and consignor severally shall cause the goods to be fully and sufficiently insured, and that in case of loss the carrier shall have the benefit of such insurance if such loss "shall occur from any cause which shall be held to render this line or any of its agents liable therefor." No insurance was effected. A loss occurred as the result of a collision by two of the carrier's trains. The shipper sues to recover the amount of his loss. The only defence set up is under the condition in the bill of lading; and the question raised is, will the Courts compel the performance of a contract between shipper and carrier requiring the shipper to protect the carrier against the consequences of its own negligence? There is no doubt about the carrier's having an insurable interest in the goods, or about his right to protect himself from loss by procuring a policy of insurance for that purpose, but the question here presented is, can he compel the shipper to insure the goods for his benefit? If so, he can compel the shipper to release him entirely, and so stipulate for complete immunity from the consequences of the negligence and fraud of himself or of his servants and employés. This, in the language of the English Courts would be "unjust and unreasonable." In the language of our own cases it would be "contrary to public policy." The thought is the same. Our own mode of expressing it is preferable in this, that it suggests the reason on which the rule rests.

The judgment is affirmed. W. D. N.

Jan. '94, 420. April 19, 1894

Lohr v. The Borough of Philipsburg.

Municipal corporations—Sidewalks—Defects in—Liability of municipality for injury arising from—Notice of defects—Evidence.

In an action against a municipality for injuries received from a defective condition of the sidewalk, evidence of the condition of the sidewalk, within a reasonable time after the accident, is admissible.

There can be no implied or constructive notice of such a condition, unless it was so obvious that the officers of the municipality, in the exercise of a reasonable supervision of the sidewalk, ought to have seen it.

A municipality is not required to seek for defects; the measure of its duty is to observe such defects as a reasonable supervision discloses.

In an action of trespass for injuries received from a defective sidewalk, it appeared that the defect was not a patent one. The evidence showed that by a close examination on the part of plaintiff's witnesses they discovered such defects as would cause the injury. There was no evidence that the municipality had actual knowledge of these defects.

Held, that the municipality was not liable.

Appeal of The Borough of Philipsburg, defendant, from the judgment of the Common Pleas of Centre County, in an action of trespass brought by David Lohr and Isabella Lohr, his wife, in right of said wife, to recover damages for a personal injury sustained by the said Isa-

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bella Lohr, owing to the alleged negligence of said defendant.

Prior to the trial, David Lohr filed a release to his wife of his right to recover damages under and in pursuance of the Act of Assembly of June 11, 1879, P. L. 126.

Upon the trial, before FURST, P. J., the following facts appeared: The Borough of Philipsburg is in the extreme western part of Centre County, near the Clearfield County line, in a mining and lumbering district, and its pavements or sidewalks are principally hemlock boardwalks. The property of one Mrs. Long is situated on the corner of Fourth and Pine streets, extending about fifty-six feet along Fourth street and 120 feet along Pine street, and had a hemlock boardwalk around it. The Fourth street boardwalk, upon which the accident occurred, was five feet six inches wide, and was laid upon three stringers, three inches in width by four inches in height. The boards were from six to ten inches wide and about one and a quarter inches thick, and extended from two to three inches beyond the stringers. The stringers were about two feet apart, and imbedded in the ground about two and a half inches, making this boardwalk about two inches above the ground. It was level, solid, and there were no apparent or observable defects in it whatever. This was shown by the evidence of the plaintiff, and certain of her witnesses, Mrs. Marin and Jeremiah Funk, and by witnesses introduced by the defendant, J. M. George, and Thomas H. Doyle. On April 29, 1890, Mrs. Lohr, accompanied by a friend Mrs. Marin, walked from her home in Chesterfield borough, Clearfield County, which is across the Moshannon Creek, opposite Philipsburg, to the Borough of Philipsburg on business. They walked down Fourth street, over this boardwalk, past the place where the accident occurred, to Pine street, and then turned and retraced their steps. On their return Mrs. Marin was walking on the inside of the pavement, next the fence, and Mrs. Lohr, the plaintiff, on the outside, next the street. Mrs. Marin, who was slightly in advance, suddenly stepped on the end of a loose board, which caused the other end of the board to fly up, and Mrs. Lohr, tripping against it, was thrown against a tree, and fractured her arm. As soon as the Borough officers heard of the accident they sent an officer to examine the pavement, and on May 1, 1890, they notified Mrs. Long to repair her pavement. Action was brought for this injury against the Borough, in which the plaintiff obtained judgment, which was reversed by the Supreme Court; Lohr *v.* Borough of Philipsburg, 32 WEEKLY NOTES, 525. Upon the second trial the plaintiff offered the evidence of her husband, David H. Lohr, and one Wesley Emery, to the effect that they had carefully examined the place of the accident two or three days after the accident and found the boards in a defective condition, although not such as would appear to ordinary observation. This testimony was objected to. *First.* Because the condition of the pavement three or four days after the accident occurred, ascertained by a test then made, was incompetent and irrelevant to affect the defendant with notice of its condition. *Second.* Because the evidence does not purport to show that the defect which occasioned the injury was apparent to all passers-by, or was apparent to observation in the exercise of reasonable supervision on the part of the officers, or had existed such a length of time that they ought to have known its condition. The Court overruled the objection, and admitted the testimony. (First and second assignments of error.) The plaintiff also introduced the evidence of Mrs. James Perks to show that she was tripped by a board on this same pavement, near the gate of Mrs. Long on Fourth street, for the purpose of ascertaining the condition of the pavement. The plaintiff offered in evidence the notice of the Borough to Mrs. Long served upon her a day or so after the accident, to repair the sidewalk, as a declaration of the Borough as to the condition of the sidewalk, immediately after the accident. Objected to. Objection overruled and evidence admitted. (Third assignment of error.) The defendant submitted, *inter alia*, the following points:—

Third. The undisputed evidence in the cause both on part of the plaintiff and defendant wholly failing to show that previous to the occurrence of the accident there was any apparent defect in the sidewalk where the accident occurred that would be evident to all passers, or that it was so plain to observation, and had existed so long a time that the officers exercising reasonable supervision ought to have observed it, and wholly failing to show that the defendant, previous to the occurrence of the accident, had any express or actual knowledge of the defect, the evidence therefore utterly fails to establish negligence upon the part of the defendant, and the plaintiff cannot recover, and the verdict must be for the defendant.

Answer. This point asks us to withdraw the case from the jury. We submit the facts to you, if you should find the facts as stated in this point, then your verdict should be for the defendant. If you do not find the facts as stated in this point then it is refused. (Fifth assignment of error.)

Fourth. That under all the evidence in the case the verdict must be for the defendant.

Answer. Refused, for the reasons stated in answer to third point. (Sixth assignment of error.)

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The Court charged the jury, *inter alia*, as follows:—

"The plaintiff alleges as she was walking back on Fourth street and just beyond the gate of Mrs. Long, who owned the lot, a board in the pavement was tilted by her companion stepping on the one end of it, tripping Mrs. Lohr and causing her to fall. The plaintiff has called witnesses to testify as to the condition of the pavement on the 29th of April. [According to the evidence on the part of the plaintiff the stringers upon which the pavement rested were rotten. It is a board pavement. The planks are an inch and a half in thickness and about five feet four inches in length, laid at right angles with the pavement, resting upon three stringers about two feet apart. The plaintiff alleges that the pavement was defective on that day. That certain of the boards, especially the one that tripped her, were so rotten that they would not hold the nails, that the nails drew out of the board, which caused it to tilt when it was stepped on at the other end. The plaintiff also alleges that other boards in this pavement there were loose and that the nails would not hold in the boards on account of their rotten condition.]" (Fourth assignment of error.) The Court further reserved the question, whether there was any evidence upon which the plaintiff was entitled to recover. Verdict for the plaintiff and judgment thereon, the reserved question being answered in the affirmative. (Seventh assignment of error.) Whereupon the defendant took this appeal, assigning for error the admission of evidence, the charge of the Court given above in brackets, and the answers to the points, and to the reserved question as above.

John G. Love (with him *W. D. Crosby* and *Harry Keller*), for appellants, cited—

Lohr *v.* Borough of Philipsburg, 32 WEEKLY NOTES, 525.
Burns *v.* City of Bradford, 27 Id. 201.

Ellis L. Orvis (with him *C. P. Hewes* and *C. M. Bower*), for appellee.

January 7, 1895. McCOLLUM, J. It was essential to the plaintiff's recovery in this action that she should show by competent evidence a defective and dangerous condition of the sidewalk, which was the sole cause of the injury she received, and of which the Borough had actual or constructive notice before the accident. We think that the evidence descriptive of the condition of the sidewalk two days after she fell upon it was admissible. It is not alleged that there was any change in its condition from the time of her fall to the time of the examination of it by Lohr and Emery. If the condition they described existed when they examined it, there would be a reasonable and natural inference that it existed at the time of the accident. The intervening time of itself would make no perceptible change in it. Whether the Borough had notice of such a condition is another matter. There can be no implied or constructive notice of it unless it was so obvious that the Borough officers in the exercise of a reasonable supervision of the sidewalk ought to have seen it. Let us consider the question of implied notice in the light of the evidence and determine whether the Borough is liable on this ground. The plaintiff and all her witnesses who testified to the appearance of the walk before the accident agree that it was near the ground and level, that the boards were in place and apparently sound, and that in walking over it there was no noticeable defect in it. The plaintiff and Mrs. Marin passed over it twice on the day of the accident. The former said she did not observe anything wrong with it, and the latter said there was nothing to indicate that there was a loose board in it, and that it appeared perfectly safe. Jeremiah Funk testified that he was over the walk a day or two before the accident, and that there was no observable defect in it then. Surely in this evidence there was nothing to charge the Borough with notice that the walk was out of repair. Nor do we think that the loose board which two or three weeks before the accident tripped Mrs. Perks, under the circumstances testified to by her, was such notice, because the occupant of the abutting premises, who passed over the walk several times daily, put it in proper position and nailed it to the stringers as soon as he discovered it was out of place, and Mrs. Perks was over the walk several times between that occurrence and the accident in question, and did not observe any defects in it. When this case was here before, 156 Pa. 246, we decided in an opinion by our brother MITCHELL, that it "was holding the Borough to too strict a rule of responsibility" to require that its officers should make an examination of the sidewalk by going upon and testing it to discover, if by the eye they could do so, whether it was defective or not. We then distinctly held that the Borough was not obliged to seek for defects, and that the measure of its duty was to observe such as a reasonable supervision disclosed. There is no presumption arising from the occurrence of April 29th that the duty of supervision and observance was neglected, nor is there anything in the testimony of Lohr and Emery which can justly charge the Borough with notice of the condition they described. They were seeking for defects and their discoveries were based upon tests the Borough was not required to make. Such tests, if frequently resorted to, would render the ordinary boardwalk unsafe in a short time, as the obvious tendency of them

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would be to loosen the boards and make possible just such accidents as the one in question.

All the defendant's witnesses who testified to the observable condition of the walk prior to the accident said that there was nothing in the appearance of it to indicate that it was unsafe or in any way defective. The plaintiff offered no evidence to show that the Borough had actual notice that it was out of repair at any time previous to the 29th of April. True, there was an attempt made in rebuttal to contradict Funk, George, and Doyle by excerpts from their testimony on the former trial, but these were offered and received to discredit their testimony on the trial under review, and this was the only purpose for which they were admissible. They furnished no basis for a finding that the Borough had notice that the street was out of repair in April, 1890.

There is nothing in the report of the case in 156 Pa. to indicate that the question now before us on the Borough's fourth point and the answer to it, was considered or raised by any specification on the first appeal. A careful study of the evidence in the light of the principles stated in the former decision has satisfied us that there is nothing in it on which to convict the Borough of negligence in connection with the supervision of the sidewalk on which the plaintiff fell. We therefore sustain the sixth specification of error.

Judgment reversed.

STERRETT, C. J., dissented. S. H. T.

Oct. '94, 211. October 31, 1894.

Lafferty v. Milligan.

Municipal liens—Incumbrance—Act of June 14, 1887—Act of May 16, 1891—Set-off.

Street improvements made under the supposed authority of the Act of June 14, 1887, P. L. 386, which was dectared to be unconstitutional (Wyoming street *et al.*, 137 Pa. 494), if made within the time specified by the Act of May 16, 1891, P. L. 78, called the "Curative Act," are proper "set-offs" by the owner of the ground to a claim on the part of the mortgagee in a mortgage made to secure the purchase money of the ground dated since the passage of the Act of May 16, 1891.

Appeal of Hugh Lafferty and Mary E., his wife, from the judgment of the Common Pleas No. 1, of Allegheny County, in a case stated on a scire facias sur mortgage wherein appellants were plaintiffs and A. A. Milligan defendant. The facts as they appeared in the case stated were that Boggs avenue, in the City of Pittsburgh, was improved under the supposed authority of the Act of June 14, 1887, (P. L. 386,) and the work was completed and an assessment made August 14, 1889. An appeal from the assessment was taken to this Court by some of the property owners on this street, and the assessments and all proceedings based thereon or relating thereto were set aside.

On May 16, 1891, an Act was approved, authorizing the ascertainment, assessment and collection of the costs of municipal improvements completed within two years, or in process of completion.

On December 31, 1891, the plaintiffs below, by agreement in writing, agreed to sell a lot on Boggs avenue abutting upon the improvement, made as aforesaid, to the defendant below, the lot to be free and discharged from all liens and incumbrances, and this contract was on February 8th, 1892, executed by deed of general warranty and a mortgage delivered for the unpaid purchase money.

On July 8, 1891, viewers were appointed under the Act of 1891, and their report was set aside January 6, 1893, by this Court. The matter was afterwards recommitted to the viewers, who made a report December 6, 1893, assessing the lot so conveyed, $1,314.29, and defendant being sued on the mortgage, set up that assessment as a defence. The Court entered judgment in favor of defendant, and this appeal was then taken.

W. B. Rodgers, for appellants.

Liens for improvements made under the Act of June 14, 1887, were invalid because the Act was unconstitutional.

Wyoming Street, 137 Pa. 494.
Pittsburgh's Petition, 138 Pa. 426.

Appellants contend these improvements were not incumbrances at the time of the sale. For they did not attach as liens until the report of the viewers was filed.

Act May 16, 1891, Sec. 1, Cl. 8. P. L. 78.

On the same day on which this Act was approved there was also approved an Act entitled "An Act creating and regulating municipal liens and proceedings thereon." (Acts of 1891, P. L. 69.)

By Section 6, of this Act, it applies to the improvements heretofore made, now in progress or to be made hereafter; Section 1 provides that whenever there shall hereafter be any final assessment for any municipal improvement heretofore made, now in progress or hereafter to be made, the property assessed shall be subject to a lien, "said lien to date from the time of the final confirmation of the report under which said assessment may be made, or a final decree of the Court fixing such assessments."

There were no incumbrances when the deed was executed. The right of action, if it exists

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at all, is complete the moment the covenant is made.

Rawle on Covenants of Title, 89.
4 Kent. Com., 471.

If he cannot maintain his action at once he cannot do so at all.

Barlow *v.* Bank, 63 N. Y. 399.

Lewis McMullen, for appellee.

The Act of May 16, 1891, is constitutional, and was decided to be so between the making and delivery of the deed, viz: February 1, 1892.

Donley *v.* Pittsburgh, 147 Pa. 348.

Where an action is brought to recover unpaid purchase money in Pennsylvania, the defendant can avail himself as a defence of any matter that would entitle him to relief in the hands of a chancellor.

Steinhauer *v.* Witman, 1 S. & R., 438.
Knepper *v.* Kurtz, 58 Pa. 484.

In an action of debt on a bond to recover a balance of purchase money for land where there was a charge or incumbrance upon the land prior to the purchase, it was held there could be no recovery until the incumbrance was removed, as the incumbrance undoubtedly formed a sufficient bar in equity to the plaintiff recovering the amount or any portion of the bond in suit.

Rowland *v.* Miller, 3 W. & S., 390.

The same doctrine was followed and applied by this Court to the suit of a married woman on a bond given to her for purchase money, on the ground that the existence of a lease on the premises conveyed diminished the value of the property purchased to such an extent that the purchaser was entitled to defend in an action on the bond to the extent of the damages sustained.

Cross *v.* Noble, 67 Pa. 77.

January 7, 1895. DEAN, J. In pursuance of proper ordinances, the City of Pittsburgh, on 21st of November, 1887, awarded contracts for grading, paving and curbing Boggs avenue. The work was completed and accepted from the contractor August 14, 1889. On January 5, 1891, the Act of Assembly under which the work was done was declared unconstitutional. Then the Legislature passed what is known as the "Curative Act," approved May 16, 1891, legalizing the grading and paving of streets, either previously completed, or on the way to completion. This Act was pronounced constitutional February 1, 1892.

On December 31, 1891, Mary E. Lafferty, plaintiff, by articles, sold to A. A. Milligan, a lot on the western side of Boggs avenue, and fronting thereon 186 feet, for the consideration of $2,100; of this, $1,000 to be paid in cash on delivery of a general warranty deed, and balance, $1,100, to be paid in two years, the deferred payment to be secured by mortgage on the premises. The grantor stipulated to convey the lot free and discharged from all liens and incumbrances.

In pursuance of the contract, Mrs. Lafferty, joined by her husband, on the 8th of February, 1892, executed and delivered a deed with covenant of general warranty to Milligan, who on same day paid the $1,000, and delivered the mortgage securing the $1,100.

Before this, however, on July 8, 1891, under the provisions of the "Curative Act," the Court of Common Pleas appointed viewers to assess upon property abutting upon Boggs avenue, the cost of curbing, grading and paving, which had been done under the contract of 1887, as authorized by the unconstitutional Act of 1887. The report of these viewers was submitted to and approved by the Court 27th of November, 1891. On appeal to this Court, the decree was reversed and report set aside January 6, 1893. On the record being remitted, it was, on February 18, 1893, referred back to the viewers, who again assessed the cost of the improvements, and made report to the Court December 6, 1893, which report was confirmed by final decree. By the report, there was assesssed against this lot, $410.86; paving and curbing, $903.43; total, $1,314.29. Sci. fa. being issued on the mortgage, Milligan makes defence, averring the assessment to be an incumbrance, against which the covenant in his conveyance protects him. The parties agreed upon a case stated, embodying the foregoing facts, for the judgment of the Court as to whether, on the facts, there was an incumbrance at date of conveyance. The Court thought the case was with Milligan, the defendant, and entered judgment accordingly, and from that plaintiff brings this appeal, and argues, that at the date of the conveyance there was no incumbrance or lien for improvements on Boggs avenue.

The "Curative Act" was in force from and after 16th May, 1891; on December 31, 1891, nearly seven months afterwards, this contract to convey was entered into, and it must be presumed, the parties contracted in view of the law as it then stood. The Act provides, whenever any city, by ordinance heretofore passed, has directed the improvement, and has instituted proceedings for the assessment of damages, and the Act of Assembly under which said improvement has been made has been declared unconstitutional, whereby such assessments cannot be made as contemplated, "Now, by this Act such improvements are made valid and binding," and then proceeds to declare that such city is

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"hereby authorized to ascertain, levy, assess and collect such costs, damages and expenses," and then in the following sections, prescribes the method of assessment and collection, the same as pursued in this case.

Thus the Act recognizes and enforces a subsisting claim for the assessment of damages to be paid and benefits to be collected, because of the improvement already made; an equitable claim is made valid and binding; one which, without the Act, is unassessable and therefore uncollectable. The Act then declares, when the Court has made its final decree confirming said report, fixing the amount of assessments in each case, the sums thus ascertained as benefits "shall be a lien on the property assessed."

There was here, no specific lien until the decree of the Court confirming the report; but an incumbrance is not necessarily a lien determinate in amount. Mr. Rawle, on Covenants for Title, 94, says, incumbrance "was not one of the terms of the law, and no definition of it will be found in the older books. Within the present century an incumbrance has been defined to be 'every right or interest in the land which may subsist in third persons to the diminution of the value of the land, but consistent with the passing of the fee by the conveyance.'" So an inchoate right of dower, which could become consummate only on the contingency of the survivorship of the wife, has been held to be an incumbrance, where the covenant was to convey free of all incumbrances. Yet this is a mere right, in a third person, which diminishes the value of the land. So, assuming here there was no specific lien on this lot, as to amount, until confirmation of the assessment by the Court, there was by the statute an incumbrance on all the lots on the street by reason of the improvement. The statute says: "Whenever any city . . . . has by ordinance authorized . . . . the grading, paving, macadamizing . . . . of any street . . . . and in pursuance of such ordinance . . . . work or labor has been done, or is being done . . . and properties in the neighborhood of any such improvement, have been or will be when completed peculiarly benefited by the same, but owing to the Act of Assembly under which any such improvement has been made, being declared unconstitutional are invalid . . . . now by this Act such improvements are made valid and binding . . . . and any such city is hereby authorized to ascertain, levy, assess and collect," etc.

Proceedings to assess and collect only included work completed within two years preceding the date 16th May, 1891; the work on this street was completed 14th August, 1889, within two years; therefore, a burden or incumbrance was imposed upon this lot for this improvement, to be made a specific lien in amount, as soon as the proceedings to ascertain the amount were completed. There was clearly a legal right or claim in a third person, the city, on this lot, to the diminution of its value from the 16th May, 1891. With this incumbrance before her, the plaintiff made her contract to convey, "discharged of all liens and incumbrances."

It is argued that if this be an incumbrance then the covenant if broken at all, was broken as soon as the deed was executed; if the right of action existed, it was complete the moment the covenant was made; but there could have been no action at once, because then it could not be known whether defendant would be assessed with expenses.

This argument assumes, as a fact, that which is not proven and is directly contrary to the facts agreed upon, and the obvious inferences therefrom in the case stated; that is, that at the date of the conveyance there was no known incumbrance. The right of the city to assess the lot for the improvement already made, and to thereby diminish its value, was known; the exact weight of the burden it might impose was not precisely known; so far as concerned the city, that could only be determined by the statutory proceedings before the board of viewers. But that when the proceeding was had the event would be a lien for greater or less amount on this lot, was plain from its relation to the costly improvement. A mechanic who has expended his labor on a house has his right to a lien for the value of the labor; the value, if there be no contract price, cannot be determined until the lien be filed, and then perhaps not definitely until judgment on scire facias; but if the lien be not filed until the last day of the six months, that fact does not affect the right during the interval to impose the burden; the incumbrance is there, indefinite as to amount, because of indefiniteness of opinion as to the value of the labor; but there is absolute certainty of opinion as to the labor having some value, for there stands the house, the product of the mechanic's labor. Here, the improvement of the street on which this lot fronted, had been completed; the event demonstrated that the burden imposed by the Act of 1891 was a very heavy one; but whether, at the date of the deed, it appeared light or heavy, being on Boggs avenue, it was obvious it could not escape assessment, therefore there was upon it an incumbrance. If the case stated had embodied as a fact, that at the date of the conveyance it could not be known whether this lot would be called upon to pay any assessment, the argument of the learned counsel would probably have been forcible; but he agrees that this work had been completed; that by a constitutional statute the cost of it had been imposed upon the lot

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owners; that this lot's share of the cost had been judicially ascertained to be $1,314.29, under the contract for work in 1887. The inevitable inference from these facts is, that there was a known incumbrance at the date of conveyance although afterwards made certain in amount. This gave an immediate right of action to the covenantee, and whether, in a suit on his covenant, his damage would have been measured by the report of viewers, or would have been heavy or only nominal by the judgment of a jury, it is not important here to inquire; for counsel for appellant has agreed in his case tated, that this judgment shall depend solely on whether the right to assess, at the date of the deed, was an incumbrance.

The judgment is affirmed.

W. D. N.

Oct. '94, 44. October 26, 1894.

Appeal of the M. E. Church of Sewickley.

Municipal Improvements — Taxation—Exemption—Act May 16, 1891, P. L. 78.

The ground upon which a church building is erected is not exempt from municipal assessments for improvements to the property. The more so where the corporation has joined with the other property owners in the petition under the Act of May 16, 1891, asking that these improvements be made.

Taxes are a contribution to the general fund for support of the government of the municipality; general municipal improvements are benefits to the various properties upon which they are made.

Northern Liberties *v.* St. John's Church, 13 Pa. 104, and Pray *v.* Northern Liberties, 31 Id. 69, followed.

Appeal of the Methodist Episcopal Church in the Borough of Sewickley, County of Allegheny, from the decree of the Common Pleas No. 2, of Allegheny County, dismissing exceptions filed to and confirming the report of the board of viewers appointed by the Court in the matter of the petition of the appellant and other property owners for the paving of Broad street in said borough.

The facts appearing were as follows: In July of 1892 a majority in interest and amount of the owners of property abutting on Broad street, in the borough of Sewickley, petitioned the borough councils for the paving of said street from Beaver street to Bank street, whereupon the councils passed an ordinance authorizing the same to be paved, which was accordingly done. Among others the petition was signed by the president and secretary of the board of trustees of the Methodist Episcopal Church of Sewickley, which was the owner of two pieces of property abutting on said street; one fronting eighty-four feet, on which was erected their parsonage, and an adjoining lot, fronting one hundred and seven feet, on which was erected their church building, used exclusively as a regular place of stated religious worship and from which no revenue was derived. The board of viewers in assessing the benefits, assessed the parsonage lot benefits to the amount of three hundred and thirty-six dollars, and the church lot with benefits to the amount of four hundred and twenty-eight dollars. The church paid the assessment against the parsonage property, but objected to paying the assessment against the church lot, claiming that it was exempt from such assessment by the first section of the Act of May 14, 1874, and filed exceptions before the board of viewers to their said report, (which were overruled,) and afterwards, on the 25th day of November, 1893, renewed the exceptions in Court. These exceptions the Court dismissed and confirmed the said report of the board of viewers.

The church took this appeal and assigned as error the above action of the Court.

John R. Harbison, (*Clarence Burleigh* with him), for appellants.

The church building is exempt.

Act of May 14, 1874, P. L. 158.
City of Erie *v.* Church, 105 Pa. 281.

Paving assessments are taxes and all such improvements belong to the taxing power.

Asylum's Appeal, 111 Pa. 135.
McMasters *v.* Commonwealth, 3 Watts 292.
Washington Avenue, 69 Pa. 352.
Seely *v.* Pittsburgh, 82 Id. 360.
In re Centre Street, 115 Id. 253.

Thomas Patterson, (*C. E. Cornelius* with him), for appellee.

January 7, 1895. STERRETT, C. J. The assessment, sustained by the Court below, was made for the purpose of paying the cost of paving part of Broad street on which appellant's church property has a frontage of 107 feet, more than one-thirtieth of the entire frontage paved. The work was done under the Act of May 16, 1891, which, upon the petition of a majority of the property owners, in interest and number, on the line of the proposed improvement, empowers every municipal corporation to pave any public street, etc., and provides for assessing the cost and expense thereof on the property benefited. Appellant not only signed the petition for the improvement, but its frontage of 107 feet thereon is necessary to make up the required majority in interest and number. As shown by the schedule attached to the viewers' report, the aggregate frontage of the petitioners,—exclusive of appellant,—is only 1507.66 feet, which is less than the required majority. It thus appears that the question of paving under the Act was virtually

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determined, in favor of the improvement, by appellant's signature to the petition therefor. The street was accordingly paved; and, as the viewers found, the property fronting thereon was specially benefited to the extent at least of the cost of paving. Having thus united with other property owners in procuring the improvement to be made, and having enjoyed the benefits resulting therefrom, it comes with bad grace for appellant to object to paying its proper share of the cost. In equity and good conscience it should pay it. If not liable on broader grounds, we think the facts and circumstances of the case justify application of the principle of estoppel enforced in Bidwell *v.* Pittsburgh, 85 Pa. 412; Dewhurst *v.* Allegheny, 95 Id. 437, and kindred cases.

But, aside from any question of estoppel, there is no valid reason for extending the exemption from taxation, authorized by Article IX. of the Constitution, to a municipal charge or assessment such as that under consideration. After declaring that "all taxes shall be uniform," etc., the first section provides that "the general assembly may, by general laws, exempt from taxation public property used for public purposes, actual places of religious worship, places of burial not used or held for private or corporate profit, and institutions of purely public charity." Section 2 declares: "All laws exempting property from taxation, other than the property above enumerated, shall be void." It is scarcely necessary to say that any enlargement of the scope of the constitutional exemption, by legislative enactment or otherwise, should be treated as an absolute nullity.

The constitutional exemption relates to taxes proper, or general public contributions, levied and collected by the State or by its authorized municipal agencies, for general governmental purposes, as distinguished from peculiar forms of taxation or special assessments imposed upon property, within limited areas, for the payment of local improvements therein, by which the property assessed is specially and peculiarly benefited and enhanced in value to an amount at least equal to the assessment. There is such an obvious distinction between all forms of general taxation and this species of local or special taxation that we cannot think the latter was intended to be within the constitutional exemption. The distinction is recognized in several of our own cases, among which are Northern Liberties *v.* St. John's Church, 13 Pa. 104; Pray *v.* Northern Liberties, 31 Id. 69. In the former it was held that an assessment for pitching, curbing and paving a street was not a tax within the meaning of the Act of April 16, 1838, exempting churches and burial grounds from taxes. In none of the cases, however, which we have had occasion to examine, are the distinction and its legitimate result so clearly and forcibly pointed out as they are in Illinois Central Railroad Co. *v.* Decatur, 147 U. S. 190, 197, wherein it is held that an exemption from taxation is to be taken as an exemption from the burden of ordinary taxes, and does not relieve from the obligation to pay special assessments imposed to pay for local improvements and charged upon contiguous property upon the theory that it is benefited thereby.

"Taxes proper, or general taxes," says Mr. Justice BREWER, "proceed upon the theory that the existence of government is a necessity; that it cannot continue without means to pay its expenses; that for those means it has the right to compel all citizens and property within its limits to contribute; and that for such contribution it renders no return of special benefit to any property, but only secures to the citizen that general benefit which results from protection to his person and property, and the promotion of those various schemes which have for their object the welfare of all. . . . .

"On the other hand, special assessments or special taxes proceed upon the theory that when a local improvement enhances the value of neighboring property, that property should pay for the improvement."

After citing several authorities in support of these propositions, among which is Cooley on Taxation, 416, c. 20, he further says:

"These distinctions have been recognized and stated by the Courts of almost every State in the Union, and a collection of the cases may be found in any of the leading text-books on taxation. Founded on this distinction, is a rule of very general acceptance,—that an exemption from taxation is to be taken as an exemption simply from the burden of ordinary taxes, taxes proper, and does not relieve from the obligation to pay special assessments."

The rule thus formulated not only rests upon an undoubtedly sound principle, but it is abundantly sustained by an almost unbroken line of authorities in nearly all of our sister States, several of which authorities are cited and commented on in the opinion referred to. We are, therefore, of opinion that special municipal assessments, such as that in question, are not within the constitutional exemption above quoted. While these assessments, resting for their final reason upon special local benefits, are referable to the taxing power, and therefore not improperly recognized as a species of taxation, they are not general burdens, or taxes proper, within the true intent and meaning of the law exempting property from taxation; and, in so far as any of our cases may be in conflict with this conclusion, they must be considered overruled.

Decree affirmed and appeal dismissed with costs to be paid by appellant. W. D. N.

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Oct. '94, 301. October 17, 1894.

Commonwealth ex rel. Braughler v. Weir.

Constitution—Repeal of statutes—Act March 12, 1869, P. L. 344—Act May 23, 1893, P. L. 113—Burgess—Quo warranto.

The Legislature may abolish any office which exists by legislative authority only, without regard to the term of an incumbent when the abolishing Act is passed.

The relator claimed the office of burgess of a borough under the provisions of the General Law of May 23, 1893, section 1. Respondent set up the Special Law of March 12, 1869, providing for the election for this particular office in the borough in question, and alleging his election to the office and his having served only part of the term to which under the Act in question he was elected:

Held, that the Act of May 23, 1893, repealed the Special Law of March 12, 1869, so far as concerned the election and office of burgess, and as there was no provision in the Act of 1893 exempting from its operation terms of officers unexpired before its passage, that such were terminated thereby.

Quinn *v.* Cumberland Co., 162 Pa., 55 s. c., 34 WEEKLY NOTES, 431; Commonwealth *v.* McCombs, 56 Id. 436, followed.

This was an appeal by A. C. Braughler from the judgment of the Common Pleas of Indiana County, denying a suggestion for a quo warranto at the relation of appellant directed to John Weir, to show by what warrant he exercised the office of burgess of the Borough of Indiana, in the County of Indiana.

The petition set forth the incorporation of the Borough of Indiana, and that on the 23d day of May, 1893, Hon. Robert E. Pattison, Governor of the Commonwealth, approved an Act of the General Assembly thereof, entitled "An Act to authorize the election of a chief burgess for three years in the several boroughs of this Commonwealth, who shall not be eligible to the office for the next succeeding term, and providing that such officer shall not be a member of the town council, giving him the power to veto ordinances, providing for the election of a presiding officer of councils, and abolishing the office of assistant burgess."

That section 1 of said Act was as follows: "Be it enacted, etc., that the qualified voters of every borough in the Commonwealth of Pennsylvania shall on the third Tuesday of February, Anno Domini one thousand eight hundred and ninety-four, and triennially thereafter, vote for and elect a properly qualified person for chief burgess in each of said boroughs who shall serve for the term of three years, and shall not be eligible to the office for the next succeeding term."

That section 4 of said Act was as follows: "That from and after the passage of this Act the office of assistant burgess in all of the boroughs of this Commonwealth shall be and the same is hereby abolished."

That section 5 of said Act was as follows: "All Acts or parts of Acts inconsistent herewith are hereby repealed."

That under the provisions of said Act at an election held February 20, 1894, the relator received the majority of votes cast for burgess of said borough, received a certificate of election, and took the oath of office.

And that one John Weir refused to vacate the office of burgess and continued to occupy and enjoy the same.

The answer set forth that under the provisions of the Act of March 12, 1869, P. L. 344, "Regulating the election of burgess and town council of the boroughs of Indiana and Brookville and fixing their term of office," John Weir was elected on the third Tuesday of February, 1892, to the office in question for a term of three years, and that the said term had not yet expired.

The Court denied the quo warranto and the relator appealed.

J. A. C. Ruffner, for appellant.

This case raises three questions:—

First. The right of a person claiming a borough office to have a writ of quo warranto on showing a *prima facie* case, without the aid of the attorney general.

Second. Has the Legislature the power to reduce the term of an officer whose office and term of office exist only by virtue of legislative enactment?

Third. Did the Act of Assembly approved May 23, 1893, P. L. 113, a general law, repeal the Act approved March 12, 1869, P. L. 344, a special law applicable to the boroughs of Brookville and Indiana?

Sec. 5, Act May 23, 1893, repeals all laws or portions of laws inconsistent with this Act.

The provisions of the two Acts are in several instances in direct conflict, and the repeal must have been intended.

Quinn *v.* Cumberland Co., 162 Pa. 55.
Newbold *v.* Pennock, 154 Id. 591.

The Legislature has power to reduce the term of an office which exists under legislative enactment only.

Commonwealth *v.* McCombs, 56 Pa. 436.
Donahugh *v.* Roberts, 11 WEEKLY NOTES, 186.

A claimant to a municipal office can institute quo warranto without the attorney-general on showing a *prima facie* case.

Com. *v.* Swank, 79 Pa. 154.
Murphy *v.* Farmers' Bank, 20 Id. 415.
Com. *v.* Jones, 12 Id. 365.
Com *v.* Burrell, 7 Id. 34.

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John P. Blair, for appellee, submitted his paper book without oral argument.

January 7, 1895. GREEN, J. We think this case is controlled by our decision in the case of Quinn *v.* Cumberland County, 162 Pa. 55 (Adv. Rep.). The considerations which ruled that case so far as the question here involved is concerned, are entirely applicable to this. We there held that the Act of 11th May, 1893, P. L. 44, which was a general law applicable to all the boroughs of the Commonwealth, enabling borough councils to establish boards of health, repealed the special law of 28th January, 1873, applicable only to the Borough of Carlisle, making provision for the same subject. Our decision was based both upon the necessary inconsistency of the two Acts, so great that they could not stand together, and the special repealing clause of the later Act. In this case the repealing words are almost precisely the same as in Quinn *v.* Cumberland County, to wit, "All Acts or parts of Acts inconsistent herewith are hereby repealed." These are words of express repeal of all previous inconsistent legislation.

The Act of 23d May, 1893, P. L. 113, was passed, as expressed in its title, "To authorize the election of a chief burgess for three years in the several boroughs of this Commonwealth," and the first section positively directs that "The qualified voters of every borough in the Commonwealth of Pennsylvania" shall, etc. Of course this enactment expressly embraces every borough in the Commonwealth, and therefore includes the borough of Indiana. Recurring now to the Special Act of 1869, P. L. 344, "Regulating the election of burgess and town council of the boroughs of Indiana and Brookville," we find several material points of difference between it and the Act of 1893.

By the first section of the Act of 1869, it is provided that in case of a vacancy in the office of burgess by death, resignation or otherwise, the council shall elect one of their own number to discharge the duties thereof until the next annual borough election, when a burgess shall be elected for a full term. But section 2 of the Act of 1893 provides that the "Burgess shall not hold any other borough office or appointment during the term for which he is elected, nor be a member of nor preside at the meetings of the town council of said borough." Under the Act of 1869 the person elected by council to discharge the duties of burgess during a vacancy, would have to be a member of council, and he would thus exercise the functions of burgess and member of council at the same time, which is positively prohibited by the Act of 1893. If he should veto any act of council he would have the power to vote on the measure under the Act of 1869, and also to veto the same measure under the Act of 1893, two functions entirely inconsistent with each other.

Under the Act of 1869 there is no power to veto any ordinance or resolution passed by council, but under the third section of the Act of 1893 a full power to veto all such ordinances and resolutions is conferred upon the burgess, with an added provision requiring a vote of two-thirds of all the members elected to pass the measure over the veto. This section of the Act of 1893 is not only inconsistent with the Act of 1869, but in positive hostility to it, inasmuch as under the latter Act a vote of a majority of the members was always sufficient to pass any ordinance or resolution, whereas under the Act of 1893 in any case of a veto such a majority would not be sufficient.

By the first section of the Act of 1893, the chief burgess is made ineligible to hold the office for the next succeeding term, whereas by the Act of 1869, as there is no such provision contained in it, he would be eligible.

In this particular case it happens there is a conflict between the two Acts as to the time of holding the election. The respondent was elected burgess at the spring election of 1892, and his term of office would not expire until the first Monday of March, 1895, and the next regular election would not occur until the borough election of 1895. But under the Act of 1893 the election for burgess must be held in "every borough of the Commonwealth," on the third Tuesday of February, 1894, and triennially thereafter, and as there is no provision in the Act of 1893, excepting from the operation of the Act cases in which existing terms of office do not expire until after the time fixed for the first election, a necessary hostility results. The Act of 1893 relates only to the office of burgess and assistant burgess, and therefore it is not inconsistent with the other provisions of the Act of 1869. But in the matter of the election, the eligibility, and, to some extent, the rights and powers of the burgess, there is a hostility which cannot be reconciled, and in these particulars the two Acts cannot be executed together. We feel therefore obliged to hold that the relator is entitled to the office during the term for which he was elected, commencing the first Monday of March, 1894.

As this decision will deprive the respondent of a portion of the term of his office, some question arises as to the power of the Legislature to enact a law having such an effect. But this is fully met by the decision of this Court in the case of Commonwealth *v.* McCombs, 56 Pa. 436. We there held that as to offices which are legislative only and not constitutional, the power which created them may abolish or change them

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at pleasure without impinging upon any constitutional right of the possessor of the office, and without violating any duty of the legislative body.

In that case the office of assistant district attorney for the County of Allegheny was under consideration. An Act was passed in 1867 creating the office of assistant district attorney for Allegheny County, transferring some of the duties of the district attorney to the assistant, and providing that the fees of the latter should be taxed and allowed out of the fees allowed to the district attorney.

The question was how far the rights of the district attorney could be affected by such a law. Mr. Justice STRONG, delivering the opinion, said, "The office of district attorney is not one of those offices which are usually denominated constitutional. Unlike that of sheriff or coroner, it is not mentioned in the Constitution, and no provision is made therein for the election or appointment of such an officer. . . . . Not having been mentioned by the Constitution the Legislature was left with unrestricted power to prescribe what the duties of the office should be, what the length of its tenure, what its emoluments and how it should be filled. Having the power to create they have also the power to regulate, and even destroy. Undoubtedly the Legislature may at any moment repeal the Act of 1850, and abolish the office. They may provide a substitute for it. . . . . It was never intended to put offices created by the Legislature beyond the control and regulation of the creating power. It was not intended to ordain that an office for a term of years once made should not be modified, or abolished, while the term remained unexpired."

This seems to dispose of the question, as this office is legislative and not constitutional.

The judgment of the Court below is reversed, and it is ordered and adjudged that the said John Weir be ousted and altogether excluded from the office of burgess of the Borough of Indiana, and that the relator, A. C. Braughler, is entitled to the said office and to be admitted thereto, and to the exercise of the powers and functions thereof, and that the said John Weir do pay all the costs of this proceeding. W. D. N.

Oct., '94, 197. October 31, 1894.

Lynch v. Versailles Fuel Gas Co.

Lease—Forfeiture—Estoppel—Time as essence of contract—Equity—Relief.

Where time is not stipulated as essential and a forfeiture for non-payment of money, or non-performance of other matter, which admits of accurate and full compensation, is provided as a penalty whose object is to enforce performance of another and principal obligation, equity will relieve against its enforcement, and will not permit it to be used for a different and inequitable purpose.

Where in a lease for the development of oil territory a fixed rent is provided for delay in putting down wells, and no date is expressed for the payment of rent, but it is left to fall due by operation of law at the close of each year, time is not of the essence of the contract to pay rent to the extent of ousting equitable relief in case payment be not made on the last day of the year.

A lessor who intends to enforce a forfeiture, in case rent is not paid punctually, is bound to ascertain on the very day it is due whether it has been paid or not and give prompt notice of forfeiture. While a delay of six or seven days in giving such notice will not ordinarily raise an estoppel against the right to enforce forfeiture, yet where in that time, the lessee expends money on the leased premises with the knowledge of the lessor, the latter will be restrained from exercising the right of forfeiture and, if he bring ejectment to enforce it, the jury should be instructed to find for the defendant.

Appeal of the Versailles Fuel Gas Company, defendant, from the judgment of the Common Pleas No. 3, of Allegheny County, in an action of ejectment brought by Abram L. Lynch.

On the trial of this cause, before McCLUNG, J., the following facts appeared:

John Lynch on August 21, 1892, leased to one Vandergrift, "for the purpose and with the exclusive right of drilling and operating for petroleum and gas," a tract of land in Versailles Township, Allegheny Co., Pa., containing one hundred and sixty acres, "for and during the term of fifteen years from the date thereof, and as much longer as oil or gas is produced or found in paying quantities."

The lease provided that if oil was found, Lynch was to get one-eighth; "and should gas be found in sufficient quantities to justify the party of the second part in marketing the same, the consideration in full to the party of the first part, instead of the one-eighth petroleum royalty, shall be three hundred dollars per annum for the gas from each well so long as it shall be sold therefrom." And further, "that the party of the second part shall complete a well on the above described premises within one year from the date hereof, and in case of failure to complete such well within such time, the party of the second part agrees to pay to the party of the first part, for such delay, a yearly rental of one dollar per acre on the premises herein leased, from the time of completing such well as above specified, until such well shall be completed, the said yearly rental, amounting to one hundred and sixty dollars, shall be deposited to the credit of the party of the first part in the Peoples' Bank, McKeesport, or be paid direct to said first party. And a failure to complete such well, or to make such deposit or payment as above mentioned,

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shall render this lease null and void, and to remain without effect between the parties hereto."

This lease was by sundry assignments vested in the Versailles Fuel Gas Company. John Lynch died November 6, 1891, by will devising this land to his son, Abram L. Lynch.

July 2, 1892, the Versailles Fuel Gas Company began to drill a well. Not having completed a well within one year from the date of the lease, they had paid each year the annual rental of one hundred and sixty dollars. The rent for the year would have fallen due August 20, 1892. This was Saturday. On Monday, the 22d of August, Abram L. Lynch went to the Peoples' Bank of McKeesport and asked if the rent had been deposited for the "Lynch folks." Being answered negatively he went home to his farm where the well was being drilled. He did nothing until Friday the 26th, although the drilling was going on every day, when he notified the contractor at the well to move off. J. R. Gemmill, the secretary of the company, who had charge of such matters, had been away, but returning, was informed by the contractor of this notice. He hunted up Lynch, and finding him on the street at McKeesport offered to pay the rent. This was after banking hours, but Gemmill offered to go and borrow the money. Lynch refused to accept the rent. Gemmill said he would be out next morning to pay and did go, but Lynch had not stayed at home. On August 27, written notice of Lynch's election to declare the forfeiture was sent to the company. This well was completed August 31, according to Lynch's testimony; perhaps really a few days later. The well cost about $5,000, and being put down by the foot, each day's work cost the company about $75 from August 20, until Lynch declared the forfeiture. The company struck gas in paying quantities, and a number of times have desired to pay to Lynch the rental due under the agreement.

The testimony showed that in 1889 and 1891, the rent was not paid to John Lynch until August 22d. The rent of 1892 was the first which fell due after John Lynch died. No demand had been made for the rent from the company, the only demand being at the bank.

The defendant presented the following points:

First. That under the terms of the lease it was the duty of the lessor to make demand for the payment of the rent upon the last day of the year at the bank, and upon the premises, otherwise he could not take advantage of the forfeiture clause, and could not re-enter for non-payment of rent.

Second. That the testimony being uncontradicted that payment of rent was made usually after the last day of the year upon which it was due, the landlord could not re-enter or take advantage of the forfeiture clause without notice that he would require a strict compliance with the terms in relation to the payment of rent.

Third. The lessor having stood by and permitted work to be done upon the well, involving the expenditure of quite an amount of money, from the last day of the year until the 27th of August, when notice of his election to claim forfeiture was given, waived his right of forfeiture, and the verdict must be for the defendant.

Fourth. That under all the evidence in the case the verdict must be for the defendant.

All of these points were refused. (First, second, third and fourth assignments of error.)

In his general charge the learned Judge said, *inter alia*, "The plaintiff had the right to forfeit the lease when the money was not paid. He had a right to forfeit it at the time, and time was of the essence of this contract, as it is expressed, but he was bound to act in good faith and not encourage the defendant company to incur further expense. If he did this; if he allowed the company to incur such expense, he would be estopped to insist on the forfeiture, and would be held to have waived his right. [Did he estop himself? As has been said, he learned of the failure to pay on the 22d of August, 1892. It does not matter particularly in this case whether it was payable on Saturday before or not, it does not appear that he learned of it. One mode of payment was by depositing it in the bank at McKeesport, and that would have been a payment even if he had delayed taking it out for a great length of time. The fact is he learned of the failure to pay, and his right of forfeiture, on the 22d of August, 1892. He exercised this right, and gave this notice on the 26th; the 22d was on Monday and the 26th would be on Friday. The question is, did he, by so acting estop himself from insisting upon this forfeiture by encouragement of the defendant company to incur further expense upon this land. You have nothing to do with the amount of expense that was incurred, before or since; I mean the amount of expense so incurred in putting down that well. If the company incurred it since that notice, they did it at their own risk. If they incurred it before you have nothing to do with that, and if they chose to allow him the chance to forfeit the lease, they took that risk. The only thing with which you have to do is that amount of expense incurred between the time that the plaintiff, Lynch, learned of his right to forfeit, that is the 22d, and the time at which he actually did elect to forfeit.] (Fifth assignment of error.) Under ordinary circumstances a delay of four or five days, where the defendants were not doing anything particular upon the premises, would, of course, not be a waiver of the forfeiture. But

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under the peculiar circumstances of this case, it seems to me that the question should be left to you, whether the plaintiff did, by such delay, and with the knowledge that he had encouraged these people to act on the supposition that the forfeiture would not be insisted upon, allow the defendants to incur further expense. If he did, he waived his right. If he did not do that, if he acted in good faith, if he gave them notice as soon as he could reasonably be expected to, after having become settled in his conviction of his right to do it, then he would have the right to forfeit, and they could not complain."

Verdict for plaintiff and judgment thereon.

The defendant took this writ and filed the assignments of error above indicated.

Edwin W. Smith, (with him *P. C. Knox* and *James H. Reed*), for appellant.

Under the circumstances of this case there could be no re-entry or forfeiture without a demand for the rent; and as the bank was the lessor's agent to receive the rent, demand could not be upon it, but would have to be upon the premises or from the company's officers. Prompt payment had not been insisted upon by the original lessor, the plaintiff's father, therefore, the plaintiff could not enforce a forfeiture without previous notice of his intent to insist on strict performance.

Cogley *v.* Browne, 11 WEEKLY NOTES, 224.
Wanamaker *v.* McCaully, 11 Id. 450.
Duffield *v.* Hue, 129 Pa. 109.

The plaintiff was estopped from declaring a forfeiture, because he had permitted the defendant to proceed with its improvements at considerable cost, after the falling due of the rent. The rent was due August 20, 1892, notice of intention to claim forfeiture was not given until the 26th, and in the interim, the defendant was drilling with the knowledge of the plaintiff.

Riddle *v.* Mellon, 147 Pa. 34.

Relief will be given against the forfeiture in this case in accordance with equity.

Peebles *v.* Reading, 8 S. & R. 484.
Title & Trust Co. *v.* Shallcross, 147 Pa. 494.
Remington *v.* Irwin, 14 Id. 143.
Sylvester *v.* Born, 132 Id. 467.
Grigg *v.* Landis, 6 C. E. Gr. 501.
Hagar *v.* Buck, 44 Vt. 291.
2 Story Eq., §§ 1314-1323.
Hipwell *v.* Knight, 1 Y. & Col. (Ex.) 418.
Ewins *v.* Gordon, 49 N. H. 444.
Wells *v.* Smith, 7 Paige, 22.

John D. Shafer, (*T. C. Jones* with him), for appellee.

January 7, 1895. MITCHELL, J. There is a wide distinction even in equity between forfeitures for failure of punctual payment of money where time is and where it is not of the essence of the contract. If parties choose to stipulate for matters as essential, it is not for Courts to say they are not so, but in the absence of a clear agreement for materiality Courts will look into the nature of the transaction, and be governed by the real bearing of the facts upon the intentions and rights of the parties. Hence it is a settled general rule that where time is not stipulated as essential and a forfeiture for non-payment of money, or other matter that admits of accurate and full compensation, is provided as a mere penalty whose object is to enforce performance of another and principal obligation, equity will relieve against it, and will not permit it to be used for a different and inequitable purpose. Story Equity Jur. Sect. 1316. In the present case time is not of the essence, for although the nature of oil and gas territory and of contracts affecting them, is such that in general time is essential, yet in the lease in question there is a stipulated rent payable for delay in putting down a well, and no date is expressed for the payment of such rent, it being left to fall due by operation of law at the close of each year. The main purpose of the lease was to have the land tested and developed, and to secure for the lessor the profits of such development. It was his interest therefore to have a producing gas well, for it would immediately nearly double his rental. The appellant paid the rent for several years, postponing the effort to get gas, for reasons not appearing but of which no complaint was made, until July, 1892. It then began drilling, and prosecuted the work in good faith, at a large expense, until it produced gas in paying quantity about the end of August. This as already said was in plaintiff's interest. He lived on the premises and saw the daily progress of the work. On August 20, when the well was near completion, a year's rent fell due, and payment was overlooked by the lessee. On August 26 plaintiff told the contractor to take away his machinery, and on the next day gave formal notice of his election to enforce a forfeiture. Under the circumstances he could not equitably do so without notice. There was some evidence that in previous years the rent had not been paid or demanded on the precise day, but it was not strong enough to establish a usage between the parties, and therefore a ground of relief, though it adds something to the equity of appellant's case. But if plaintiff intended to insist on punctuality of payment he was bound to ascertain on the very day, whether the rent had been paid or not, and to give notice promptly. A delay of six or seven days, it is true, would not ordinarily be conclusive and perhaps not even material, but in this case the appellant was in that interval expending on its well, in good faith, and relying on its lease, a sum equal to nearly three years rent per

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acre, or a year and a half's rent under a producing well. While making this expenditure under the circumstances the appellant was entitled to prompt notice, and the plaintiff was bound to observe and act upon that right. It was said by our brother WILLIAMS in Thompson *v.* Christie, 138 Pa. 230 (249), that the party entitled to enforce a forfeiture of this kind must exercise his right promptly, and the result must not be unconscionable. In the present case the action of the plaintiff was neither prompt nor conscionable.

As it is quite clear upon the undisputed facts that a Court of equity would have enjoined this forfeiture, the Judge should have directed the jury as requested in defendant's third point.

Judgment reversed.

H. B.

Oct. '94, 161. October 30, 1894.

Robinson et al. v. Baird.

Building contract—Substitution of other material—Agency, limit of.

Where a contractor for work upon a building agrees in writing to use in his work certain material, and sublets the contract, binding the sub-contractor to comply with the terms of the original contract and the sub-contractor uses a different material to the injury of the building, if the change of material be made with the consent of the architect or other agent of the owner of the building then the original contractor is not liable for the damage occasioned by the change.

Where payments upon a building contract are to be made upon the certificate of the architect, a certificate which does not in terms certify an amount due, but refers to the contract, in which the amount of each stipulated payment is set out, and declares the contractor entitled "to a payment, being the last payment on contract price," and further, that the payment "is the same as written in article of agreement less credits, and credit for defective plastering," is sufficient to authorize the bringing of an action, in which both the propriety and the amount of the last mentioned credit may be passed upon.

Appeal of Elizabeth J. Baird, defendant, from the judgment of Common Pleas No. 2, of Allegheny County, in an action wherein Crawford Robinson and W. J. Kennedy, doing business as Robinson & Kennedy, were plaintiffs.

The facts of this case and assignments of error are stated in the opinion of the Supreme Court, *infra.*

C. C. Dickey, (with him *George Shiras, 3rd*, and *W. K. Shiras*), for appellant.

R. A. Balph, (*James Balph* with him), for appellees.

January 7, 1895. WILLIAMS, J. The plaintiffs are building contractors who erected a dwelling house for the defendant in the City of Pittsburgh under a written agreement. This action is brought upon that agreement to recover an apparent balance due thereon. The defence set up is that part of the work, particularly the plastering, was not done as the contract required, and that the defendant has sustained damages that should be applied to reduce or extinguish the apparent balance sued for. The contract provided that the plastering should be done with a material known as adamant. The plaintiffs sublet this part of the work, but they bound their sub-contractor to use the same material that they were bound to use. After the subletting, and without the knowledge of the plaintiffs, the architect and the sub-contractor substituted another sort of material known as the "Fitzgerald Plaster" in place of the adamant, and the plastering was actually done with the Fitzgerald plaster. The result showed that it had been improperly prepared by mixing the dry plaster with lime not sufficiently slacked, so that the process of slacking continued to go on after the plaster was spread upon the walls and the walls properly smoothed or surfaced. This caused the walls to be spotted and the surface irregular by the appearance of blisters or openings, caused by the slacking of particles of lime. It is not denied that some damages were sustained by the defendant in consequence of the substitution of the "Fitzgerald" in place of the "adamant" material, but the contention of the plaintiffs is that this damage cannot be charged to them, since the substitution was made without their knowledge by the architect as the agent of the owner and the sub-contractor.

The learned trial Judge instructed the jury that if they found the fact to be as alleged by the plaintiffs their legal position was well taken, and the damages so sustained were not chargeable against the apparent balance due them. The second and third assignments of error relate to this ruling. If the fact was, as the defendant evidently supposed it to be when this line of defence was entered upon, that the material with which the plastering was done was changed under the direction or with the consent of the plaintiffs, then their liability for all the injury sustained by reason of such departure from the terms of the contract would be clear, and the amount when ascertained could be set-off against any balance appearing to be due under the contract. But if, on the other hand, the change of material was due to the defendant's own act or to the act of her agent, the architect, without the knowledge of the plaintiffs, the results of such change would be chargeable to the interference of herself or her agent between the contractor and the sub-contractor, for which the contractor could not be held responsible. The

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learned Judge was right therefore in submitting this question of fact to the jury and in his direction in regard to the effect of their finding upon it.

The only other assignment of error is the first, which complains that the Court did not give a binding instruction to the jury to find in favor of the defendant. This direction was probably asked upon the theory that the action was prematurely brought because no particular sum was stated in the certificate of the architect to be due to the plaintiffs. The certificate refers to the contract in which the amounts of the several payments are distinctly stated and sets out the fact that the contractors are "entitled to a payment, being the last payment on contract price for your residence." As though desirous to make the amount still more certain the architect appends to his certificate a "remark" stating that the payment now due as the last payment "is the same as written in article of agreement, less credits, and credit for defective plastering." The only subject or item left uncertain was that of "defective plastering," which, in the light of the testimony, meant the substitution of the Fitzgerald for the adamant plaster. The architect knew, as his testimony shows, that this was done by himself and the sub-contractor without the knowledge of the plaintiffs, and it is fair to him to assume that he left that item for adjustment between the parties because of his knowledge of the facts. The jury have found from the testimony that the plaintiffs ought not to suffer for the acts of the defendant or her agent, and in the light of this finding the certificate is sufficiently explicit in its statement of the sum due upon the contract.

The judgment is affirmed. W. C. S.

Oct. '94, 102. October 24, 1894.

Roll v. Davison.

Husband and wife—Liability for necessaries—Effect of judgment against husband alone—Estoppel.

The husband is primarily liable for necessaries for his family, although they are contracted for by the wife on the credit of her own separate estate.

Action against the husband alone for necessaries is generally conclusive against the liability of the wife, because it is an admission of record that the goods were sold on the credit of the husband and not on that of the wife; but where action is brought against both husband and wife and a judgment is recovered against both, which, on certiorari, is affirmed as to the husband and reversed as to the wife, there being no judgment in her favor upon the merits of the case, the judgment against the husband is not a bar to a subsequent action for the same necessaries against the wife alone.

Appeal of William Roll, agent, plaintiff, from the judgment of the Common Pleas No. 1, of Allegheny County, in favor of Ellen Davison, defendant, in an action of assumpsit for necessaries.

On the trial of this cause, before STOWE, P. J., the plaintiff gave evidence tending to show that he had sold groceries to the defendant upon her credit, and that the amount still due him therefor was $133.04. The defendant admitted the receipt of the goods and their value but alleged that she had not made herself personally liable but bought as her husband's agent, and offered in evidence the record of an action, C. P. No. 2, of Allegheny County, July term, 1891, No. 195, which showed the recovery by Roll in an action before an alderman, of $133.04 for groceries (being the same sued for in the action before the Court), against Samuel Davison and Ellen, his wife, the present defendant; the issue of a certiorari and the affirmance of judgment against Samuel Davison and its reversal as to Ellen Davison. The record was objected to, the objection was overruled. (Third assignment of error.) The Court reserved the question of the effect of the judgment against the defendant's husband, and left to the jury the question whether the defendant had bought for herself or as agent for her husband.

Verdict for plaintiff in the sum of $153.04, subject to the opinion of the Court on the question of law reserved, to wit, whether the judgment against the husband of defendant, offered in evidence, is a bar to plaintiff's right to recover in this action.

The Court subsequently, being of opinion that the judgment against the defendant's husband was a bar to the action before it, entered judgment for defendant, *non obstante veredicto.* (First and second assignments of error.)

The plaintiff took this appeal and assigned error as indicated above.

Frank Whitesell (*William W. Whitesell* with him), for appellant.

A judgment against one contractor is not a bar to a judgment against another, who from necessity has not been included in the first judgment, which remains unsatisfied.

Olcott *v.* Little, 9 N. H. 262.

A sufficient excuse appears for the action brought by appellant against appellee in that appellee by her own act took out a certiorari to the Common Pleas Court No. 2, of Allegheny County, in the first proceeding, and the judgment was reversed as to Ellen Davison at her request and affirmed as to Samuel Davison by operation of law without the consent of appellant, and being an adverse proceeding there was no other alternative on the part of appellant;

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he was forced to bring suit against Ellen Davison, because the necessity of the case required a separate suit to be brought like the case at bar, under Act June 3, 1887.

A. C. Johnston, for appellee.

While the Act of 11th of April, 1848, provided that a married woman might be held liable upon certain contracts in a joint action with her husband, it did not put them upon the footing of ordinary joint promisors, and unless the record contained the averments necessary to bring her clearly within the provisions of the Act, no judgment could be recovered or sustained against her.

Berger and Wife *v.* Clark, 79 Pa. 340.

Whilst the powers and liabilities of married women have been greatly enlarged by recent legislation, there is nothing in the Act of June 3, 1887, or June 8, 1893, to warrant the conclusion that after a final judgment against the husband, an action may also be maintained against the wife for the same debt, even though it be for necessaries.

The plaintiff is estopped by his former judgment against the husband alone from now averring that the contract was with the wife.

Butcher *v.* South, 31 Leg. Int. 4.

January 7, 1895. MITCHELL, J. The husband is primarily liable for necessaries, although they were contracted for by the wife on the credit of her own separate estate: Berger *v.* Clark, 79 Pa. 340; and it was proper therefore to join him with her in the first action. The reasons for the reversal as to the wife by the Court of Common Pleas No. 2, do not appear, but as it was upon depositions on a certiorari it was clearly erroneous. But even if regular it would not prevent a second action. There was no judgment for the wife on the merits of the case which would be conclusive.

Suit against the husband alone for necessaries has usually been held conclusive against the liability of the wife, because it is an averment or admission of record that the goods were sold on his credit and not on hers. No such conclusion follows in the present case because plaintiff brought his first action in proper form to charge both. The restriction of his recovery to the husband alone was no fault of his, but the action of the Court *in invitum*. He could not join the husband in the second suit, because as to the husband the judgment in the first suit was a bar. But as to the wife it was not, and the present action was therefore from the necessity of the case brought against her alone. The jury have found that the goods were sold to her on her separate credit. It was error to enter judgment in her favor against this finding.

Judgment reversed, and judgment directed to be entered for plaintiff on the verdict. H. B.

Oct. '94, 282. October 17, 1894.

Moore v. Copley.

Practice—Points reserved—Husband and wife—Liability for necessaries—Husband primarily liable—Book account charging wife.

When a verdict is taken subject to points reserved, the points should be put upon the record either by a special verdict or by a distinct reservation, stating the question of law held under advisement. That the points reserved are not stated in any manner on the record is ground for reversal.

While the power of the husband over the separate estate of his wife has been taken away, his liability for her support and that of his children remains. He is liable for necessaries furnished to them, whether with or without his knowledge.

The wife is not liable unless she expressly undertakes to become so. Her undertaking is never presumed, but must be shown affirmatively.

The fact that the creditor has chosen to charge the accounts to the wife is no evidence that she consented to be thus charged. To recover, the plaintiff must show such consent affirmatively.

Appeal of William Copley and Rose Copley, his wife, from the judgment of the Common Pleas of Butler County, on verdict for Mary M. Moore, administratrix of J. F. Moore, deceased, plaintiff.

At the trial, before GREER, P. J., a verdict was taken for the plaintiff for $54.88, the Court instructing the jury to render a verdict for that amount, "subject to the decision of the Court upon the question of law reserved." The facts are stated in the opinion of the Supreme Court. The Court subsequently made an order that "upon the payment of the jury fee, judgment be entered upon the verdict against the defendants and in favor of the plaintiff with costs of suit." The defendant appealed, assigning this order as error.

Thomas Robinson, for appellants.

J. M. Galbreath (*J. B. McJunkin* with him), for appellees, cited—

Real Estate Co. *v.* Roop, 132 Pa. 496.
Koechling *v.* Henkel, 144 Id. 219.
Abell *v.* Chaffee, 154 Id. 257.

January 7, 1895. WILLIAMS, J. This appeal brings before us an extraordinary record. The action was brought against a married woman in order to charge her separate estate with the amount of an account for medical services rendered to herself and her children while living with her husband.

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Upon the trial in the Court below, and at the suggestion of the learned trial Judge, a verdict was taken by consent in favor of the plaintiff for the amount of the account "subject to the opinion of the Court on legal points reserved." This appears upon the minutes of the trial, and regularly the points reserved should then have been put upon the record either by a special verdict, or by a distinct reservation stating the question of law held under advisement. The points reserved are not stated in any manner on the record, and for this reason, if for no other, the judgment should be reversed. But we have groped through the defendant's points, and the opinion of the Court, to satisfy ourselves upon what question the judgment of the Court appeared to rest; in order, if possible, to save a retrial of this small case. We conclude that the fourth and fifth points of the defendant raised the only legal question in the case, and that the reservation was therefore intended to be of the question whether a book account against a married woman afforded proof, *prima facie*, both of the services rendered and of the express undertaking of such married woman to subject her separate estate to liability for their payment. The learned Judge ruled this question in favor of the plaintiff, and accordingly entered judgment in his favor. In speaking of this question, he said that a book account against a married woman "would have the same weight, force and effect towards proving a contract or promise on her part to pay the debt as an ordinary book account would have against any individual." This statement overlooks the disability of the married woman and the primary liability of the husband for the support of his family. While the power of the husband over the separate estate of his wife has been taken away, his liability for her support and that of his children remains. He is, at least for the purpose of providing necessaries, the head of the household, and he is liable for such necessaries furnished to his wife and children, whether with or without his knowledge. His wife is not liable unless she expressly undertakes to become so. Her undertaking is never presumed, but must be shown affirmatively. The act of delivery of the goods to her, or the fact that the creditor has chosen to charge them to her, is not enough. This might tend to show the desire of the creditor to reach her estate, but it does not tend to show her agreement that he shall do so.

If, as we assume, this was the question reserved, the judgment should have been entered in favor of the defendant *non obstante veredicto*. It was the duty of the plaintiff to show in addition to the entries upon his books debiting the married woman with his medical services rendered to her and her children, her promise to pay. In the absence of such proof the legal presumption is, that in sending for a physician she was acting as the agent of her husband and pledging only his credit.

The judgment appealed from is now reversed, because, first, no reserved question is stated in any manner on the record; and second, because upon the only legal question raised by the defendants' points the ruling of the Court below was erroneous. J. D. B., Jr.

Oct. '94, 280. November 8, 1894.

City of McKeesport v. Busch, et al.

Highways—Lien for improvements—Time of making amendment to—Foot front rule—Acts of April 3, 1867, P. L. 732, and May 16, 1891.

As no limit of time is prescribed, within which the petition to amend the lien must be filed, it may be presented at any time before the statute of limitations has closed on the claim.

The Act of May 16, 1891, P. L. 69, does not repeal or change the provisions of the Act of 1867, P. L. 732, (improvement of streets in McKeesport), but is rather intended to provide somewhat more specifically for the practice in cases where any final assessments have been made.

The Act of 1867 especially enjoins the foot front rule, and objections to its application growing out of inequalities of the surface which seem to make some cases harder than others, are not fundamental so as to make the rule inapplicable on that account.

Appeal of Frank H. Busch and William Busch, defendants, from the judgment of the Common Pleas No. 2, of Allegheny County in a proceeding by scire facias upon a lien filed by the Borough of McKeesport for the use of the City of McKeesport.

The facts of this case are stated in the charge of the Court (MAGEE, J.) as follows:

"This is a scire facias on a municipal claim for the cost and expense of grading, paving and curbing of Cliff street, from Fifth avenue to Elm street, in the Sixth ward of the City of McKeesport, and which has been filed as a lien against that certain lot of ground in the Third ward of the borough now the Sixth ward of said city of McKeesport, fronting 390 feet on the west side of Cliff street, and of which the defendants are the owners or reputed owners. The claim filed is for the sum of $1,864.20, with interest from October 30, 1891.

"This lien is filed under the provisions of the Act of Assembly of the 3rd of April, 1867, P. L. 732, which provides for the improvement of the streets in McKeesport. The Act, which

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has been offered in evidence and admitted, provides that town councils have the power to require by ordinances the grading, paving and macadamizing of any street, lane or alley or parts of same, not less than one square, within such reasonable time as the said Councils shall by ordinance direct, and shall have full power to levy and collect the costs and expenses of such grading and paving or macadamizing by a *pro rata* assessment on the feet front, etc. Provided, that a majority of persons owning property on the street petition therefor; and after causing demand to be made on the owners and on neglect to pay, may file liens against the property and such costs and expenses shall be recovered by writs of sci. fa. in the name of the Commonwealth, etc., as debts by mortgage are now recoverable, and such sci. fa. may issue at any time after the filing of such statement.

"[The evidence is before you on the part of the plaintiff that there were fourteen persons owning land on the portion of Cliff street between Fifth avenue and Elm street, and that eight of the fourteen petitioned the Councils for the grading, paving and curbing of that portion of the street being not less than one square, and that the petitioners were a majority of the owners of the land abutting on the street to be improved as shown by the paper marked Exhibit A., supplemented by the testimony of E. J. Taylor, the civil engineer of the borough at the time, and who made an examination into the ownership of the abutting property.] (Sixth assignment of error.)

"[The plaintiff has also given in evidence an ordinance for the grading, paving and curbing of Cliff street between Fifth avenue and Elm street, shown by the paper marked Exhibit B, also the contract between the borough and Sloan and McIlvaine, for the grading, paving and curbing of the street, as shown by the paper marked Exhibit C, and bearing date September 26, 1890, and also the assessment made of $4.70 per lineal foot on the abutting property and the assessment on the 390 feet of the abutting land of the defendants to the amount of $1,860.30, their proportion of the cost and expense of the improvement by a *pro rata* assessment on the feet front. The evidence thus presented is in compliance with the requirements of the Act referred to in relation to the improvement of streets in McKeesport.] (Seventh assignment of error.)

"Now, the measures provided for the enforcement of the lien authorized to be filed for the cost and expenses of the improvement, by the Act of 1867, are, that they shall be recoverable by writ of scire facias as debts secured by mortgage are now recoverable, and such scire facias may issue at any time after the filing of such statement. The Act of the 16th May, 1891, P. L. 69, is an Act general in its application, "creating and regulating municipal liens and proceedings thereon," and by this Act it is provided that the lien when filed shall be proceeded upon for collection by writ of scire facias in accordance with the course of the common law. By the Act it is also provided that "If an appearance be entered (and such is the case here) the plaintiff shall also be entitled to judgment unless a sufficient affidavit of defence be filed within fifteen days after the return day. If such affidavit be filed, the cause shall then be proceeded with in accordance with the rules of law and the practice of the Court. This Act, I take it, permits the defendants to present their defences to the scire facias in accordance with the rules of law and the practice of the Courts governing the enforcement or collection of liens entered and filed under the authority of existing laws, and, presumably, just and lawful claims as filed. The defence may therefore be made to the want of conformity to the law of the lien authorized to be filed and such other defences upon the merits of the claim as go to the defective character of the work done on the improvement or extravagant charges for the same, or the non-performance of the work or mistakes in the feet frontage assessed, or that the property is not the subject of a *pro rata* assessment by the foot front from its rural, agricultural or farming character, etc., provided that under the rules of law and the practice of the Courts such defences—and only such defences—are set up in the affidavit of defence required to be filed in the case.

"The defences there set up are as follows: First, That the land of the defendants abutting on the street is not the subject of a foot frontage rule of assessment. The Supreme Court has said that upon a scire facias sur municipal lien for paving, if the jury find the property to be rural —and I will add as connected with it, agricultural or farming—it cannot be charged by the foot front rule of liability. It is no defence, however, to a claim for street improvements filed according to the foot front rule, that the property is but a narrow strip along the street, and not worth the amount of the assessment. That is not the character of objection to defeat recovery. [The inequality—if such exists—must arise from a *pro rata* foot frontage assessment on rural, agricultural or farming lands; and not on city lots; not that it is hilly, uneven territory, or might be an actual advantage or disadvantage—inequalities that arise from that source do not defeat a *pro rata* assessment. If it is city street, the general character of the property and its value is to be regarded in city lots as substantially the same, and these lots in

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question are in a city—the city of McKeesport—so stated by all the witnesses and the papers filed.] (Eighth assignment of error.)

"[As to the second suggestion of a defence, that the lien filed is defective and void in that it does not give or definitely describe the boundary or depth of the land; I say to you that the description in the lien is sufficient, and is not defective and void, and that any defence set up on that account will not avail to defeat recovery.] (Ninth assignment of error.)

"I shall now read to you what the Act of Assembly says on that subject. [The Court here read the second section of the Act of 1867.] There is in this description sufficient to identify it. It is not a full description, such as would be given in a conveyance, but it is what is intended —a brief description such as would identify the property, and no defence of that kind would defeat recovery here.

"The third defence is that the lien is void because not filed in accordance with the direction of the Act of April 3, 1867. This objection to the form in which the lien has been filed is without merit; there has been a substantial compliance with the Act, and that will not defeat recovery.] (Tenth assignment of error.)

"Fourth. [The defence set up that the improvement must be made on a petition of a majority of the property owners abutting thereon. This defence, if established by evidence, is a good one, as the Act makes such a petition a prerequisite to the making of the improvement. That fact you will determine from the evidence before you. So far as I recall the testimony—and my recollection seems to be pretty clear upon the subject—I do not remember any evidence to sustain such a claim. The only effort that was made, I thought, in the way of defence upon that ground, was to show no such interest in the property on the line of the improvement as that the signature of the party signing ought to be regarded as one of the property holders along the line of the street in securing the majority of the property owners, but there was no evidence that I can recall that the eight signers of the fourteen owners alleged to be there—no positive assertion that I recall—that they were not a majority of the owners of the property abutting on the improvement.] (Eleventh assignment of error.)

"[The defence further sets up that 'there never was, nor now legally is, a Cliff street.' This is a good defence, if it be established that the improvement made was not of a public highway or street known and recognized as such and identified as Cliff street. The fact that it was also known as a township road would not make the ordinance for its improvement under the name of Cliff street null and void. The important fact to make the improvement lawful is, was it of a public highway and has it a location and name as Cliff street? It is in evidence that there was a Cliff street connected with it.] (Twelfth assignment of error.)

"The next defence is—and I hardly know whether the defendant is insisting on that or not, but it was spoken of by some of the witnesses—is that of the character of the work done upon the street, that the paving and the work in general was incompletely, unskilfully and carelessly done. Now, that defence, if there was evidence to support it, might be set up, but only to reduce the claim upon the contract price to the extent shown in its value as less than the contract price, owing to the defective character of the work done upon its final completion. Upon that point I do not recall any evidence, there was some slide spoken of as having occurred. That might happen in any work, but the engineer says that when it occurred he had the contractor replace it and put it in good shape, so I think that any evidence of that kind would scarcely warrant a reduction from defective work. [The last suggestion of a defence is that the improvement was made at the instance and request of the Highland Land Company, and that is immaterial, if done on the petition of a majority of the persons owning property on the line of the improvement. It makes no difference as to whose instance it was done at or whether the parties pestered the lives of the Councilmen in order to get it done, or whether they had some interest in having it done, if they succeeded in getting the names of a majority of the property owners on the street.] (Thirteenth assignment of error.)

"I have now, I think, indicated the character of the plaintiff's case and the character of the defences set up, and the law by which you are to be governed in their consideration. The evidence upon the question of fact material to be determined by you, has not been discussed by me; that has been fully done by the learned counsel. I have endeavored to give you the law applicable to the case, and have suggested what I conceive to be the material questions in issue. The material questions I leave to you to be determined under all the evidence, aided, as you have been, by counsel in their review and discussion of the testimony, as to the bearing and effect it ought to have in enabling you to reach a true verdict. A great deal of the testimony is connected with the plans as to the location of the property and streets and the character of the surroundings. That evidence has all been clearly presented before you, and as I have not been made acquainted with it, I could not well discuss the testimony as it was given. That is one reason why I have not touched on the facts

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that have been offered on either side, because so much of it was connected with the plans which were shown you. I think I may say that the disputes in the main relate to the question of the character of the land assessed; is it rural, agricultural or farming land, or is it property not of that description or city property, and is there a public highway known and existing at the time of the improvement under the name of Cliff street? If it was a street in McKeesport and paved under a recognized name mentioned as Cliff street in the ordinance, it will be sufficient for the purpose of making the improvement, although the portion of the street paved was also known as a township road. The plans and evidence of all kinds submitted to you are for your consideration upon the questions I have submitted to you as arising under the pleadings and evidence in the case."

The defendant presented *inter alia*, certain points which with their answers are as follows:

Second. If the jury find that the improvement of the street in front of the defendant's property is of a character which can be benefited, if at all, in a degree grossly disproportionate to other property on Cliff street, then the equal charge per front foot is oppressive and unjust and plaintiff cannot recover. *Refused.*

Third. If the jury find that the said improvement is of no benefit whatever to said defendants, but solely or mainly for the benefit of other parties owning property on the said street, then the equal charge per front foot is oppressive, unjust and illegal upon defendants. *Refused.*

Fourth. If the jury find that the improvement is a public benefit, then the charge per front foot is an imposition on the defendants, and their verdict should be for defendant. *Refused.*

Fifth. If the jury find that the property of defendants is not divisible into town lots, or that it cannot be divided and built upon as on ordinary town lots, then the equal per front foot charge is unjust and illegal, and their verdict should be for the defendants.

Refused. "I would have to make the answer too long in order to make it accurate, and I have indicated it in my general charge."

Sixth. If the jury find that the said street in front of defendants' property was legally known only as the Township or River road, it required an ordinance to change its name to Cliff street, and it was the duty of the plaintiff to produce such ordinance. *Refused.*

Seventh. No ordinance having been produced the said street in front of defendants' property is legally still the township road or river road, and all proceedings in relation to the paving are void, and defendants cannot be charged with any part of the cost thereof. *Refused.*

Eighth. That upon the entire evidence their verdict should be for the defendants. *Refused.*

Verdict for plaintiff. After the verdict the Court made an order for amendment of the lien as regards the depth of the property and entered judgment. Defendants appealed, assigning for error the charge of the Court included within the brackets, and also the answers to the points offered by defendants.

Magnus Pflaum, for appellants.

There was legally no Cliff street. The Act of Assembly April 3, 1867, P. L. 732, prohibits the opening of a street unless preceded by a petition "of a majority of persons owning property upon the street, or a portion thereof." This clearly was intended for the benefit of such property owner. The Act of Assembly did not and could not contemplate that a petition for the paving of one well known street should secretly embrace another street and thus deprive the property owners of their right of assent or dissent, as granted to them by said Act. If there legally was no Cliff street, then the lien was defective. It was also defective, because it described the land as running back to a line. There was no line, except perhaps the water course about 20 or 30 feet from the line of the street. The difficulty in the present case is that the Act of 1867 above referred to was passed for the then borough of McKeesport, in which acres had been all changed into building lots. By the Act of May 24, 1873, its boundaries were enlarged and acres taken in, yet the street paving Act of 1867 designed for lots, remained unaltered. This Act declares that any misdescription of the property shall not defeat the lien. Here it is not a misdescription but a question of confiscation. The Court peremptorily instructed the jury that the description of the lien was sufficient. If the description of the lien was sufficient why did the Court allow an amendment after verdict? An amendment may, of course, be allowed at any stage of the proceedings if there be anything to amend by. Here there was nothing of the sort.

City of Allentown *v.* Hower, 93 Pa. 332.

The plaintiff did, avowedly, not file it under the provisions of said Act. The affidavit of claim expressly says that it was filed under the Act of May 16, 1891, and thereby admits that the provision of the Act of 1867 was ignored.

O'Byrne *v.* City of Philadelphia, 93 Pa. 225.

The Court ruled that the per foot rule applied upon the ground that the property was not shown to be either farming or rural land and distinctly charged the jury that the inequalities in the assessment, arising from hilly or uneven territories do not defeat a *pro rata* assessment.

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In the case of farming or rural property such assessment is merely premature and the improvement may in time benefit the land. In the present case a public water course must first be diverted, dried up or covered over and the land filled from 20 to 60 feet before it could be built on or used as building lots. All the cases—

Hammett *v* Philadelphia, 65 Pa. 146.
Washington Ave. 69 Id. 352.
Kaiser *v.* Weise, 85 Id. 368.
Craig *v.* Philadelphia, 89 Id. 269.
Philadelphia *v.* Rule, 93 Id. 15.
Scranton *v.* Penna. Coal Co., 105 Id. 448..
Keith *v.* Philadelphia, 126 Id. 581.

are emphatic that local assessments must be for local or at least common benefit. The application of this principle was generally invoked in case of farm land or rural property. The Court below held that it applied to such land alone and does not apply to any other case, although there may be neither local nor common benefit. In the present case to make the benefit common would require, even if possible or practical, an expenditure several times beyond the value of the property—leaving out of consideration that the proof tended to show that the benefit of the improvement was intended for other property than that of defendants. The case of Harrisburg *v.* McCormick, 129 Pa. 213, has no application. There an assessment for street improvement was made against a narrow strip of land fronting on the street. This Court declined relief because the land could be squared in the rear; and because to hold otherwise would enable property owners to escape street assessments by disposing of a narrow strip fronting on a street.

W. B. Rodgers (*R. C. Rankin* with him), for appellee.

There was originally a township road running from Fifth avenue and this road was in front of the appellants' property and was a part of what was improved. The appellants claim that this road at the time of the improvement was still known as the Township road, and the appellee claims that it was known as Cliff street. The question as to whether this was Cliff street was then a question for the jury and the Court charged that the question was: "Was it a public highway and had it a name and location as Cliff street? If it was not the defendants could escape liability, but if it was, then the borough had a right to improve under the ordinance."

There was no attempt on the part of defendants to deny that the petition was signed by a majority. The reason given why the lien was not valid is because the depth is not given in the lien. The defendants pleaded and went to trial. This question could not be raised after plea.

Fahnestock *v.* Speer, 92 Pa. 146.

At any rate there is nothing in it. The question as to what the city can sell on a lev. fa. will arise hereafter. The frontage is correct and that is all that we are interested in at present.

The objection that the lien was not filed in the form prescribed by the Act of 1867 comes too late after pleading to the sci. fa., but it is without merit, under the law. The Act of 1867, Sec. 2, provides for the filing of a statement in the Prothonotary's office in which shall be stated the name of the street, the names of the delinquents, the amount of the assessment of each, and a description of the property sufficient to identify it, giving the frontage and date of demand, to which the street commissioner shall swear, and this statement is then to be made a record. All this is found in the lien filed. The sum and substance of this objection is that others are not included with Busch in the same statement. There is no evidence that there are any others, and if there were, their association with Busch would neither be for his profit nor loss.

The property assessed is city property, surrounded by lots and manufacturing establishments and manufacturing sites. It may be that the property is not as much benefited as others, or others may receive less benefit, but that cannot be helped.

Hammett *v.* Philadelphia, 65 Pa. 155.
Harrisburg *v.* McCormick, 129 Id. 216.

The allegation as to the improvement not being a benefit, is best answered in the language of the Court in Michener *v.* Philadelphia, 118 Pa. 535.

January 7, 1895. GREEN, J. The learned Court below instructed the jury that if "there never was, nor now legally is, a Cliff street," this is a good defence, "if it be established that the improvement made was not of a public highway or street known and recognized as such and identified as Cliff street." The petition and ordinance were for the improvement of Cliff street, between Fifth avenue and Elm street, and it was not disputed that there was originally a township road between those points on which the defendant's property abutted. As to whether this was a part of Cliff street there was conflicting testimony, and the question was necessarily for the jury. They have decided that question in favor of the city, and we cannot reverse their verdict. The fact that it was a public highway was not disputed, and whether it was known as Cliff street was a pure question of fact.

There was affirmative testimony that the petition was signed by a majority of the property owners along the line of the improvement, and we

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are not referred to any testimony which denied the fact. Of course it was a question for the jury, and as such was referred to them by the Court.

The lien is certainly lacking in not defining in some way the depth of the lot. But the frontage is given and the boundaries on either side, and a petition to amend the description was presented to the Court after verdict and allowed. This petition is not printed by the appellant and the inference therefore arises that the defect in the description was cured by the amendment. The Act of 1867, P. L. 732, under which the proceeding was had, expressly provides that no error in the names, or misdescription of the property, shall vitiate the statement of claim and that the same may be amended on application to the Court. As no limit of time is prescribed within which the petition to amend must be filed, it may be presented at any time before the statute of limitations has closed on the claim.

The appellants contend that the lien was not filed in accordance with the Act of 1867. An examination of the record in relation to this subject shows, that the petition for the passage of the ordinance asks that it be granted under the provisions of the Act of 1867 and its supplements. The ordinance declares that it is enacted under the provisions of the same Act and its supplements. The claim of lien declares that the work was done and the assessment made under the provisions of the Act of 1867, and that the claim is filed in accordance with that Act. The affidavit of claim alleges that the ordinance was passed, the grading and paving done, the amount assessed and demand made in accordance with the same Act and its supplements, and that a lien was filed in accordance with the Act of 1891, P. L. 69. The latter Act does not repeal or change the provisions of the Act of 1867, but is rather intended to provide somewhat more specifically for the practice in cases where any final assessments have been made. It is true it says the lien shall date from the time of the final confirmation of the report under which the assessment may have been made, but it does not invalidate assessments which have not been made in that way. It, of course, would be applicable to all such assessments as require a final confirmation of a report under which they were made, or a final decree of the Court fixing such assessments. The requirements of a valid lien fixed by the second section of the Act appear to have been complied with in the lien filed in this case. The claim of lien contains the names of the owners, or reputed owners, a reasonable description of the property as amended, the amount claimed to be due, for what improvement the claim is made, and the time when the final assessment was made, and the authority by which it was made. These are all the requisites of the Act of 1891, and as these were valid under the special law of 1867 we discover no reason for holding them invalid under the Act of 1891.

We can discover no good reason for holding that the foot front rule does not apply. The Act of 1867 especially enjoins it, and objections to its application growing out of inequalities of the surface which seem to make some cases harder than others, are not fundamental so as to make the rule inapplicable on that account. It may well be that the improvement is less valuable to some owners than to others, and that the burthen of payment is more oppressive to some than to others, but that consideration cannot suffice to change the application of the rule. In City *v.* McCormick, 129 Pa. 213, speaking upon this subject, we said, "It is perhaps impossible to frame any general rule that would produce exact uniformity and do equal justice in all cases. This arises from the fact that a rule to be valid must be general, and the further conceded fact, that in the application of all general rules there will be cases of individual hardships."

In Michener *v.* Philadelphia, 118 Pa. 535, we said, "The plaintiff alleges, however, that his property is not benefited by the sewer. He may or may not be mistaken in this. We cannot say. But this is a species of taxation, and all taxation is presumed to be for the benefit directly or indirectly of the taxpayer or his property. Laid as taxes are under general laws there will always be cases of apparent individual hardship. . . . . And it would be intolerable if in every instance of a special taxation the question of benefits could be thrown into the jury box." In Hammett *v.* Philadelphia, 65 Pa. 155, SHARSWOOD, J., delivering the opinion, said, "Perhaps no fairer rule can be adopted than the proposition of feet front, although there must be some inequalities if the lots differ in situation and depth. No system of taxation which the wit of man ever devised has been found perfectly equal." The appellants are doubtless unfortunately circumstanced in respect of the character of their surface, but that fact cannot change the application of the rule. We see no error in the record, and the assignments of error are all dismissed.

Judgment affirmed. W. C. S.

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Oct. '94, 246. November 6, 1894.

McKeesport v. Soles.

Public improvements—Assessments for—Foot front rule when applied—Whether urban or rural, for the jury.

Whether the property charged for public improvements is urban or rural is a question of fact, and usually for the jury.

Assessments on individual properties for public improvements can only be made to the extent of the local and special benefit received therefrom, and the system of assessment by the foot front rule has only been sustained on the ground that in cities and large towns where population is dense and lots are small, it is a fairly approximate and just measure of such benefits; it is not applicable to rural neighborhoods.

Appeal of Catherine Soles, defendant, from the judgment of Common Pleas No. 2, of Allegheny County, in a proceeding by scire facias sur lien filed by the City of McKeesport for street improvements.

On the trial of this cause, before WHITE, J., the following facts appeared:—

The City of McKeesport filed a lien against the property of the defendants for grading, paving and curbing of Fifth avenue for $10,394.31. The lien was based upon an assessment made by resolution of the city council of $9.78 per front foot, pursuant to an Act of Assembly approved April 3, 1867, and an ordinance of McKeesport passed May 20, 1890. The defence denied that the improvement was made at the instance or request of defendant, or that she promoted it in any way, and alleged that it was done without notice to her of the proceeding by which it was accomplished, and that her said tract of land, through which this alleged improvement was made, was only used, so far as improved, for farming purposes and pasturage, the residue being wild, uncultivated land, and none of it within the built-up town of McKeesport. The defendant submitted, *inter alia*, the following points:—

4. The resolution of the town council, arbitrarily assessing the cost and expense incurred by the borough for grading, paving, etc., of the said avenue, was void, and imposed no legal liability upon the defendant, or her land, therefore plaintiff cannot recover.

5. The assessment of the costs and expenses of the said improvement of Fifth avenue by the frontage rule of valuation, whereby the same were charged against the property abutting upon the avenue in proportion to the number of feet front thereon, was arbitrary, unconstitutional and void.

6. Such a mode of assessment for improvements through a rural or suburban district is contrary to law.

7. Upon all the testimony in the case the verdict of the jury should be for the defendant.

The Court refused all of defendant's points, reserved the above questions involved, and instructed the jury to find for the plaintiff.

Verdict for plaintiff for $11,714.32, subject to the questions of law reserved. Subsequently the Court gave judgment for plaintiff and filed the following opinion:—

"These points raise only questions of law. There was no point directly raising the question whether this was rural property, in the sense that it was not liable to an assessment according to the frontage rule; but if there had been, it should have been refused. The evidence as to the properties all along the street on both sides of defendant's property, was, that small lots had been sold and built upon, as is usual in the outer suburbs of cities and boroughs. It was a part of the city, not of the country. The defendant has a farm of over 100 acres, lying back, but fronting about 1,000 feet on this street. That portion fronting on the street was rough and steep. The assessment was for 172 feet deep, being the depth back of adjoining lots, sold from the Soles' property. At that distance back, or less, the ground was very suitable for laying out in lots, either fronting on this street, or on others that might be laid out from it. The improvement was made under the special Act for the borough, approved April 3, 1867, P. L. 732. That Act does not require the petition to be signed by a majority in interest of property owners on the street, but only a majority in number. The petition in this case was so signed. The proceeding in this case was under special Act of the borough and the improvement completed before the general Act of 1891. All the legal questions raised in the defendant's points are involved in the validity of that special Act for McKeesport borough. All the proceedings in this case were in strict conformity to, and compliance with, that statute. If it was a valid statute at the time these proceedings were had, the defendant has no legal defence. For more than twenty years that special Act was in force, many streets were improved under it, it has been repeatedly before the Courts of this county and the Supreme Court, and always upheld. And at the time of this improvement was the only street improvement Act applicable to the Borough of McKeesport. Under these facts, we think the questions of law raised by defendant's points should be decided in favor of the plaintiff and against the defendant. And it is accordingly ordered that judgment be entered on the reserved questions of law in favor of plaintiff against defendant for the amount of the verdict, on payment of verdict fee."

Thereupon defendant appealed, assigning as

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error the entry of the judgment and the refusal of the Court to instruct the jury as prayed for by defendant.

A. M. Brown, (*John D. Brown* with him), for appellant.

The frontage rule of valuation, whereby the cost of the paving of street or other municipal improvements is assessed upon the property holders abutting upon the street, in proportion to the number of feet their property fronts thereon, while it may be a just mode of assessing the cost upon compact city lots, where the properties do not materially differ in value, cannot be applied where the street or improvement is made through rural or suburban districts, and furthermore, an Act of Assembly which applies that mode of assessment to such districts is unconstitutional.

Seely *v* The City of Pittsburgh, 82 Pa. 360.
Washington Avenue, 69 Id. 352.
Keith *v.* Philadelphia, 126 Id. 575.
Craig *v.* Philadelphia, 89 Id. 265.

Upon the testimony in this case the jury would have been justified in finding that Mrs. Soles's property was in a rural district, remote from the built-up part of the town of McKeesport, and therefore within the rule established in the Seely case, and it was error to refuse her points and determine the question without submitting it to the jury.

W. B. Rodgers, (*R. C. Rankin* with him), for appellee.

In view of the entire evidence, this property, surrounded as it was by building lots and buildings, situated on an avenue, of which almost the whole frontage was either laid out in lots, or built upon, was ripe for city improvement, within the rule which appellant's attorney laid down in the argument, viz: "The foot front rule can only be applied to the built-up portion of the city, or to property ripe for city treatment," and should not be permitted to escape its proper burden, because it stands high above the street and may therefore be less valuable than other tracts.

January 7, 1895. MITCHELL, J. Assessments on individual properties for public improvements can only be made to the extent of the local and special benefit received therefrom, and the system of assessment by the foot front rule has only been sustained on the ground that in cities and large towns where population is dense and lots are small, it is a fairly approximate and just measure of such benefits: Washington Av., 69 Pa. 352, 361; Seely *v.* Pittsburgh, 82 Id. 360; Craig *v.* Philadelphia, 89 Id. 265. In rural neighborhoods and other places such a rule is not applicable and cannot be constitutionally applied. Id. The question whether the property charged is urban or rural is one of fact, and usually for the jury. Scranton *v.* Coal Co., 105 Pa. 445.

The learned Judge below was of opinion that this question was not open to contention in the present case, and therefore took it away from the jury. In this we think there was error. The local Act of 1867 is exceedingly arbitrary in its provisions and liable to work very great injustice. Proceedings under it therefore should be carefully scrutinized and held with a firm hand for the protection of private rights. The appellant's property, upon which a very heavy assessment was levied apparently without her knowledge or opportunity to be heard, is admitted to be mainly, at least, farm land with a frontage of half a mile on the street in question, but the principal part lying back, and not accessible from the street. There was evidence that it is a rough tract, unsuitable for building on, and elevated some feet above the grade of the avenue. It is at some distance from the built-up portion of the town of McKeesport, and the intermediate buildings and improvements are claimed to be rural rather than urban in character. A very important fact on which much stress was laid, was the division of the property on the opposite side of the street into lots and dwellings. Ordinarily such fact would be controlling evidence of the extension of the town to that neighborhood, but this effect is modified by the other fact that the avenue is laid upon the line of an old State road, and the lots and buildings in question are claimed to be only the usual development of rural property on the line of such a road, and therefore not conclusive of the growth of the town in that direction. All the evidence bearing on this question should have been submitted to the jury.

Judgment reversed and venire de novo awarded. W. C. S.

Oct. '94, 294. October 18, 1894.

Appeal of William M. and John M. Webb.

Orphans' Court—Executors—Accounts—Surcharge—Payment to attorney-at-law.

A credit claimed in their account by executors or administrators for suitable tombstones for the decedent's burial lot is entirely proper and should be allowed.

Nor should the accountants be surcharged with the amount of a judgment due the decedent which had been paid to the attorney-at-law who had represented decedent. Gross negligence only on their part will render them liable to surcharge.

McGlinsey's Appeal, 14 S. & R. 64; Porter's Estate, 77 Pa. 43; Calhoun's Estate, 6 Watts, 185, and Konigmacher *v.* Kimmel, 1 Pen. & Watts, 213, followed.

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Appeal of William M. Webb and John M. Webb, from the decree of the Orphans' Court of Butler County, dismissing exceptions to report of the auditor appointed by the Court to audit their account.

The material facts, as found by the auditor, were that John Webb, the testator, died on August 22, 1890, and that by his last will, which was proved on August 30, 1890, he made the appellants executors. The executors upon a citation directed to them, filed a partial account on February 18, 1892, and a final account August 5, 1893.

Except the moneys and securities the executors took all the personal estate at its appraised value.

The total appraised value of the estate was $3,039.19. In their final account executors claimed credit for $120 for tombstones placed in decedent's burial lot.

This credit the auditor disallowed. Among the items which the auditor found the accountants should have charged themselves with was a judgment held by the testator against William B. Curry. Interest on this judgment was paid up to July 11, 1890, the interest having been paid to John Webb in his lifetime. The evidence also shows that William B. Curry paid this judgment to Walter L. Graham, attorney for the executors of John Webb, deceased, on the 25th day of January, 1892. The money was not paid over to the executors, and they did not know it had been paid until the fact appeared in evidence. The auditor is of the opinion that under the circumstances the executor should account for the sum of $701.75 and all interest thereon from July 11, 1890, to August 5, 1893, the date of the filing of the final account, making in all the sum of $830.97. The other items of the appraisement, consisting of personal property on the farm, are accounted for on the basis of the appraisement. With this amount the auditor surcharged the executors.

Both to his disallowing the credit claimed for the tombstones and to the surcharge accountants filed exceptions, which were dismissed by the Court, whereupon accountants appealed.

John M. Thompson, for appellants.

Executors shall not be compelled to account for money they never received where no gross negligence or wilful default on their part is shown.

Johnson's Appeal, 12 S. & R. 324.
Moore's Appeal, 10 Barr, 438.
Calhoun's Estate, 6 Watts, 188.
Thompson *v.* Brown, 4 Johns. 619.
Neff's Appeal, 57 Pa. 96.

Common skill, common prudence and common caution, are all Courts have required.

Chambersburg Saving Fund's Appeal, 76 Pa. 226.
Konigmacher *v.* Kimmel, 1 P. & W. 213.

It is the duty of executors to erect suitable gravestones in the place of burial of their testator.

McGlinsey's Appeal, 14 S. & R. 66.
Porter's Estate, 77 Pa. 43.
Connelly's Estate, 28 Pitts. L. J. 352.

H. H. Goucher (*G. W. Fleeger* with him), for appellee, cited—

Stong's Appeal, 160 Pa. 13.
Wynkoop *v.* Wynkoop, 6 Wright, 302.

January 7, 1895. GREEN, J. It is rather surprising that after two express decisions of this Court to the contrary, the auditor and Court below should have refused a credit of $120 paid by the accountants for the erection of a tombstone over the grave of the testator. Both McGlinsey's Appeal, 14 S. & R. 64, and Porter's Estate, 77 Pa. 43, decide explicitly that an allowance for such an expenditure is entirely proper, and credit for it should be given against the estate of the decedent. In the former of these cases the expense was incurred by an administrator, in the latter by executors, and in both the credit was allowed without the slightest hesitation. In Porter's Estate, Mr. Justice SHARSWOOD, delivering the opinion, said, "This Court has recognized the expense of a suitable tombstone over the grave of a decedent to be a legitimate item of credit in the accounts of an executor even when no provision on the subject was made in the will of the testator."

In the present case the credit claimed for this purpose was only $120, which was entirely reasonable and proper in any point of view. Wynkoop *v.* Wynkoop, 42 Pa. 293, contains nothing in conflict with the case above cited. This question did not arise there, and in any event the act of burial includes all the usual incidents of decent burial of which one, at least, is the erection of a suitable tombstone.

As to the surcharge of the amount of the Curry judgment we are of opinion it should not have been made. The loan was made by the decedent, who took a judgment note for it, payable five years after date, and it did not mature until January 11, 1894. The decedent employed Mr. Graham, a member of the bar, to enter the judgment, and Mr. Graham did so and entered his appearance for the decedent as plaintiff in the judgment. The record remained in this condition until the death of the decedent, which occurred in 1890. The executors employed Mr. Graham as their counsel in the settlement of the estate. During the life of John Webb the interest was paid to him as it fell due, and after his death several interest payments were made to the executors. In January, 1892, the last of these payments of interest was made to the executors, and Mr. William M. Webb, one of

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the executors, then told Mr. Curry, the judgment debtor, that they would need some money to pay legacies, and supposed they would have to sell the judgment. Mr. Curry then told Mr. Webb that he would like to have the opportunity of paying the judgment and said he thought he could pay it. Mr. Webb then told Mr. Curry that Mr. Graham was their attorney and he should see him about it, and arrange the payment as soon as was convenient. Afterwards, about January 26, 1892, Mr. Curry paid the money to Mr. Graham, who thereupon satisfied the judgment of record.

The executors filed their first account on February 18, 1892, and did not charge themselves with the money paid by Curry to Graham. They filed another account on August 5, 1893, and it was on the audit upon this account that the auditor was asked to surcharge the executors with this money. At the meeting before the auditor on October 12, 1893, both of the executors testified that they had no knowledge of the payment of the money due on the Curry judgment, either when it was paid or afterwards, until they heard of it on that audit. That Graham had never told them of it but had said he could have the money when the account was confirmed. They also testified that Graham was their counsel throughout the settlement of the estate.

It cannot be doubted that the payment to Graham was a good payment and that the accountants could not be charged with supine negligence for permitting the payment to be made, or for not collecting it from him if he was insolvent, and on that account they were unable to collect it.

The leading case in Pennsylvania on this subject is Calhoun's Estate, 6 Watts, 185. There the testator had recovered a judgment against solvent debtors and held it at the time of his death. The executors issued a sci. fa. to revive, employing the same counsel who had been employed by the testator. Judgment on the sci. fa. was obtained, execution issued and certain lands were levied upon and condemned as the property of the defendants in the judgment. Nothing further was done for several years when another sci. fa. was issued, and to that the surviving defendant pleaded payment with leave, and then that proceeding rested. Subsequently other proceedings were had which so resulted that if the money was collected by the counsel of the executors it was embezzled by him, and if not it was lost through his neglect in conducting the proceedings. Testimony was given to show that the attorney had collected the money and used it himself. On the settlement of the executors' account an attempt was made to surcharge them with the money lost. The Orphans' Court surcharged them, but this Court reversed the decree and held that the executors were not liable. Mr. Justice ROGERS, delivering the opinion, said, "Thus executors, administrators or trustees, acting with good faith, and without any wilful default or fraud, will not be responsible for any loss that may arise. All that a Court of equity requires from trustees is common skill, common prudence and common caution. Executors, administrators or guardians, are not liable beyond what they *actually* receive unless in case of gross negligence; for when they act as others do with their own goods and with good faith, and not guilty of gross negligence, they are not liable. 1 Penn. Rep. 213; Theenigmote, Appellant *v.* Thimnel, assignee; Thompson *v.* Brown, Fay and others, 4 John. Cha. Rep. 619. A Court of equity, as is said in Thompson *v.* Brown, always treated trustees acting in good faith with great tenderness. . . . . In Routh *v.* Howell, 3 Ves. 567, the same point was ruled. Executors were discharged from liability for a loss arising from the insolvency of a banker whom the testator had trusted and with whom they suffered stock, deposited by the testator, to remain. This principle has an exceedingly strong bearing on the case in hand." Speaking of the action of the executors it was further said, "They reposed confidence where the testator had reposed it; for it must not be forgotten that Mr. Wright was the counsel selected by the testator himself. . . . . Nor can it affect the liability of the executors, whether Mr. Wright received the money or not, nor in what capacity he received it, as they had a right to repose confidence in his skill. The money was lost by his misconduct, and the cases cited show that trustees who act with good faith, are not liable for such mismanagement of their agents as they can neither foresee or control."

All of the foregoing has been many times affirmed by this Court, and it is the undoubted law of the Commonwealth to-day.

In Moore's Appeal, 10 Pa., on page 438, we said, "The general rule unquestionably is that a trustee is not liable for more than he receives of the profits of the estate, for he is considered in the character of a stakeholder or bailiff. If you wish to surcharge him beyond the actual profits, you must prove satisfactorily supine negligence or wilful default."

In Chambersburg Savings Fund's Appeal, 76 Pa. 203, we said, "It is well settled that a trustee shall not be surcharged for a loss which has occurred, in case he has exercised common skill, common prudence and common caution; but for supine negligence, or for wilful default he shall be held responsible," citing several cases.

In Landmesser's Appeal, 126 Pa. 115, a guardian placed a claim in the hands of an attorney,

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at the time of good standing, for collection. The attorney having collected the money and embezzled it, gave the guardian his judgment note for the amount, which proved worthless by reason of the maker's insolvency. In such case the fact that the guardian declined to incur costs in a fruitless effort to enforce payment of the note by ordinary process, or to apply to the Court for a rule on the attorney, or to institute a criminal prosecution against him, was not such negligence as would warrant a surcharge of the amount of the note.

Without further reference to the adjudicated cases, and recurring to the facts of this case, we do not perceive thus far sufficient evidence of supine negligence on the part of these executors to justify a surcharge of the amount in the hands of their attorney. They were guilty of no negligence in allowing him to receive it. He was trusted by their testator, and their trusting him was no proof of negligence. They were guilty of no wilful default and of no fraud. They did not know the money had been collected by him at the time, even, when their last account was filed, and at the time of the audit they had not sufficient opportunity to enforce collection from him by adverse proceedings. They testify that he assured them the money would be forthcoming when the account was confirmed. While that is no excuse for his not paying over the money it is a reasonable excuse for their not having it at the moment they discovered he had received it, and even at the close of the audit. It is true the Orphans' Court referred the matter back to the auditor to hear further testimony, and such testimony was taken in May, 1894. The accountants were then examined in relation to this matter and they gave full testimony upon the whole subject. But for some unaccountable reason they were not asked by counsel on either side, what was the reason they had not collected the money from Graham, nor whether they had or had not taken any steps to collect it, nor whether Graham was insolvent. This was dereliction on the part of counsel on both sides for which we do not feel disposed to surcharge them at this time. As the asset is one that has not yet been administered, it is still the subject of a future accounting to which the executors may yet be summoned by citation, when the whole subject can, and certainly ought to be thoroughly investigated, especially the question of Graham's solvency. We only decide now that on the present state of the record we do not think the executors should be surcharged with this debt. Should they fail to show hereafter that they could not have collected the money after they were informed of its payment to Graham, a very grave question as to their liability to be surcharged will arise. If any false sentiment about exposing the insolvency or dishonesty of their own attorney should deter them from a thorough exhibition of the matter they must take without complaining whatever consequences may result.

The decree of the Court below is reversed, and the record is remitted with instructions to restate the account in accordance with this opinion, the costs of this appeal to be paid by the appellees. W. D. N.

Executive Department of Pennsylvania.

In re York Wall Paper Company.

Charter — Manufacturing companies—Similar names.

Upon an application by "The York Wall Paper Company," for incorporation under the Act of April 29, 1874 and its supplements, for the purpose of manufacturing wal paper, a protest was filed by the "York Card and Pape Company," whose business was principally the manufac ture of wall paper, although not originally chartered for that purpose exclusively:

Held, that as no present injury was apparent from its incorporation and none could be presumed a charter should be granted, leaving to a Court of equity the duty of restraining the corporation from longer exercising its franchises under that title, should any evil subsequently develop.

In re application for a charter of the York Wall Paper Company.

The facts sufficiently appear in the opinion, *infra*.

Stewart, Niles & Neff, for protestant.

N. Sargent Ross, for applicant.

January 10, 1895. THE SECRETARY OF THE COMMONWEALTH (HON. WILLIAM F. HARRITY).

The "York Wall Paper Company" desires incorporation under the Act of April 29, 1874, aud its supplements, for the purpose of manufacturing wall paper, decorative paper hangings and other paper products.

The "York Card and Paper Company," whose business of late years has been confined principally to the manufacture of wall paper, although said company was not originally chartered for that purpose exclusively, objects to the granting of this charter because both corporations would be engaged in the manufacture of the same kind of paper, and especially on account of the alleged similarity of their titles and the resulting confusion which it is alleged would follow.

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It cannot be successfully contended that either of these companies have an exclusive right to the name "York;" nor do we think that the words "paper" and "company" can be exclusively used by them. It has been decided by this department that the "Citizens' Trust, Tax Indemnity and Surety Company" could amend its title by striking out the words "Tax Indemnity," notwithstanding a protest by the "City Trust, Safe Deposit and Surety Company," which protest was based on the ground of similarity of titles. 9 Penna. C. C. R. 366. The application for charter of the "Dime Savings Bank of Philadelphia" was also granted, although a protest was filed against it by the "Dime Savings Fund and Trust Company," which latter company objected to the granting of the charter because of the similarity of the titles. 9 Penna. C. C. R. 369. (See also Carlin Manufacturing Company, 1 Penna. Dist. Rep. 14.) It was also decided in the case of Koehler *et al.*, appellants, *v.* Edward Sanders *et al*, respondents, 122 N. Y. 65, that an exclusive proprietory interest cannot be acquired in a word which is a generic term, in common use, and in its nature descriptive of and ordinarily characterizing the business to which it pertains, rather than its origin or proprietorship, and that a name adopted as a partnership name which merely indicated a business in which the firm purports by it to be engaged, may not be protected as a trade mark. In an action by the Hygeia Water Ice Company to restrain the New York Hygeia Ice Company, Limited, from the use of its corporate name on the ground of similarity of title, the Court says, "The gravamen of the action is that the defendant has appropriated and is using a corporate name calculated to confuse and deceive the public to the plaintiff's injury. There is no finding and no satisfactory proof that the defendant, by use of the name ever deceived anyone, or that any confusion as to identity was ever produced in consequence. The two corporations certainly have different names, though the word "Hygeia" occurs in both; but this fact would not warrant us in assuming as matter of law that the name adopted by the defendant has deceived the public or is calculated to deceive them, or that any confusion with reference to the identity of the two corporations exists to the prejudice of the plaintiff in consequence of the defendant's act. Courts of equity must, in such cases, assume that the public will use reasonable intelligence and discrimination with reference to the name of the corporations with which they are dealing or intend to deal, the same as in case of individuals bearing the same or similar names. It is time enough in such cases for equity to use its extraordinary powers when it appears that deception or confusion has in fact resulted from the use of a word or a name, or when it clearly appears that such result is likely to follow." Hygeia Ice Company, The New York Hygeia Ice Company, 140 N. Y. 97.

The difference between the point decided, so far as it affects the present controversy, is that there were two corporations already in existence in that case; but that cannot alter the fact that there is no present evil apparent which is to follow the incorporation of the company here asking for a charter, and this cannot be presumed, and should it subsequently develop, a Court of equity would restrain the corporation from longer exercising its franchises under that title.

Under a certain Act of Massachusetts it was held that the name "Internation Loan and Trust Company, of Kansas City," or the name with the addition of the abbreviation "Mo." is not so nearly the same as "Internation Trust Company" as to mislead, and a domestic corporation which had previously owned and done business under the latter name is not entitled to an injunction against a foreign corporation to restrain it from doing business under the former name, although the corporation would be entitled to an injunction to restrain it from carrying on a similar business. International Loan and Trust Company, of Kansas City, 26 N. E. 693. (See also Employers' Liability Assurance Corporation *v.* Employers' Liability Insurance Company, 10 N. Y. S. 845.)

It was held in the case of the Bank of Attica, reported in 12 N. Y. S. 648, that there was no such similarity in the names "Buffalo Commercial Bank" and "Bank of Commerce in Buffalo," as to threaten in the proposed use of the former any substantial injury or inconvenience to the bank bearing the latter name. See also Charles S. Higgins Company *v.* Higgins Soap Company, 24 N. Y. S., 801; Boston Rubber Shoe Company *v.* Boston Rubber Company, 149 Mass. 436; Drummond Tobacco Company *v.* Randle, 114 Ills. 412.

"The ground on which Courts of equity afford relief in this class of cases is the injury to the party aggrieved, and the imposition upon the public by causing them to believe that the goods of one man or firm are the productions of another. The existence of these consequences does not necessarily depend upon the question whether fraud or evil intent does or does not exist. The *quo animo*, therefore, would seem to be an immaterial inquiry." Holmes *v.* Holmes, etc., 37 Conn. 278–295, (1870.)

A New York corporation, "Goodyear Rubber Company," cannot enjoin a Connecticut corporation from using substantially the same name. Goodyear Rubber Company *v.* Goodyear's Company, etc., 128 N. S. 398, (1888.)

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Upon a bill for injunction to restrain the use of a trade-mark claimed by complainant that it applied to a medical preparation, *held*, that it described the characteristics and qualities of the preparation, and that being thus descriptive it could not be exclusively appropriated by complainant. Rumford Chemical Works *v.* Muth, 35 Fed. Rep. 524.

It is not clear that if the "York Wall Paper Company" had already been chartered, the Courts would restrain its use of the proposed name, and from these decisions, as well as from a careful consideration of the whole case and of the argument and brief submitted, we have reached the conclusion that this application should be granted.

Many disputed questions of fact, which this department cannot decide, have arisen; but it not appearing from the argument heard or law quoted that there would be a present injury from this grant of letters patent, and the mere intention to injure, or possibility of mistake not being sufficient ground for refusal, there being a remedy at law for any actual injury which may hereafter be sustained, while a refusal of this application would practically decide that the "York Wall Paper Company" could not designate by its title the kind of business it proposed to carry on, have furnished some additional grounds for this decision. G. H. S.

Common Pleas.

C. P. No. 1. January 26, 1895.

Partridge v. Powell.

Practice—Privilege of party attending on taking depositions—Waiver of process.

Where by agreement testimony is taken within this jurisdiction for use in a case pending in another State, and to be present at the taking of such testimony, a party comes within this jurisdiction, while such attendance will not perhaps exempt him from service of process here at the suit of a third person, as he is not here by process, or in attendance on a case here pending, yet he is exempt from service at the suit of the other party to the action in which the testimony is to be used, as the agreement is, between the parties, a waiver of formal legal process, and the parties to the agreement stand as though the evidence were taken in pursuance of process.

Rule to set aside service of writ.

The facts appearing by affidavit and depositions were as follows: The defendant Powell was a resident of Virginia and plaintiff in a suit in equity, pending in the Circuit Court of Wythe County, Virginia, in which the present plaintiffs were defendants. It was agreed between the parties that testimony to be used in said suit might be taken before a notary public in Philadelphia. The plaintiffs therein served a notice upon the defendant that on January 15, 1895, between the hours of 6 A. M. and 6 P. M. they would take testimony at 926 Walnut street, in the City of Philadelphia. The defendant thereupon came to the city of Philadelphia for the sole purpose of being present at the taking of the depositions, and while so present was served with a summons.

Francis J. Alison, for the rule.

The defendant as a party was privileged from service during his attendance at the taking of depositions. The attendance need not be before a Court, it is sufficient if it be before any one *pro hac vice* representing the Court.

Wetherill *v.* Seitzinger, 1 Miles. 237.
Holmes *v.* Nelson, 1 Phila. 217.
Trine *v.* Winton, 3 Luz. Law Reg. 216.
Huddeson *v.* Prizer, 9 Phila. 65.

When the law requires a duty of a citizen it will protect him in the discharge thereof.

Holmes *v* Nelson, *supra*.
XIII Bac. Abr. Tit. Privilege p. 169.

William C. Mayne, contra.

The act of a notary public in taking testimony in another State from that of the Court, acts ministerially only, and the attendance before him involved in this case was in no sense an attendance upon Court, hence the defendant was not entitled to protection.

February 2, 1895. BIDDLE, J. As between the parties the agreement to take testimony in Philadelphia was the waiver of the necessity of taking out a commission for the benefit of the defendant. While the plaintiff, coming here to be present at the taking of the depositions, could not, perhaps, as against a third party, claim exemption from service, as he was not brought here and did not even come voluntarily in consequence of legal process, yet where the legal process is waived by both parties to a case neither can take advantage of the waiver; which waiver would be an inducement to bring the other party within the jurisdiction. The party so brought ought to stand in the same position as if he came to attend upon a commission, in which case we do not think he could be served.

Rule absolute.

H. B.

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OF

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BY

HENRY BUDD, Esq.

ACKNOWLEDGMENT. The defective acknowledgment of a married woman cannot be cured, but if the certificate thereof only is defective, an acknowledgment having been made in fact, the certificate may be amended in accordance with the Act of May 15, 1878, P. L. 149. Spencer *v.* Reese, 449.

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ADMINISTRATION. An escheator, as such, has no status to apply to the register of wills for letters of administration, in default of next of kin of decedent, if a demand for letters has previously been made by a creditor who is unobjectionable and who has qualified. (O. C.) Jakey's Estate, 476.

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ADMINISTRATION—*Continued.*

Under the Act of March 15, 1832, a creditor of a de cedent, to have status to apply for letters, must be a principal creditor, and it is a discretionary matter with the register whether he shall grant the letters to such creditors, in default of next of kin, or to any fit person to be selected. Id.

Grant of administration d. b. n. c. t. a. in place of one of two executors. See EXECUTORS, Packer *v.* Owens, 423.

See LEGISLATION, Krecker *v.* Shirey, 165.

ADMINISTRATOR. See EXECUTOR.

AFFIDAVIT OF DEFENCE. An affidavit of defence which does not allege any facts or circumstances, upon which to found a belief, is unavailing, and the mere averment of a belief without stating the facts upon which it is founded does not give any information to the Court upon which it can determine its efficiency. Second National Bank of Clarion *v.* Morgan, 484.

AGENT. The fact that an agent, appointed to collect rent, is a joint owner with his principal of the premises out of which the rent arises, does not interfere with the right of the principal to revoke the agency. Barrett *v.* Bemelmans, 76.

Where the agent of the lessor occupies a position of trust and confidence towards the lessee, a stipulation for a secret profit to himself is sufficient fraud to vitiate the contract. (O. C.) Heckman's Estate, 199.

A power of attorney to mortgage establishes simply the relation of principal and agent between the parties to it. Campbell *v.* Foster Home Association, 293.

An agent to sell has no right to take payment in anything but money, unless specially authorized so to do, and if, without special authorization, he take in payment for the property of his principal anything else, he at once becomes liable to the principal for the money value of the thing sold. Paul *v.* Grimm, 451.

A letter of attorney authorizing an agent to sell property "for such sum or price and on such terms as to him shall seem meet," and to receive all sums of money due on account of the sale and "to compound and agree on the same" does not authorize the attorney to take payment in bonds. "Terms" in such connection, means the times and amounts of payment and, if any payments are deferred, it may embrace stipulations as to how such payments are to be secured. "Price," in the same connection does not differ in its meaning from "sum." Id.

Change of conditions of contract by agent. See CONTRACT. Robinson *v.* Baird, 561.

ALLEGHENY COUNTY. See SALARIES. McCleary *v.* County of Allegheny, 193.

AMENDMENTS. Where an Act permits amendment of liens without specifying the time within which the amendment shall be made, it may be made at any time before the statute of limitations has closed on the claim itself. City of McKeesport *v.* Busch, 564.

ANNUITY CHARGED ON LAND. M. owning land charged with an annuity to C., sold the land to F., and subsequently agreed to protect the land from the annuity. He continued for some time to pay to C., but on C.'s death the annuity was in arrears. C.'s administrator brought action against F. for arrearages and obtained a judgment which was paid by F.'s vendee A., to prevent the sale of the land. In this action M. was requested to allow the use of a claim which he had against C. as a set-off, but he refused and subsequently obtained judgment on the claim against the administrator for $330, the Court, however, restricting the judgment by an order that it should not be used or assigned until the auditor's report of distribution of C.'s estate should be confirmed. The auditor awarded the amount of M.'s judgment to A., and the Court confirmed the report: *held*, (*a*), that as

ANNUITY CHARGED ON LAND—*Continued.*

the arrearages of the annuity accrued while M. was not an owner of the land, he owed C. nothing, and the administrator could not set-off the claim for annuity in an action by M. for goods sold; (*b*), that M. was under no obligation to either F. or A. to pay the annuity, the covenant with their predecessor in title being a personal one only. Clippinger's Estate, 18.

Whether interest should be allowed upon arrears of an annuity charged upon land is a question to be decided by a jury in view of all the facts of the case. Rohn *v.* Odeswelder, 181.

ANTE-NUPTIAL CONTRACT. While an ante-nuptial agreement between a woman and a man whom she is about to marry may, in equity, be given effect to sustain the provisions of a will, made before marriage, as to him, such agreement has no effect whatever upon the question of revocation by marriage, with respect to the rights of third parties. Craft's Estate, 413.

APPEAL. An appeal, with security, taken in due time, is a supersedeas to a decree under the Act of June 19, 1871, P. L. 1361, approving a plan by which one railroad may cross the tracks of another, and, pending such an appeal, the Supreme Court may enforce the supersedeas by an order restraining the appellee, whose plan has been approved, from proceeding with the construction of the crossing. Citizens Passenger Ry. Co. *v.* East Harrisburg Passenger Ry. Co., 12.

A judgment cannot be stricken off except for want of jurisdiction or other fatal irregularity apparent on its face, and an appeal from a refusal to strike off a judgment brings up the record alone. City of Philadelphia *v.* Jenkins, 276.

No appeal lies from an order of the Common Pleas reinstating an appeal from an alderman, which appeal had on motion been stricken off; such order is interlocutory only and simply determines that the case is properly in the Common Pleas. Cupples Wooden Ware Co. *v.* Howe, 374.

A decree refusing to set aside a lev. fac. is a final decree and an appeal lies therefrom. In such appeal terre tenants of the premises are proper parties. Packer *v.* Owens, 423.

Where a judgment binding certain land is satisfied of record and afterwards the satisfaction is stricken off, the terre tenant has the right to appeal from the order striking off the satisfaction. Whitesell & Sons *v.* Peck, 540.

Until the final disposition of a case and an order in pursuance thereof, it cannot be the subject of review by the Supreme Court, hence an order in habeas corpus proceedings for the possession of a child, which contains the provision that the writ itself shall stand over as a pending writ is not a subject of an appeal. Commonwealth *ex rel.* Parker *v.* Blatt, 469.

ARBITRATION. As a basis for the reference provided by the Act of 1810, an action should be pending before a justice of the peace, and it should appear that the plaintiff's claim exceeds five dollars and thirty-three cents, and that one of the parties refused to submit to the determination of the justice. Climenson *v.* Climenson, 471.

When parties appear before a justice and state that they have agreed to an arbitration, name the arbitrators and the time and place fixed for hearing, and the justice enters the agreement upon the docket under the caption "amicable action," the reference is at common law and not under the Act of 1810, and the case is not altered by the fact that the arbitrators return their award to the justice, instead of handing it to the successful party. Id.

ARCHITECT'S CERTIFICATE. As condition to bringing action. See CONTRACT. Robinson *v.* Baird, 561.

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ASSIGNEE. See ASSIGNMENT FOR BENEFIT OF CREDITORS.

ASSIGNMENT FOR BENEFIT OF CREDITORS. Where money of a county is deposited by its treasurer in his own account in bank, but is known by the banker to be county funds, and the banker has become possessed of county warrants, his claim upon said warrants is subject to be set-off by the amount of the deposit of county funds in his hands, and the warrants will be regarded as paid, if the money on deposit exceed the amount of the warrants. This rule will apply as against the banker's assignee for benefit of creditors. County of Crawford *v.* Merchants National Bank, 133.

An assignee for the benefit of creditors is not a purchaser, within the meaning of the rule which protects lien creditors or vendees for value. (C. P.) *In re* Assigned Estate of the Goodwin Gas Stove and Meter Co., 234.

As between other lien creditors and the Commonwealth, the latter must be postponed when a certificate of lien has not been filed by the auditor-general in pursuance of the Act of 1827, but the Commonwealth's lien has priority over the claims of general creditors claiming under an assignment. Id.

When an assignee is discharged or removed, the Court having jurisdiction of his account must ascertain what is in his hands and, by its decree, order him to pay over to his successor the trust funds. Hurst *v.* Freeman, 235.

When an assignee is discharged or removed and there is no decree that he shall pay over it must be conclusively taken in any collateral proceedings that the Court which discharged or removed him found no funds in his hands. Id.

In a proceeding under the Act of June 14, 1836, for the removal of an assignee, it is improper for the Court to appoint a master. It is the duty of the Judge to decide upon the examiner's finding of facts, without the intervention of a master. *In re* Assigned Estate of Powel & Co., 237.

In a first account, an assignee claimed and was allowed credit for counsel fees and commissions, which had not been paid; *held*, error, 1, as an appropriation of unconverted assets, and 2, because assignee could not claim commissions after delegating this duty to counsel. Id.

In a second account, assignee claimed credit for the difference between what an asset brought by sale and what it was appraised at, and sought a discharge on account of a piece of property which had been omitted from a schedule of assets: *held*, the property should remain as an unconverted asset and be made the subject of a future account. Id.

In stating an account, the assignee charged itself with the appraised value of the property assigned and added to this amount receipts from the estate which were largely from sales of the assets themselves: *held*, to be a misleading and improper way of accounting. Id.

An assignee for the benefit of creditors should not be represented by counsel who represent claims adverse to the estate. Id.

Under a deed of assignment for the benefit of creditors, none but the then existing creditors of the assignor acquire an equitable interest in the assigned estate. Assigned Estate of Weinmann, 321.

A landlord is not entitled to recover a dividend out of an assigned insolvent estate upon a claim for rent, accrued after the assignment and after the occupancy of the premises by the assignee had ceased. Id.

The mere acceptance of the trust by an assignee for benefit of creditors is not an acceptance of a lease of premises held by the assignor, so as to make the assignee liable for subsequently accruing rent. Id.

When a landlord seeks to enforce a claim based on an

ASSIGNMENT FOR BENEFIT OF CREDITORS—*Continued.*

alleged election by an assignee to hold the lease, it is incumbent upon him to prove, by clear and satisfactory evidence, an express agreement by the assignee so to hold it or conduct on his part which necessarily implies that he had elected so to do. Id.

ASSIGNMENT OF ERROR. Assignments of error in the admission or rejection of testimony must set out so much of the evidence, as is essential to a clear comprehension of the offer and the ruling of the Court, and, if the Court has admitted the testimony which is objected to, so much of it as may show the injury to the party who excepts. To put such matter in the bill of exceptions, or in the argument in the paper book, does not fulfill these requirements. Commonwealth *v.* Werntz, 93.

The Supreme Court will not consider an assignment of error when the record shows nothing to support it and no exception relating to the same. Delaware County and Phila. Electric Ry. Co. *v.* Philadelphia, 348.

ASSIGNMENT OF JUDGMENT. See JUDGMENT. Vanderpool *v.* Vanderpool, 157; Assigned Estate of Ernst, 158.

ASSIGNMENT OF LEASE. See LANDLORD AND TENANT. (O. C.) Heckman's Estate, 199.

ATTACHMENT. The damages allowed by the Act of May 24, 1887, when an attachment under the Act of March 17, 1869, has been quashed, dissolved or ended, cover all legal costs, fees and damages by reason of the attachment. The last includes all damages for pecuniary loss, ordinarily and naturally resulting from the seizure of the goods, such as loss of sales, interruption of business, and expenses, necessarily incurred, but not indirect or consequential loss or punitive damages for the malicious use of civil process. Commonwealth *v.* Magnolia Villa Land and Improvement Company, 87; Berwald *v.* Ray, 458.

In a proceeding on a bond, executed by virtue of the Act of 1887, the liability of an attaching creditor and his surety cannot be extended beyond the terms of that Act. Commonwealth *v.* Magnolia Villa Land and Improvement Co., 87.

ATTACHMENT EXECUTION. A fund in the hands of a master, appointed to make partition, is not attachable at the instance of a judgment creditor of one who has obtained a judgment against one of the defendants in the partition suit, although the master has set apart a fund as the property of the defendant in the partition and against whose interest the attachment is issued. (C. P.) Hayes *v.* Mantua Hall and Market Company, 198.

Where an attachment execution is issued, and, under proceedings had upon it, goods of a third person are sold by the sheriff, as the goods of the debtor, the sheriff is liable in trespass to the owners of the goods and the remedy for such sale is not confined to an action upon the bond given when the attachment issues. Berwald *v.* Ray, 458.

An attachment execution, served on a garnishee within this State, while it cannot bind goods of the defendant, in another State, which have been deposited with the garnishee, will, when the goods have been sold by the garnishee, bind the proceeds in his possession. Merchants and Manufacturers Bank *v.* W. A. Baeder Glue Company, 69.

While a defendant may waive his right to an account of his goods from one with whom he has deposited them, yet he cannot by such waiver, if collusively made, affect the right of his attaching creditor to require an account. Id.

Where a garnishee fails to appear after service of an attachment with clause of summons, but there is no

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ATTACHMENT EXECUTION—*Continued.*
specific attachment of goods or credits, plaintiff will be entitled to a judgment by default; but such judgment will be interlocutory, only, and the plaintiff cannot liquidate it, or have execution, without proceeding first by writ of inquiry or before the prothonotary, according to the rules or the practice of Court, and the plaintiff must establish his claim by evidence of the garnishee's possession of goods or credits of the defendant, and the measure of damages will be the value of such goods. Longwell *v.* Oil City Electric Company, 370.

Where attachment is levied upon specific goods, default by garnishee is an admission of the possession of such goods, but the plaintiff must establish their value before execution. Id.

If an attachment is of money or a debt and the amount appear in the sheriff's return, the default is an admission of all the requisite facts, and no further evidence or inquiry is necessary. Id.

The proper form of judgment is for the plaintiff against the garnishee, and that the garnishee has in his hands certain goods, effects or credits (naming them) of the value, etc., or that the garnishee is indebted to the defendant in the sum of, etc. Id.

The plaintiff's measure of damages, which determines the amount of the judgment against the garnishee, is the value of the goods attached, not exceeding the amount of his judgment, with interest and costs, against defendant. The single exception is when garnishee neglects or refuses to answer interrogatories, in which case by the terms of the Act of January 16, 1836, § 57, the judgment is that the garnishee has goods or effects of the defendant sufficient to satisfy the plaintiff's demand and execution may issue against him as for his own debt. Id.

ATTORNEY. See POWER OF ATTORNEY. Vanderpool *v.* Vanderpool, 157.

ATTORNEY-AT-LAW. An attorney-at-law has no authority to satisfy his client's judgment, unless the money represented thereby be actually paid to him; if he go beyond this, and accept securities instead of money, the client, when the fact comes to his notice, has his election to ratify or repudiate the unauthorized act of his attorney. Whitesell & Sons *v.* Peck, 540.

Where an attorney has, without authority, accepted securities in payment of a judgment and entered satisfaction thereof, the client must make his election to repudiate or ratify the act, promptly upon acquiring knowledge of the fact, and inaction after such knowledge, or an attempt to realize upon the securities taken, will amount to a ratification of the attorney's act. Id.

BAILMENT. Where A. delivers to B. a chattel under a contract of bailment, which provides for payment at specified times, and in default of payment confers upon A. the right to retake the chattel, and, at the same time, B. gives to A. his bond, as collateral security for the performance of the contract; upon B.'s default, A. may proceed either to re-take the chattel, thus rescinding the contract, or he may elect to stand by the contract and proceed against B. on the bond, but the remedies are not cumulative. Seanor *v.* McLaughlin, 455.

BANKS AND BANKING. Where money of a county is deposited by its treasurer in his own account in bank, but is known by the banker to be county funds, and the banker has become possessed of county warrants, his claim upon said warrants is subject to be set-off by the amount of the deposit of county funds in his hands, and the warrants will be regarded as paid if the money on deposit exceed the amount of the warrants. This rule will apply as against the banker's assignee for benefit of creditors. County of Crawford *v.* Merchants National Bank, 133.

BANKS AND BANKING—*Continued.*
The fact that the treasurer was accustomed to give from time to time, at convenient intervals, his check for the amount of warrants held by the banker does not alter the rule and prevent the deposit of money from constituting payment, in the case of a failure by the banker at a time when the money on deposit exceeded the amount of the warrant and no check has been given for said amount. STERRETT, C. J., and MITCHELL, J., dissented. County of Crawford *v.* Merchants National Bank, 133.

See NATIONAL BANKS.

BENEFICIAL SOCIETIES. Beneficial societies are not life insurance companies, and the member has no property interest in the fund to be paid at his death which can be claimed by the executor or administrator as such. The member has only a power of appointment within the classes limited by the society. (O. C.) Kendrick's Estate, 46.

The exercise of the power of appointment by one holding a certificate of membership in a beneficial society is of the nature of a testamentary disposition. Id.

The Act of May 11, 1881, P. L. 20, which requires copies of the application to be attached to all life and fire insurance policies, does not apply to a beneficial association which does not issue policies. Johnson *v.* Phila. & Reading R. R. Co., 375.

A certificate of membership in a beneficial association is not an insurance policy, within the meaning of the Act of May 11, 1881, and it is not requisite that the by-laws be contained in or attached to the certificate. Lithgow *v.* Supreme Tent of the Knights of the Maccabees of the World, 493.

BILL OF LADING. See COMMON CARRIER. Willcock *v.* The Penna. R. R. Co., 545.

BOND. A trustee cannot make a charge to the estate for expenses involved in procuring his official bond. Eby's Appeal, 160.

BOROUGH. Commissioners were appointed to inquire into the propriety of granting a petition to divide a borough into wards. No provision was made in the order of appointment as to notice. The commissioners caused small hand bills to be posted in ten or twelve of the saloons, hotels, etc., of the borough, which contained 12,000 inhabitants and in which daily and weekly newspapers were published. The report of the commissioners having been confirmed by the Court, *held*, the proceedings were void for lack of notice and should be set aside. *In re* Borough of Columbia, 41.

Where a petition is for a division into "wards" and an order is made to the commissioners to the effect that if they deem such division necessary they shall make a plot or draft of the proposed new "election districts," it is careless and erroneous practice. Id.

The general law of May 23, 1893, sec. 1, providing for the election of burgess of a borough, repeals special laws incorporating boroughs, so far as concerns the election and office of burgess, and, as the Act of 1893 does not exempt from its operation terms of officers unexpired at the time of its passage, such are terminated thereby. Com'th *ex rel.* Braughler *v* Weir, 556.

BRIDGES. Aside from the right of the bridge company to demand and receive reasonable tolls from the traveling public, a bridge does not differ from the ordinary highway constructed and maintained by the inhabitants of the district through which it passes. Pitts. & West End P. R. W. Co., *v.* Point Bridge Company, 393.

The right to exact tolls does not carry with it the power to prohibit such use of a bridge by the public as is reasonably consistent with the purpose of its erection. Pitts. & West End P. R. W. Co., *v.* Point Bridge Co., 393.

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BRIDGES—*Continued.*

The natural and reasonable construction of the Act of May 14, 1889, P. L. 211, is that the streets and highways mentioned therein include the bridges connecting with and constituting portions of them. Pitts. & West End P. R. W. Co., *v.* Point Bridge Co., 393.

The use of a bridge by a railway company which operates its road by electricity does not constitute a taking of, or an injury to, the property of the bridge company by the exercise of the power of eminent domain. It is a use which is reasonably consistent with the purpose for which the bridge was erected and is necessary for public travel and accommodation. Id.

Where a right is claimed by a passenger railway company to string wires for the purpose of carrying its electric system of transportation across a bridge, owned by an incorporated bridge company, and to run its cars across the bridge, which right is denied by the bridge company, a Court of equity has jurisdiction both to determine the right and to fix the compensation to be paid by the railway company for the use of the bridge. Pitts. & West End P. R. W. Co., *v.* Point Bridge Co., 393.

When the use of steam engines for threshing, etc., becomes so general that their transportation amounts to an ordinary use of the roads, it may be necessary to strengthen the bridges so as to withstand the increased strain. The generali y of such use would ordinarily be a question for the jury. Coulter *v.* Township of Pine, 399.

The Act of May 8, 1876, P.L. 131, and its supplement of May 3, 1878, P. L. 41, apply to the City of Philadelphia, and proceedings may be had under these Acts for the taking of a bridge. *In re* City Avenue and Germantown Bridge, 409.

BROKER. A loan broker has earned his commission when he has procured a person willing, ready and able to advance the money desired, upon the terms communicated by the employer to the broker, although no binding contract has been made, provided the person produced by the broker is ready to perform his part of the proposal and the failure occurs through the fault or inability of the principal. Middleton *v.* Thompson, 1.

See INSURANCE BROKER. Commonwealth *v.* Reinoehl, 20.

BUILDING ASSOCIATIONS. The proper method of apportioning the profits of a building association, having more than one series of stock, is to divide them equally among the shares, in proportion to the amount paid in on each share, and to ascertain the value of a particular share at a given time there must be added to the amount paid on each share a proportion of the profits thus ascertained. The Charles Tyrell Loan and Building Association *v.* Haley, 269.

The fact that a shareholder in a building association has acquiesced for a number of years in a method of ascertaining the value of shares, by which the profits were divided equally among all the shares, without regard to the amount paid in, will not estop him from requiring that the method in ascertaining the value of his share be changed to the proper method. [MITCHELL and FELL, JJ. dissent.] Id.

BUILDING CONTRACTS. See CONTRACT. Robinson *v.* Baird, 561.

BURDEN OF PROOF. Burden of proof where it is sought to prove a lost will by a copy. See WILL. Estate of Lot Gardner, 417.

See CORPORATIONS. American Tube and Iron Company, *v.* Baden Gas Company, 530.

CARRIERS. See COMMON CARRIER.

CASES FOLLOWED, DISTINGUISHED, COMMENTED ON, OVERRULED, REVERSED, ETC.:

Bank *v.* McCoy, 69 Pa. 204. followed, 379.
Bell *v.* County of Allegheny, 149 Pa., 381; 30 WEEKLY NOTES, 193, distinguished, 193.
Boults *v.* Mitchell, 15 Pa. 371, distinguished, 437.
Brooklyn Street, 118 Pa. 640; 21 WEEKLY NOTES, 56, followed, 4.
Brotzman's Appeal, 119 Pa. 645, 21 WEEKLY NOTES, 318, followed, 369.
Brown *v.* Seidel, 153 Pa. 60, 31 WEEKLY NOTES 519, distinguished, 29.
Buehler & Fairlamb's Appeal, 100 Pa. 385, distinguished, 81.
Clark *v.* Martin, 49 Id. 289, followed, 122.
Com'th *v.* Fall Brook Coal Co., 156 Id. 488, followed, 124.
Com'th *v.* McCombs, 56 Id. 436, followed, 556.
Craven *v.* Bleakney, 9 Watts, 19, followed, 369.
Dawson *v.* Pittsburgh, 34 WEEKLY NOTES, 69, followed, 42.
Dietrick's Appeal, 107 Pa. 158, commented on, 158.
Germantown Pass. Ry. Co. *v.* Citizens' Pass. Ry. Co. 151 Pa 138; 31 WEEKLY NOTES, 281, distinguished, 311.
Glading *v.* Frick, 88 Pa. 460, followed, 379.
Hosler *v.* Hursh, 151 Id. 415; 31 WEEKLY NOTES, 82, followed, 379.
Hoyt *v.* Hoyt, 143 Pa. 623, 29 WEEKLY NOTES; 309, distinguished, 29,
Ins. Co. *v.* Evans, 102 Pa. 281, commented on, 180.
Johnson *v.* P. & R. R. R. Co., 163 Id. 127; 35 WEEKLY NOTES, 377, followed, 379.
Konigmaker *v.* Kimmel, 1 P. & W. 213, followed, 571.
Lancaster *v.* Dolan, 1 Rawle, 213, distinguished, 293.
McCleary's Appeal, 20 WEEKLY NOTES, 547, followed, 293.
McGlinsey's Appeal, 14 S. & R, 64, followed, 571.
Meigs *v.* Lewis, 33 WEEKLY NOTES, 484, reversed, 317.
Morewood Avenue, 159 Pa. 20, followed, 400.
Morris *v.* Ziegler, 71 Id. 450, followed, 379.
Northern Liberties *v* St. John's Church, 13 Id. 104 followed, 554.
Phelan *v.* Moss, 67 Id. 59, followed, 484.
Pierce *v.* Livingstone, 80 Id. 99, followed, 369.
Porter's Estate, 77 Id. 43, followed, 571.
Pray *v.* Northern Liberties, 31 Id. 69, followed, 554.
Putnam Nail Co. *v.* Delaney, 118 Id. 37; 27 WEEKLY NOTES, 205, distinguished, 29.
Quinn *v.* Cumberland County, 162 Pa. 55; 34 WEEKLY NOTES, 431, followed, 556.
Robinson *v.* Myers, 67 Pa. 9, followed, 379.
St. Andrew's Church's Appeal, 67 Id. 512, followed, 122.
Shirlock *v.* Shirlock, 5 Id. 366, overruled, 44.
Spier's Appeal, 26 Id. 233, distinguished, 495.
Stocker *v.* Hutter, 134 Id. 19; 26 WEEKLY NOTES, 221, followed, 330
Weiter's Appeal, 20 WEEKLY NOTES, 499, distinguished, 81.
Whittaker *v.* Phœnixville Borough, 141 Pa. 327; 28 WEEKLY NOTES, 30, followed, 4.
Wilson's Estate, 1 Pa. C. C. R. 509, followed, 160.
Wineland's Appeal, 118 Pa 37; 20 WEEKLY NOTES, 412, followed, 15.

CAVEAT EMPTOR. The maxim, *caveat emptor*, applies to all judicial sales as a rule, but such sales, and especially those made under the direction of the Orphans'

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CAVEAT EMPTOR—*Continued.*
Court, must be conducted in good faith, all misdescription and misrepresentation being avoided. (O. C.) Howe's Estate, 16.

CEMETERY. See HIGHWAY. Dubois Cemetery Company *v.* Griffin, 530.

CERTIFICATE. A certificate is evidence only of what it contains and gives rise to no presumption that anything else took place before the certifying officer. Spencer *v* Reese, 449.

CHARGE OF COURT. When the general trend of a Judge's charge shows a manifest purpose to throw doubt and discredit upon the testimony of one side and tends to convey to the jury the idea that, in the opinion of the Court, it is unlikely that the state of facts testified to by the witnesses for that side is true, the Supreme Court will reverse. Young *v.* Merkel, 303.

While a Judge may express to a jury his opinion of the weight of the testimony and its bearing and effect, and, if in his opinion the evidence is not sufficient to sustain a verdict, may give a peremptory instruction, yet whatever he does should be done directly, so that his acts may be fairly brought up for review by the party aggrieved. Heydrick *v.* Hutchinson, 503.

When the effect of an instruction is to take from the jury all testimony, except that of a particular witness, and to leave to the jury the construction of a paper, properly for the Court, such error is not cured by telling the jury that the whole testimony is for it to pass upon. Id.

A charge whose tendency as a whole is to belittle and prejudice one side and which is not in expression and tone a judicial presentation of the case, is error. Id.

CHARGE ON LAND. When a deed creates a charge upon the land by reserving an annuity to the grantor in a clause in the habendum, beginning "under and subject nevertheless to the payment," etc., and, by a further provision of the same clause, reserves an annuity of less amount to his widow after his death; the second annuity is also a charge upon the land. Rohn *v.* Odenwelder, 181.

Such a charge is not divested by a sheriff's sale upon a subsequent lien. Id.

G. devised land to his son for life, remainder in fee to his grandson, providing, however, that after the death of his son, his (the son's) widow should "be maintained out of the products" of the land during her widowhood: *held*, this did not give the widow the right of possession of the land, but created a charge during her widowhood. Walker *v.* Gibson, 369.

CHARTER. "The York Wall Paper Company" applied for a charter under the Act of April 29, 1874; a protest was filed by the "York Card and Paper Company," whose business was principally the manufacture of wall paper, although not chartered for that purpose exclusively: *held*, as no present injury was apparent from the proposed incorporation and none could be presumed, a charter would be granted, leaving to the Courts the duty of restraining the corporation from the exercise of its franchise under the title assumed, should any evil be subsequently developed. (Ex. Dept.) *In re* York Wall Paper Co., 574.

CHILDREN. The word "children" in the Act of April 14, 1851, does not necessarily mean minor children only. (O. C.) Young's Estate, 316.

If a petitioner for exemption under the Act of April 14, 1851, have in his possession property belonging to the estate, the Court will award the exemption only upon condition of the restitution to the estate of the property held by petitioner. Id.

CHURCH PROPERTY. See ECCLESIASTICAL LAW. Krecker *v.* Shirey, 165.

See TAXATION. Appeal of M. E. Church Sewickley, 534.

COLLATERAL SECURITY The holder of collateral securities, with power to sell them for his debt, is not bound to obtain the highest possible price for them, but he is bound to the exercise of common prudence and good faith in his management and conversion of them, and, while the debtor may acquiesce in or assent to fraudulent conduct, so far as concerns himself, he cannot bind his creditors by such acquiescence or assent. Merchants and Manufacturers Bank *v.* W. A. Baeder Glue Co., 69.

COMMISSIONS. The commissions paid to an administrator, or other trustee, are intended as compensation for the responsibility involved in the acceptance of the trust and for services rendered in administration of it. Eby's Appeal, 160.

COMMON CARRIER. A common carrier cannot, by stipulations on a bill of lading, render a shipper liable to it for a sum sufficient to cancel its liability for a negligent loss of the goods. Willcock *v.* Penn. R. R. Co., 545.

COMMON PLEAS. The Judges of the Common Pleas have supervisory power over certain work of the register of wills by virtue of the Act of June 17, 1839, P. L. 678, but such supervision does not extend to his judicial acts from which an appeal lies to the Orphans' Court. In his judicial acts is included the admission of a will to probate. Coleman's Appeal, 273.

A paper having been admitted to probate as a certified and true copy of a will, claimed to have been proved in France, and having been recorded and letters issued upon it, parties interested cannot after an interval of fifteen years invoke aid of the Act of June 17, 1839, P. L. 678, and have the record corrected by a true copy of the original will. Id.

COMPROMISE. No contestant can compromise anything beyond his or her own personal interest in the contest and can be entitled to no more than his or her distributive share of a sum received by way of general compromise, hence where an issue *devisavit vel non* is compromised, the money received thereupon belongs to all the parties entitled in case the will had been set aside. Seip's Estate, 401.

Where three sisters had the same interest in the setting aside of a will, two appearing of record as contestants, the presumption as to the third sister is that she was entitled to share in the benefits secured by the litigation, and the burden of proof is upon the others to show some contract, release or state of facts sufficient to rebut the presumption. Id.

A. brought action against a township to recover for material furnished; both parties appeared before the justice, the township being represented by its supervisors, and a settlement was arrived at, which was reduced to writing by the justice, and, after being read to and by the parties and assented to, was entered upon his docket. It was as follows: "December 10, 1892, parties appear and settle by defendants giving plaintiff a credit in full of all road tax assessed against the plaintiff for each and every year to this date, including the tax for 1892, the plaintiff to pay the costs taxed." Subsequently the township brought action against A. to recover road taxes on tax duplicates for the years 1890, 1891 and 1892. The township endeavored to avoid the effect of the settlement by alleging that nothing was taken into consideration before the justice but the work road tax, and that the money tax for which action was brought was not then considered: *held*, (*a*) the settlement was conclusive against the plaintiff's claim, whether considered as a judgment or as an agreement; (*b*) that it was not open to the plaintiff to show by parol its understanding of the agreement; (*c*) that the fact that the settlement was not signed by the parties did not affect its binding force, as it had been formally assented to by them before the justice. Township of French Creek *v.* Moore, 500.

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CONDITION. A. left a legacy to W., provided that if "any attempt at law or otherwise" were made during the minority of W. to withdraw him from the charge of A.'s executors by X., W.'s father, or any other person, the legacy should be revoked. X. wrote demanding the surrender of his son and threatening legal proceedings. The executors, of whom one was also the guardian of the child and the husband of a residuary legatee, and another was a residuary legatee, gave him up without contest: *held*, W. did not thereby lose his legacy, as by "attempt" the testator did not mean any unsuccessful attempt to withdraw the child from the executor, and a surrender, as the result of a correspondence, was evidently not within his contemplation, and the executors could not by their surrender of him deprive the child of his legacy. White's Estate, 105.

CONSIDERATION. An obligation to pay debts supports a promise to pay them. (C. P.) Fourth Street National Bank *v.* Haines, 353.

A mortgage imports consideration. Saalfield *v.* Manrow, 463.

J., having embezzled money of a client of his employer, B., his father, P., gave his bond and mortgage for the amount to the client W. In a suit upon the mortgage, it appeared that the mortgage was given for the debt of J. and for his benefit. P. claimed that B. had promised to give J. employment, so that he could gradually pay the money back, and had assured him that P. would not be called upon, as the bond would be extended from time to time; that he only gave the mortgage for that purpose and that no employment had been given to J.: *held*, the evidence warranted a finding that there was an undertaking that the mortgagee would not bring action against J. until the mortgage matured, which consideration was sufficient to sustain the mortgage, and that the Court below erred in directing a verdict for the defendant. Id.

CONSTITUTIONAL LAW. The effect of Art. 4, Sec. 2, of the Constitution of the United States is to declare that whatever rights or immunities are granted by a State to its own citizens, or whatever qualification is attached to a restriction imposed by it upon the exercise of rights by its own citizens, the same measure must be applied to the exercise of the same rights by all citizens of the United States within the boundaries of the grantor or restrainor State. (Q. S.) Commonwealth *v.* Simons, 511.

The police power does not enable a State to debar the citizens of other States from engaging in any business which the State leaves open to its own citizens. Id.

The Act of April 15, 1891, P. L. 17, forbidding peddling without a license, providing that nothing therein shall prevent any citizen of this Commonwealth from peddling the products of his or her farm or garden, and empowering cities of the first class to fix by ordinance the amount of the fee to be paid for a license, is unconstitutional, as a discrimination against citizens of other States and as a restraint upon interstate commerce. Id.

Legislative power is vested in the legislative branch of the government and cannot be delegated; and while a law, complete in its terms, may depend, for its going into effect, upon the action of some person other than the Legislature, yet an Act which, as passed, delegates the right or power to insert in it terms or parts, which have not been passed upon by the Legislature, is unconstitutional and void. O'Neil *v.* American Fire Insurance Co., 513.

The Act of April 16, 1891, P. L. 22, providing for a uniform policy of fire insurance, is unconstitutional as a delegation of legislative power. Id.

The Act of February 4, 1870, P. L. 14, prohibiting any person from issuing a policy or making a contract of indemnity against loss by fire without authority expressly

CONSTITUTIONAL LAW—*Continued.*

conferred by charter, is a valid exercise of the police power and is constitutional. STERRETT, C. J., GREEN and DEAN, JJ., dissented. Commonwealth *v.* Vrooman, 97.

The Acts of May 13 and May 23, 1889, P. L. 196 and 277, were intended to remedy the intolerable confusion which was the effect of the unconstitutionality of the Act of May 24, 1887, P. L. 204, and, as the true intent of the Act of May 13 is not, in the least, doubtful, it will not do to stick in the letter of its terms. It specifies ordinances and resolutions, but it also declares the city councils under the Act of 1887, to have been legally constituted, and its clear purpose was to validate municipal action based on the Act of 1887. Melick *v.* City of Williamsport, 39.

An office, supposed to have a legal existence under the Act of 1887, having been legalized by the Acts of 1889, the duties which the incumbent discharged were thereby validated and so was his claim for the salary appointed for the office by councils. Id.

The Legislature may abolish any office, which exists by legislative authority only, without regard to the term of the incumbent when the abolishing Act is passed. Com'th *ex rel.* Braughler *v.* Weir, 556.

The requirement of the Constitution, Art. 3, sec. 6, that laws shall not be amended by title only, but by re-enactment at length, only applies to express amendments. Seabright's Estate, Stuart's Appeal, 55.

The Act of June 8, 1891, sec. 4. P. L. 229, is not unconstitutional because of defects in its title or for any other cause. Commonwealth *v.* Scranton & Wilkesbarre Ry. Co., 443.

When the title of an Act is "an Act supplementary to" etc., if the subject of the supplementary Act be germane to the subject of the original Act, the constitutional provision with reference to titles has been complied with. Commonwealth *v.* Sharon Coal Co., Limited, 213.

The title of the Act of June 8, 1891, P. L. 229, is sufficient to cover those sections of the Act which provide a new method of assessing the value of stock for the purpose of taxation and repeal the former method. Id.

The Act of June 10, 1881, authorizing service of a sci. fa. sur municipal claim on non-resident registered owners of real estate in Philadelphia by posting and publication is constitutional. City of Philadelphia *v.* Jenkins, 276.

A Court, constitutionally organized, can act only as a whole and in a constitutional manner and a Judge is not authorized to express the decision of the Court, without consultation with his colleagues, unless the opinion filed by him has been approved and adopted by his associates. Butts *v.* Armor, 137.

The Legislature has power to classify corporations for the purpose of taxation and sever a small class from a larger one and subject one class to taxation while it leaves another exempt, without violating Art. IX., sec. 1, of the Constitution of Pennsylvania or Art. XIV., sec. 1, of the Amendments to the Constitution of the United States. Commonwealth *v.* Sharon Coal Co., Limited, 213.

CONSTITUTION OF PENNSYLVANIA.

Art. I., § 3, 278.
§ 11, 137.
III., § 3, 213.
§ 18, 278.
IX, § 1, 213.
X., § 1, 278.
§ 2, 278.
XIV., § 5, 411.
XVI., 347.

CONSTITUTION OF UNITED STATES.

Art. I., § 8, par. 4, 511.
IV., § 2, par. 1, 511.
XIV., of Amendments, 97, 213.

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CONTRACT. A contract to be void as against public policy must be inconsistent with sound policy and good morals as to the consideration or thing to be done. Enders *v.* Enders, 118.

While a contract by a parent by which she bargains away the control of her child to a stranger, and so attempts to relieve herself of all parental responsibility, is void as against public policy, yet a contract of the nature of a family compact by which a mother in needy circumstances agrees that her child may be brought up by and live with his grandfather, who is of good character and ample estate and who further agrees that the mother shall visit her child when she desires and have him at her house when convenient, is not against public policy and the mother may recover the stipulated consideration upon which she surrendered the possession of her child. Id.

A county solicitor cannot recover for services rendered upon a contract made with the county commissioners during his term of office. Fulton *v.* County of Lancaster, 128.

A binding contract may be made by a county with one who has recently been an official, although the subject of the contract be the accomplishment of something which the latter has unsuccessfully attempted to accomplish during his term of office and the terms of the contract are similar to or identical with those of a void contract made during his occupancy of office; his compensation, however, must be limited to services rendered in pursuance of the new contract and so far as it is sought to recover for services rendered while in office the plaintiff must fail. Id.

In a contract for the sale of timber, where the parties intend a severance and no time is fixed within which the timber is to be removed, the law implies that the vendee is to remove it within a reasonable time, and if, after notice from the vendor, the vendee neglect for an unreasonable time to remove the timber he loses his right under the contract. Patterson *v.* Graham *et al.*, 437.

Where an interval of eleven years elapses between ceasing to cut and remove timber and a return to prosecute the work, it must be concluded that the grantee had relinquished his rights under the contract allowing him to cut the timber, and he becomes a trespasser when he enters for the purpose of removing the timber. Id.

Where a contractor for work upon a building agrees in writing to use certain material, and sublets the contract, binding the sub-contractor to comply with the terms of the original contract, and the latter uses a different material to the injury of the building, if the change be made with the consent of the architect or other agent of the owner of the building, then the original contractor is not liable for the damage occasioned by the changes. Robinson *v.* Baird, 561.

Where payments upon a building contract are to be made upon the certificate of the architect, a certificate which does not in terms certify an amount due but refers to the contract, in which the amount of each stipulated payment is set out, and declares the contractor entitled "to a payment being the last payment on contract price" and further that the payment "is the same as written in article of agreement less credits and credit for defective plastering" is sufficient to authorize the bringing of an action in which both the propriety and the amount of the last mentioned credit may be passed upon. Id.

See BAILMENT Seanor *v* McLaughlin, 455.

CONVERSION. A direction "this land I want disposed of as follows: The valuation of it when sold is to go to my brother" etc., in a will, is insufficient to work a conversion. Irvin *v.* Patchen, 341.

CORPORATIONS. A partnership decided to organize as a corporation under the natural gas Act of 1885. By agreement, the capital stock, fixed at $500,000, was issued to the members of the old partnership, who received and held among them $175,000 of the said stock and returned to the treasurer the remaining $325,000 to be sold for the purpose of securing capital for the company. The company having become embarrassed and all its property right and franchises having been sold on execution, a bill was filed by its creditors to compel the payment in cash of so much of the par value of the $325,000 of stock as might be necessary to discharge the claims of the creditors. There was no allegation of fraud: *held*, (*a*) that, while the method adopted may have been an irregular and mistaken mode of reaching the purpose in view, the good faith of the parties was to be judged by the facts before them when the arrangement was made, and the subsequent demonstration that the property was less valuable that they supposed was immaterial; (*b*) that, in the absence of any suggestion of fraud, the burden of proof was not shifted to the defendant to establish the good faith of the transaction; (*c*) that the sale could not be disregarded and the subscriptions to the capital stock treated as unpaid at the instance of subsequent creditors of the corporation, who stood in no better position than the corporation itself. American Tube & Iron Co. *v.* Baden Gas Co., 530.

A binding contract for exemption from taxation may be made between a corporation and the Commonwealth by an Act supplemental to the charter. It is not necessary for its validity that it be contained in the charter itself. Commonwealth *v.* Philada. & Erie R. R. Co., 217.

Where a supplement to its charter which exempts certain stock from taxation has been adopted by a company, the general repealing clause in a later Act will not repeal the supplement. Commonwealth *v.* Philada. & Erie R. R. Co., 217.

The indebtedness of a corporation, held in their own right by Pennsylvania corporations, or by non-residents of this Commonwealth is not taxable. Commonwealth *v.* Wilkesbarre & Scranton Ry. Co., 443.

It is well settled that, ordinarily, one corporation has no standing to raise the question of the right of another corporation to use the streets of a city. The State alone may invoke the chancellor's aid where the powers granted by it are not properly exercised, or the city may have a standing in Court when its rights have been invaded. (C. P.) People's Passenger Ry. Co. *v.* Union Passenger Ry., 311.

Shares of stock on which State tax has been paid by the corporation issuing them are not liable to be again taxed in the hands of the holder, whether an individual or another corporation. Commonwealth *v.* Lehigh Coal & Nav. Co., 124.

Taxation upon a stockholder as such has been abolished by the Act of January 3, 1868, P. L. 1318. Id.

Since the Act of June 8, 1891, P. L. 229, all corporations are taxable upon the actual value in cash of their capital stock and, in determining the amount upon which a corporation is to be taxed, the amount and rate per cent. of dividends made and the amount carried to surplus and sinking fund during the tax year do not furnish an absolute indication or measure of the actual value in cash of the capital stock, but are to be considered with all other relevant facts in determining what is the actual value in cash. Commonwealth *v.* Edgerton Coal Co. Limited, 205.

The Legislature has power to classify corporations for the purpose of taxation and may sever a small class from a larger one and subject one class to taxation while it leaves another exempt, without violating Art. IX., sec. 1, of the Constitution of Pennsylvania or Art. XIV., sec. 1, of the Amendments to the Constitution of the United States. Commonwealth *v.* Sharon Coal Co. Limited, 213.

The Act of June 30, 1885, P. L. 194, is not repealed by

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CORPORATIONS—*Continued.*
the Act of June 8, 1891, sec. 4, and, under this section, it is the duty of the treasurer of the corporation to assess and retain and pay over to the State the taxes imposed by the first section of the Act of June 8, 1891, or so much of this indebtedness as is held and owned by residents of Pennsylvania, and the corporation is liable for his failure to do so. Commonwealth *v.* Wilkesbarre & Scranton Ry. Co., 443.

A corporation is indictable and it can be brought into Court by compulsion if necessary. Commonwealth *v.* Lehigh Valley R. R. Co., 505.

The only cases in Pennsylvania, except in suits by the Commonwealth, in which a summons can be served upon a manager or a director of a corporation, even where the property of the corporation is wholly or in part in the county, are where the president, treasurer, secretary or chief clerk do not reside or cannot be found in the county, and the sheriff's return must so show. (C. P.) Dale *v.* Blue Mountain Mfg. Co., 509.

The words "manager" and "director," used in the Acts of March 17, 1856, March 21, 1842, and March 15, 1847, are synonymous and mean one of the body of persons appointed pursuant to the charter or by-laws of the corporation to manage its affairs, the acts of the individuals not binding the corporation except when acting as a body. Id.

The term "principal officer" in Act of June 13, 1836, means the chief executive of the corporation whether he be called president, chairman or by any other title. Id.

See FOREIGN INSURANCE COMPANIES. Kennedy *v.* Agricultural Insurance Company, 457.

Practice of Executive Department in case of possible conflict of titles. See CHARTER. (Ex. Dep't.) *In re* York Wall Paper Co., 574.

COSTS. An accountant cannot have charged against one of the distributee's share, the expense of successfully defending a suit against him individually, for such share, in another State, although such suit indirectly benefited the estate. Whatever costs accountant is entitled to recover are incidental to the judgment in his favor, and must be collected under the law of the State, where it was obtained. Roberts's Estate, 250.

The Orphans' Court of P. county appointed A. guardian of the person and B. guardian of the estate of a minor. Subsequently C. was appointed guardian of said minor by the Orphans' Court of D. county. C. petitioned the Court of P. county asserting the jurisdiction of the Court of D. county and denying that of the Court of P. county, which after full hearing decided in favor of its own jurisdiction. This decision was not appealed from. A. and B. then petitioned the Court of D. county to revoke the appointment of C.: the decree prayed was made, but on terms that A. and B. pay to C. the costs of the proceeding and those incurred in the proceeding in the Court of P. county or indemnify C. against the same: *held*, the circumstances did not justify the imposition of costs upon the successful contestants or warrant the unsuccessful contestant in claiming indemnity against the same and that the Court had no right to append terms to its decree revoking C.'s appointment. Mintzer's Appeal, 326.

Where only a few of a class of persons, who are equally interested in the distribution of a fund in Court, appeal from the decree of the Court, it is proper that the fund should bear the costs and expenses of the litigation. Schwartz *v.* Keystone Oil Co., 387.

COUNSEL. An assignee for the benefit of creditors should not be represented by counsel who represent claims adverse to the estate. *In re* Assigned Estate of Powel & Co.

Admissions of counsel are no part of the record and

COUNSEL—*Continued.*
cannot be considered by the Supreme Court. *In re* Vacation of Swanson Street, 306.

Counsel for a trust estate cannot speculate, either directly or indirectly, in claims against the same. Woods *v.* Irvine, 324.

The mere fact of the employment of counsel is not privileged, but is open to inquiry in any Court in which counsel appear as such. Therefore, counsel is competent to testify, in a collateral proceeding, as to the fact of his having, in a prior proceeding, represented certain parties. Seip's Estate, 401.

COUNSEL FEES. The amount of an allowance for counsel fees made to a trustee, by the Court in which his account was filed, will not be reviewed on appeal. Appeal of the First National Bank of Oswego, 162.

COUNTY COMMISSIONERS. In counties containing more than 150,000 inhabitants, county commissioners are salaried officers, and the number and pay of the clerks employed by them are to be fixed by the salary board of the county. Commonwealth *ex rel.* Boyle *v.* Mercer, 411.

County commissioners of a county of over 150,000 inhabitants have no right to let out the work of transcribing registry, treasurer's tax books, etc. Id.

COUNTY OFFICERS. The salary of a county official covers all his services to the county, and he cannot make a binding contract with the county entitling him to receive extra compensation for specified services. Fulton *v.* County of Lancaster, 128.

A county solicitor cannot recover for services rendered upon a contract made with the county commissioners during his term of office. Id.

A binding contract may be made by a county with one who has recently been an official, although the subject of the contract be the accomplishment of something which the latter has unsuccessfully attempted to accomplish during his term of office and the terms of the contract are similar to or identical with those of a void contract made during his occupancy of office; his compensation, however, must be limited to services rendered in pursuance of the new contract, and so far as it sought to recover for services rendered while in office the plaintiff must fail. Id.

The officers of a county and their agents are properly subject to the jurisdiction of the Courts of any other county within which they attempt to commit an act of trespass, and the rule that a municipality can only be sued in the Courts of the county where it is situated has no application under such circumstances. Delaware County and Phila. Electric Ry. Co. *v.* Philadelphia, 348.

See COUNTY COMMISSIONERS, Commonwealth *ex rel.* Boyle *v.* Mercer, 411.

COURTS. A Court constitutionally organized can act only as a whole and in a constitutional manner, and the Judge is not authorized to express the decision of the Court, without consultation with his colleagues, unless the opinion filed by him has been approved and adopted by his associates. Butts *v.* Armor, 137.

Under the Constitution the office of associate Judge not learned in the law not having been abolished in counties not forming separate judicial districts, the Courts in such counties are constituted under the Act of 1834, and when a cause has been tried before the president Judge and two associates, neither the president Judge alone nor the two associates can take up and dispose of a question arising out of the trial. Id.

COVENANT RUNNING WITH LAND. S. being seized of three contiguous lots sold them, to three different persons, by deeds executed and delivered on the same day, reserving a rent in each deed. In each deed, the description referred to the adjoining lot or lots

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COVENANT RUNNING WITH LAND—*Continued.*

as "intended to be this day granted by the said S." to the purchaser of such adjoining lot. The deed for the middle lot contained the following: "It is further understood, conditioned and agreed by and between the said parties hereto," then followed a restriction as to the dimension and character of building to be erected on the rear of the lot. In the deeds for the adjoining lots no reference was made in express terms to this building restriction, but in each case the lot conveyed was described in part as to its boundaries by a reference to a conveyance of the middle lot. The three deeds were duly recorded. The middle lot by mesne conveyances came to one H., and the lot adjoining it on the west to M.: *held*, the restriction was in the nature of a covenant running with the land, and H. having begun to erect a building on his lot in violation of the restriction, should be enjoined from proceeding therewith. Muzzarelli *v.* Hulshizer, 122.

CREDITOR. While a defendant may waive his right to an account of his goods from one with whom he has deposited them, yet he cannot by such waiver, if collusively made, affect the right of his attaching creditor to require an account. Merchants and Manufacturers Bank *v.* W. A. Baeder Glue Co., 69.

CRIMINAL LAW. In refusing to discharge the jury in a murder case, the Court said to do so "would be a wrong and defeat the ends of justice;" *held*, to be improper, as the jury might regard it as a binding instruction to convict. Commonwealth *v.* Werntz, 93.

It is enough to bring an instrument within the Act of March 31, 1860, section 169, that it be fraudulently made, may prejudice another's right and is intended to defraud any person or body corporate. Possibility of injury is enough. (Q. S.) Commonwealth *v.* Fitzpatrick, 258.

A pilot who gives a receipt for the amount of lawful pilotage, when he has received less than the amount recited in the receipt and when he has not taken charge of the vessel as pilot, is criminally liable under the Act of March 31, 1860, section 169. Id.

A corporation is indictable and it can be brought into Court by compulsion if necessary. Commonwealth *v.* Lehigh Valley R. R. Co., 505.

Practice. The older remedies in case of non-appearance of defendant, venire facias ad respondendum and distringas extending to outlawry, have fallen entirely into disuse in the civil courts and the end sought is there attained by a judgment entered for default. The same remedy is applicable in criminal indictments for misdemeanors, without express statutory authority but by virtue of the common law of Pennsylvania. Commonwealth *v.* Lehigh Valley R. R. Co., 505; Commonwealth *v.* Wilkesbarre and Eastern R. R. Co., 509.

DAMNUM ABSQUE INJURIA. The right of one land owner to injure the land of another is founded on necessity and exists only where he himself would otherwise be deprived of the beneficial use of his own land. Pfeiffer *v.* Brown, 481.

DECEDENTS' ESTATES. The proceeds of certificates of beneficial societies are not assets for the payment of debts, even though intended to be made so. (O. C.) Kendrick's Estate, 46.

Beneficial societies are not life insurance companies and the member has no property interest in the fund to be paid at his death, which can be considered assets for the payment of debts, and the executor or administrator, as such, has no right to claim it. Id.

A payment in conformity with an absolute decree of the Orphans' Court making an award protects the executor, and also the distributee, although no refunding bond be given by the latter. Ferguson *v.* Yard, 429.

DECEDENTS' ESTATES—*Continued.*

B. died in 1876. An action was brought in 1886 against his executrix, upon which judgment was obtained: *held*, that under section 24 of the Act of February 24, 1834, plaintiff had lost all lien as against the real estate of B., the claim not being founded upon a mortgage or secured by judgment. Id.

The right of a creditor of a decedent is fixed by the amount unpaid at the time of the decedent's death, and it cannot be reduced by what he may have received from a fund appropriated as collateral. (O. C.) Carr's Estate, 448.

The rank and standing of the creditors holding liens upon a decedent's real estate are fixed absolutely as matter of law by a sale of the realty. After such sale, no new rights of lien or claim on the proceeds can be acquired by subrogation or otherwise. Seabright's Estate, Coyle's Appeal, 58.

DECEIT. The only ground for recovery in an action for false representations is bad faith in making them and the scienter must be proved. Lamberton *v.* Dunham, 489.

If it appear that the defendant in an action of deceit knew nothing about the matter and made the statement without any belief as to its truth or untruth, he was guilty of a moral wrong not less serious than a deliberate falsehood and the jury may well find that he acted in bad faith and with a purpose to defraud Id.

One who, in good faith, makes a statement, is not guilty of deceit, although the grounds of belief upon which he proceeds may be slight, and it is error to charge a jury, in an action of deceit, where a statement has been proved to be false, that, in order to defeat the action, the defendant must have had reasonable grounds for believing his statement to be true. Sincerity of belief is the only test and the jury has nothing to do with the reasonableness of the belief. Id.

DEED. A paper, duly proved as a will, cannot, before the probate thereof is set aside, be treated in a collateral proceeding as a deed. Tozer *v.* Jackson, 264.

In construing a deed, it is proper and sometimes necessary to consider the circumstances under which it was made for the purpose of ascertaining the intention of the parties, and the rule that the provisions of a deed are to be construed most strongly against the grantor is never available to defeat an intention so manifested. Meigs *v.* Lewis, 317.

A., who owned two pieces of land, conveyed one to B., the deed containing the following clause in the habendum, "under and subject . . . . as respects the two feet three inches wide strip above mentioned to the right and privilege of the owners and occupiers of the premises adjoining on the east to build over and above the same in like manner as is now done." The premises on the east were the other of A.'s two tracts and, at the time of the deed to B., certain structures were over a portion of the strip, beginning at the height of eleven feet from the ground: *held*, the manifest purpose of the parties, in connection with the ground and the building rights reserved, was to secure to the grantee the use and benefit of the way as it then existed; that the words "in like manner as is now done" referred to the point and manner of the location of the structure upon it and hence so long as B. or his grantee of the eastern premises left a way of eleven feet in the clear, he or they could build over the strip and were not limited to buildings of the height of those which existed at the time of the conveyance to A. Id.

The omission of the word "trustees" after their signatures is immaterial when the deed recites them as such (O. C.) Trust Estate of John Lawrence, 406.

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DEED—*Continued.*

To render the acknowledgment of a deed by a married woman sufficient, she must be separately examined by the officer taking the acknowledgment, must have full knowledge of the contents of the deed and voluntarily consent to the execution of it, and these facts must appear by the certificate of the officer. Spencer *v.* Reese, 449.

The defective acknowledgment of a married woman cannot be cured, but if the certificate thereof only is defective, an acknowledgment having been made in fact, the certificate may be amended in accordance with the Act of May 15, 1878, P. L. 149. Id.

DELIVERY. Where goods are sold to be delivered to purchasers, whose place of business is on the upper floor of a factory, the delivery is not complete until the goods are fastened to the lift for the purpose of being hoisted to the upper floor, and if the same be negligently fastened to the lift, the purchasers are not responsible for the consequences. Fuhrmeister *v.* Wilson, 223.

DEVISAVIT VEL NON. If the Orphans' Court finds that there is proof of alleged undue influence, sufficient to sustain a verdict against the will, an issue must be awarded. (O. C.) Erwin's Estate, 477.

Where the charge of undue influence centres in the relations which obtained between testator and those accused of exerting the influence, any testimony which throws light upon these relations is a vital factor in the case. Id.

Unless the testimony as to testator's testamentary incapacity or undue influence exerted on him be sufficient to sustain a verdict against the will, the parties will not be subjected to the delay, expense and trouble of a trial, by the award of an issue. Loeser's Estate, 543.

DISTRIBUTEE. Not chargeable in distribution with expenses of suit against accountant individually, although such suit indirectly benefited estate. See EXECUTOR. Robert's Estate, 250.

EASEMENT. The owner of land may adapt the parts thereof so as to render one portion subject to a servitude in favor of the other, and purchasers, who take with notice of the adaptation, will take their lands, respectively, charged with and entitled to the easement. Sharpe *v.* Scheible, 10.

Notice of the existence of an easement may be given by the appearance of the property in or over which it is claimed. Id.

ECCLESIASTICAL LAW. The organization of a denominational body or a church involves the adoption of both a creed and an ecclesiastical polity; abandonment or repudiation of either constitutes secession from said body. Krecker *v.* Shirey, 165.

When the constitution of a church provides for the fixing of a place of meeting from time to time by a certain body, the act of fixing the place of meeting is a matter of administration and not of legislation and the power to perform said act may be delegated. Id.

The title to the corporate property of a congregation which is divided, is in that part of the congregation which is in harmony with the laws, usages and customs, as accepted by the body before the division took place, and which adheres to the regular organization. Id.

A congregation connected with any denomination must submit to the system of discipline peculiar to the body with which it is connected, irrespective of the views of the majority of the congregation itself. Id.

Upon questions of discipline, as well as of faith, the decisions of ecclesiastical courts are ordinarily final and will be respected and enforced by Courts of law. Id.

The discipline of the E. Association provided that a general conference should meet once every four years

ECCLESIASTICAL LAW—*Continued.*

and that each said conference should fix the place of meeting of the next, but should it fail to do so, the oldest of the annual conferences (subordinate bodies) should fix the place. The conference of 1887 adjourned after referring the next place of meeting to the Board of Publication, a corporation connected with the association. The board appointed I. as the place of meeting for 1891. The oldest annual conference, that of E., appointed P. as the place of meeting. A large body assembled at I. and a smaller one at P. in 1891. In December, 1889, B., the bishop within whose jurisdiction was the annual conference of E., was suspended by a trial conference, the authority of which the bishop denied and the sentence of which he disregarded. In February, 1891, a majority of the members of the annual conference of E. met at the appointed place and refused to allow B. to take part in the meeting. B. and some members who adhered to him met in another place. The majority body assigned one S. as pastor of the R. church within the conference. The B. body assigned to the same place one K. In October, 1891, the conference at I. recognized the proceedings of the B. body as those of the regular annual conference, while the body meeting at P. recognized the meeting from which B. had been excluded. In the meantime, S. had been admitted and K. excluded from the R. church; *held*, 1, the conference which met at I. in 1891 was the regular successor of that of 1887, and the annual conferences, congregations and church members adhering to it constituted the E. Association, while the adherents of the P. body had become by their own act a hostile and independent organization; 2. the property which prior to 1891 belonged to the E. Association belonged after that time to those who still constituted the association; 3, the assignment of K. to the R. church was made by a provisional body of adherents without any ecclesiastical authority, and gave no title, but the subsequent ratification of the assignment by the general conference gave K. a title good from that date; 4, the assignment of S. was by an illegally organized body and gave him no title, notwithstanding his reception by the majority of the members and officers of R. church. Id.

ELECTION. Of assignee for benefit of creditors to hold lease, how manifested. See ASSIGNMENT FOR BENEFIT OF CREDITORS. See Assigned Estate of Weinmann, 321.

ELECTION LAW. At an election for township officers, a printed paster was prepared for electors to paste over the right hand column of the official ballot provided under the Act of June 10, 1893. Upon this paster, under the head of school directors, were printed the names of two persons who received the majority of votes cast: *held*, that this was an alteration of the official ballot, which invalidated the votes cast for the candidates in question and that such votes could not be counted or returned. *In re* Contested Election of School Directors of Little Beaver Township, 533.

ELECTRICAL RAILWAY. The use of a bridge by a railway company, which operates its road by electricity, does not constitute a taking of or injury to the property of the bridge company by the exercise of the power of eminent domain. It is a use which is reasonably consistent with the purpose for which the bridge was erected and is necessary for public travel and accommodation. Pitts. & West End P. R. W. Co. *v.* Point Bridge Co., 393.

EMINENT DOMAIN. The use of a bridge by a railway company, which operates its road by electricity, does not constitute a taking of or an injury to the property of the bridge company by the exercise of the power of eminent domain. It is a use which is reasonably con-

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EMINENT DOMAIN—*Continued.*
sistent with the purpose for which the bridge was erected and is necessary for public travel and accommodation. Pitts. & West End P. R. W. Co. *v.* Point Bridge Co., 393.

Where land is taken for public use, the measure of damages is the difference between the market value before and after the improvement, and the jury may not consider the cost of replacing buildings injured by the taking. as an independent item of damages. Larkin *v.* City of Scranton, 42.

The taking of land by a city for a public park is, in substance, the same as the taking of land for a street by the exercise of the power of eminent domain. *In re* Vernon Park, 49.

Where land is taken by a railroad company for the construction of its road and none of the property is left to the owner, the market value of the land taken is the true value of the damages recoverable. Boteler *v.* Phila. & Reading Terminal R. R. Co., 261.

K. was the tenant of a leasehold by a lease, which provided that, in the event of the property being taken by a railroad, the lease should be terminated without prejudice to the rights of either party in any suit for damages sustained by the appropriation of the premises: *held*, such a provision was not a bar to an action by a subtenant for the destruction of his leasehold. Id.

EQUITABLE EJECTMENT. To entitle a plaintiff in ejectment, founded on an equity only, to recover, he must not only tender the price before suit brought, but must show his readiness to perform his part of the contract by having it in court, ready to be paid in the event of a verdict in his favor. Dwyer *v.* Wright, 7.

Where a vendee takes possession of land, but fails for an indefinite time to pay the purchase money, the vendor may resume possession, if he can do so peaceably,and the vendee cannot then recover in ejectment, as against his vendor or any subsequent purchaser, except on tendering the purchase money in full. Id.

L. sold D. land to be paid for in instalments. The agreement contained a warrant to confess judgment in ejectment, to be released upon the payment, within three months, of the amount due on account of the purchase money. D. remained in possession until his death, some three years later, at which time there was a considerable sum due on the contract. L. began an action of ejectment against the widow and heirs of D., a guardian *ad litem* being appointed for the minor heirs. Subsequently L. entered judgment by confession in accordance with the agreement and sold the lot to W., having taken possession peaceably without taking out any writ. W. recorded his deed. The agreement between L. and D. was never recorded. Ten years later the heirs of D. having become of age, brought ejectment against W.: *held*, that the jury was rightly instructed to find for the defendant. Id.

EQUITY. One who attempts to impose his goods upon purchasers as those of a rival trader, by means which have a tendency to mislead the public may be restrained by an injunction. (C. P.) Shepp *v.* Jones, 29.

When the evidence shows that a collection of pictures has been published in book form and has acquired a reputation valuable for the purposes of sale, an imitation of the said collection, in style, form and size, which so closely resembles the first collection as to naturally deceive the ordinary picture book buyer, although called by a different title, is such a fraud upon the rights of the publisher of the first collection as to entitle him to relief by an injunction and account. Id.

Injunction to enforce building restriction contained in covenant running with land. See COVENANT RUNNING WITH LAND. Muzzarelli *v.* Hulshizer, 122.

EQUITY—*Continued.*
Even when an action at law will lie for breach of covenant, yet, if there is an utter uncertainty in any calculation of damages from the breach and the measure of damages is largely conjectural, equity will intervene because of the inadequacy of the remedy and restrain a continuing breach by injunction. Wilkinson *v.* Colley, 177.

An injunction will lie to restrain a defendant from practicing as a physician within a limit of eight miles, when he has agreed in writing with another physician for a consideration to abstain from practicing within such limit for ten years. Id.

Where a school district illegally assesses taxes upon land lying without its boundary, it may be restrained by injunction at the suit of the land owner illegally taxed, but the district within whose boundaries such land lies cannot have an account from the first named district. Arthur *v.* School District of Polk Borough, 289.

A married woman orally agreed with H. to sell him certain real estate. The following day her husband, acting for her, placed the same property in the hands of a broker for sale. The broker, that day, obtained a purchaser, and the terms of the sale were approved in writing by the owner. She and her husband consummated the oral bargain with H. The second purchaser filed a bill against H. and his wife, in whose name the property was taken, for specific performance and general relief: *held*, the first purchaser acquired the title; specific execution could not be decreed against the vendor, for it was out of her power, and the plaintiff's remedy was for damages sustained in consequence of the vendor's refusal to perform the contract with him. Maguire *v.* Powell, 228.

Where it is sought to compel the surrender of county warrants, to discover their custody and the equities, if any, attached to them and to determine the character of a fund, alleged to be composed of trust money, the proper proceeding is by bill in equity. County of Crawford *v.* Merchants' National Bank, 133.

Where a right is claimed by a passenger railway company to string wires, for the purpose of carrying its electric system of transportation across a bridge owned by an incorporated bridge company, and to run its cars across the bridge, which right is denied by the bridge company, a Court of equity has jurisdiction both to determine the right and to fix the compensation to be paid by the railway company for the use of the bridge. Pitts. & West End P. R. W. Co. *v.* Point Bridge Co., 393.

When upon proceedings under the Act of May 15, 1878. P. L. 149, the plaintiff testifies that an acknowledgment was made in due form of law and the defendants, the married woman, whose acknowledgment it is sought to establish, and her husband, deny the same, a decree for reformation is properly refused. Spencer *v.* Reese, 449.

Where time is not stipulated as essential and a forfeiture for non-payment of money or non-performance of any other matter, which admits of accurate and full compensation is provided as a penalty, whose object is to enforce performance of another and principal obligation, equity will relieve against its enforcement and will not permit it to be used for a different and inequitable purpose. Lynch *v.* Versailles Fuel Gas Co., 558.

Where, in an oil lease, a fixed rent is provided for delay in putting down wells, which rent is left to fall due by operation of law at the end of the year, time is not of the essence of the contract to pay rent to the extent of ousting equitable relief in case payment be not made at the end of the year. Id.

A plaintiff, asking for the exercise of extraordinary equitable remedies, must show that his own conduct has been equitable and that he has not slept on his rights in

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EQUITY—*Continued.*
such a way as to mislead his adversary. (C. P.) People's Pass. Ry, *v.* Union Pass. Ry., 311.

A plaintiff, having consented by agreement with the city and a park commission that other passenger railways might be given permission to use the tracks across a bridge and within the park and having secured its own use of them only by such agreement, cannot be said to be injured and to have its rights invaded when the defendants have secured such permission, and an injunction against the use of the road by defendants will not be granted. Id.

Where a mortgagee, with a knowledge of the fact that a portion of the mortgaged premises has been bought and paid for by a third person, subsequently releases from the lien of the mortgage the remaining part, which was of sufficient value to have satisfied the debt, such release will operate as a discharge of the lien of the mortgage against the land bought by the third person. Turner *v.* Sharpneck, 366.

Equity—Practice. To a bill for an injunction to restrain a railroad company from operating its road in front of plaintiff's premises and to require it to remove its enbankment, ties, rails and fittings and restore the surface to its former condition, and for general relief, defendant demurred and the Court sustained the demurrer and dismissed the bill on account of delay in filing it: *held*, error, because although upon final hearing the injunction might be denied on account of laches, yet the plaintiff might be entitled to relief against the mode of construction adopted by the respondent and to such restoration of the former grade as might be necessary to restore to him safe and convenient access to his home. Westhaeffer *v.* Lebanon and Annville Street Ry. Co., 33.

Where, in a proceeding by a county to recover possession of certain warrants, it appears that its treasurer is also interested and that, for the proper determination of the suit, the assignees for the benefit of creditors of the depositaries of a fund, claimed by the county to have, in effect, paid the warrants, are necessary parties, the treasurer may be added as plaintiff and the assignees as defendants. County of Crawford *v.* Merchants' National Bank, 133.

Where the material averments of facts contained in the bill are sustained by the injunction affidavits and the answer is not sworn to, it is error to dissolve a preliminary injunction. Wick China Co. *v.* Brown, 330.

ERROR. In refusing to discharge the jury in a murder case the Court said to do so "would be a wrong and defeat the ends of justice" *held*, to be improper, as the jury might regard it as a binding instruction to convict. Commonwealth *v.* Werntz, 93.

In a murder trial where the deceased had been killed by stabbing, and the defence was that he had been stabbed by a colored man, a servant of the defendant, the Court charged with reference to the declarations of the injured man as to who had hurt him "whatever relevancy they may have as affecting the general credibility of some of the witnesses, yet they would not be of potent force in the case if you should expressly find from the other evidence affirmatively that no colored man was in the room at the time of the act or could have inflicted the wound: *held*, to be error. Id.

When the effect of an instruction is to take from the jury all testimony, except that of a particular witness, and to leave to the jury the construction of a paper, properly for the Court, such error is not cured by telling the jury that the whole testimony is for it to pass upon. Heydrick *v.* Hutchinson, 503.

A charge whose tendency as a whole is to belittle and prejudice one side, and which is not in expression and tone a judicial presentation of the case, is error. Id.

ESCHEAT. An escheator, as such, has no status to apply to the register of wills for letters of administration, in default of next of kin of decedent, if a demand for letters has previously been made by a creditor who is unobjectionable and who has qualified. (O. C.) Jakey's Estate. 476.

ESTATE FOR YEARS. The right of alienation is an incident of an estate for years, though not an inseparable one. (O. C.) Heckman's Estate, 199.

ESTOPPEL. The refusal of an insurance company to pay a loss on a specified ground estops it from asserting on the trial another ground of defence of which it had full knowledge, when the assured has incurred expense and brought action in the belief that the only objection was that communicated to him. McCormick *v.* Royal Insurance Co., 23.

Where a partner, who is acting as prosecutor of one who has embezzled money of the firm, agrees to settle the prosecution and receives money therefor, the presumption is that the money is received on behalf of the firm and he cannot be heard to allege that the money was a bribe to himself to betray the rights of his firm. Merchants and Manufacturers Bank *v.* W. A. Baeder Glue Co, 69.

The fact that a shareholder in a building association has acquiesced for a number of years in a method of ascertaining the value of shares, by which the profits were divided equally among all the shares, without regard to the amount paid in, will not estop him from requiring that the method in ascertaining the value of his share be changed to the proper method. The Charles Tyrell Building and Loan Association *v.* Haley, 269. [MITCHELL and FELL, JJ., dissent.]

A delay of seven days to give notice of intent to enforce a forfeiture for non-payment of rent, when in that time the lessee has, with the knowledge of the lessor, expended money upon the leased premises, will estop the lessor from exercising the right of forfeiture. Lynch *v.* Versailles Fuel Gas Co., 558.

A grantee who accepts a deed, which reserves a right of way for all occupiers of lots bounding upon it is estopped from denying such rights. (C. P.) Ehret *v.* Gunn, 291.

A policy of fire insurance provided that the insurance should cease if additional insurance were obtained in another company unless notification thereof were given and the additional insurance approved at a regular meeting of the board of directors of the company issuing the policy; further, that a compliance with the terms of the policy should not be considered waived unless the waiver were in writing and signed by the president or secretary. At the time the policy issued, there was no other insurance on the property, and S. (the insured) so stated in his application, but at the same time told the director of the company having the matter in charge that he wished to procure other insurance. He subsequently notified one of the directors that he had procured such insurance. The director told him that it was all right and that he could have the matter attended to when convenient to come to the office. Some months later, he went there on the day of the regular meeting of the board; although he did not know the fact, the meeting had adjourned, but one-half of the board was still present. He gave his policy to the director, above mentioned, who showed it to the president, who stated that he knew all about it and instructed the director to write the necessary consent upon the policy. This was done by striking out the word "no" in the answer as to other insurance in the application and inserting the amount of additional insurance and the name of the company insuring. The policy was then approved by the president and handed back to S.: *held*, the company was estopped from denying its approval of the addi-

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ESTOPPEL—*Continued.*
tional insurance. Stauffer *v.* Penn Mutual Fire Association, 298.

Acceptance of purchase money as estoppel, see WILL. Cameron *v.* Coy, 525.

And see LIFE INSURANCE. Commonwealth *ex rel.* Provident Life Association, 147.

EVIDENCE. Where a levy has been made upon personalty which is claimed by a third person, and a feigned issued is framed between the claimant and the execution plaintiff, and the latter dies and his administrator is substituted, the claimant is incompetent as a witness under the Act of May 23, 1887, sec. 5, clause E., P. L. 159, because he is a surviving or remaining party to a thing or contract in action whose interest is adverse to the right of the deceased party. Smith *v.* Rishel, 365.

An execution plaintiff, who is not a party to a feigned issue between the claimant and execution plaintiff to determine the title to the goods levied on, is a competent witness unless it appear that his interests are adverse to the right of the deceased. The mere relation of the parties does not show that his interest is of that character. Id.

Where a legacy is claimed by an assignee thereof and by an attaching creditor, the death of the attaching creditor does not render the legatee and his assignee incompetent to testify to the facts concerning the assignment. Kuhn's Estate, 155.

The mere fact of the employment of counsel is not privileged but is open to inquiry in any Court in which counsel appear as such. Therefore, counsel is competent to testify, in a collateral proceeding, as to the fact of his having, in a prior proceeding, represented certain parties. Seip's Estate, 401.

The declarations of a husband that, in a particular transaction, he acted as agent both for his wife and for a third party are competent, in support of a claim by such third party against the estate of his wife. Such declarations relate only to the husband's conduct and violate no domestic confidence. Id.

Where the proof of an agreement in writing depends upon one of the parties to the instrument who is somewhat familiar with the handwriting of the two subscribing witnesses who are both dead, there is sufficient proof to justify the admission of the paper. Irvin *v.* Patchen, 341.

Under the plea of not guilty, filed in an action of trespass under the Act of 1887, for damages for personal injuries, an alleged release given by the plaintiff is admissible in evidence. Johnson *v.* Phila. & Reading R. R. Co., 375.

The facts that through delay on the part of the plaintiff in the fulfillment of his part of a contract the defendant suffered loss and that plaintiff promised to make such loss good cannot be given in evidence in an action on the contract under the plea of set-off, non-assumpsit or payment, unless notice has been given, as required by rule of Court, of the intention to introduce such facts as a defence. Lovegrove *v.* Christman, 327.

Assessor's books and tax receipts are not sufficient in themselves to prove title, but are admissible as evidence of claim. Irvin *v.* Patchen, 341.

A certificate is evidence only of what it contains, and gives rise to no presumption that anything else took place before the officer. Spencer *v.* Reese, 449.

Where the charge of undue influence centres in the relations which obtained between testator and those accused of exerting the influence, any testimony which throws light upon these relations is a vital factor in the case. (O. C.) Erwin's Estate, 477.

Continued and liberal gifts and emoluments from one person to another where the persons stand in such relationship as client and lawyer, show that the donee has found his way to both the affections and judgment of the donor. Id.

EVIDENCE—*Continued.*

In cases in which the use of land, taken by virtue of the right of eminent domain, has been restricted to a specific purpose, witnesses who are best informed in regard to the use of property for such a purpose are the persons usually best qualified to testify as to value, without regard to whether they are experts as to land values or acquainted with the neighboring property. Boteler *v.* Phila. & Reading Terminal R. R. Co., 261.

B. sublet from K. part of a house taken by a railroad company for its road. By the terms of the lease the use of the premises was restricted to lodge meetings. In an action against the railroad by B. to recover damages for the destruction of the leasehold, the testimony of witnesses familiar with the premises used for such purpose but not acquainted with the neighborhood or with land values in general was properly admitted. Boteler *v.* Phila. & Reading Terminal R. R. Co., 261.

In an action in ejectment where a paper, duly proved as a will, has been given in evidence, the record of the Orphans' Court in proceedings to set aside the will, the probate and the record of the Common Pleas, wherein an issue *devisavit vel non* was tried, from which it appears there was no certificate to the Common Pleas or any return made to the Orphans' Court or any final decree vacating the probate or sustaining the appeal from the register, are not admissible in evidence. Tozer *v.* Jackson, 264.

In a question of distribution the validity of testamentary provisions, depending on facts *dehors* the record, may be inquired into notwithstanding probate. Craft's Estate, 413.

Where a will, which is shown to have been executed by the testator, cannot be found, and it is sought to obtain probate thereof by the production of a copy, the burden is upon the proponents to overcome the presumption of revocation and not only the testator's character, condition, acts and declarations, but the conduct and interests of those around him, from and after the date of the will, are legitimate subjects of inquiry. Estate of Lot Gardner, 417.

Where it appears that an accident has occurred at a railway crossing at which there was no gate, evidence that, shortly after the accident, the defendant erected gates at that crossing is admissible as bearing upon the question of negligence. Lederman *v.* Pennsylvania Railroad Company, 502.

One who, at the time of a railroad accident, was working on the railroad one thousand feet from the scene of accident, it being in evidence that the brakes had been taken off after the cars passed him, is not qualified to testify as to the speed at which the cars were moving when the accident occurred. Id.

A city ordinance regulating the speed of trains is admissible and should be considered by the jury, in connection with other evidence in the case, as bearing upon negligence. Id.

In an action against a municipality for injuries received from a defective sidewalk, evidence of the condition of the sidewalk within a reasonable time after the accident is admissible. Lohr *v.* Borough of Philipsburg, 548.

That an account is charged against a married woman, is not evidence that she consented to be so charged. Moore *v.* Copley, 563.

In determining the amount of damages suffered by a property owner by the grading of a street, the fact that the newly established height had previously been assigned by the municipal authorities for a street, intersecting the first at the edge of the property in question, and that a proceeding to open the intersecting street at that

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EVIDENCE—*Continued.*
height was previously begun, is not admissible in the determination of damages. Markle *v.* Phila., 346.

The Act of May 11, 1881, P. L. 20, which requires copies of the application to be attached to all life and fire insurance policies, does not apply to a beneficial association which does not issue policies. Johnson *v.* Phila. & Reading R. R. Co., 375.

In an action of deceit where the defendant, who had stated that a signature which proved to be a forgery was genuine, has testified that he had seen the alleged maker write and is familiar with his signature, and that his statement as to genuineness was based upon his belief founded upon this knowledge, letters containing genuine signatures of the alleged maker are admissible in evidence, as a resemblance of the admittedly genuine writing to the forgery on the check would go directly to the question of his good faith in the representation made with reference to it. Lamberton *v.* Dunham, 489.

Illiteracy raises no presumption that words are used incorrectly; at most it lets in the conjecture that they may be. Ihrie's Estate, 60.

In a trial for murder there was evidence to show that the killing was done by a negro in the employ of the prisoner and a witness testified that, while he was outside of the enclosure where the killing was done, he heard the voice of the murdered man say "the coon did it," and that as the injured man was carried to a place across the lot where he was wounded he repeated the words. The witness was asked whether whilst the wounded man was lying on the floor of the shop, where his wounds were dressed, he made a similar statement: *held*, the evidence should have been admitted as part of the *res gestae*, if made so soon after the occurrence as to exclude the possibility of premeditation. Commonwealth *v.* Werntz, 93.

Witnesses testified in a case of murder by stabbing, that the defendant was the only person in the assemblage who had a knife. The defence offered evidence that another person in the same assemblage received injuries from a knife about the same time the deceased was stabbed and when the defendant was not present: *held*, such evidence should have been admitted. Id.

A witness testified that he saw the defendant stab the deceased, and the defence offered to show that, immediately after the fight, this witness had made statements contrary to and inconsistent with this testimony: *held*, such evidence should have been admitted. Id.

EXECUTION. A pluries fi. fa. issued and duly prosecuted does not lose its priority because the party who issued it had previously issued a fi. fa. and an alias which he had stayed. Sweet *v.* Williams, 36.

An execution will not be postponed for the fault of the officer who should have carried it into effect; his procrastination can affect the creditor, only, when the latter directs the officer not to proceed; mere sufferance will not bring about a postponement. Id.

The mere fact that a sheriff has lost a paper containing a list of stocks upon which he has levied, which paper it was intended should be made part of the return to a writ of fi. fa., does not destroy the effect of the levy as between the execution plaintiff and an assignee for the benefit of creditors of the defendant, to whom the assignment was delivered after the fi. fa. had come to the hands of the sheriff. *In re* Voluntary Assignment of Braden, 497.

National bank stock is subject to levy under a writ of fi. fa. Id.

See ATTACHMENT EXECUTION.

EXECUTOR. Where an executor in good faith, and with reasonable grounds to believe the estate in his care solvent, pays off judgments, he has an equitable right of subrogation, so far as personal estate is concerned,

EXECUTOR—*Continued.*
provided it can be allowed without injury to others. Seabright's Estate. Coyle's Appeal, 58.

An executor and trustee must account to the Orphans' Court of the county of his appointment; that Court has full jurisdiction and cannot be ousted by a Court of equity of another county. Henderson, Hull & Co., Limited *v.* Stryker, 151.

An accountant cannot charge against one of the distributee's share the expense of successfully defending a suit against him individually for such share in another State, although such suit indirectly benefited the estate. Whatever costs he is entitled to recover are incidental to the judgment in his favor and must be collected under the law of the State where it was obtained. Roberts's Estate, 250.

As a general rule, an executor is not bound to defend his testator's will, and if he undertake to do so it must be as the agent of and in the interest of those benefited by his action. Titlow's Estate, 252.

Either of two executors has the right to receive and give a discharge of a debt due to the testator and that right is not impaired by the death of his co-executor. Packer *v.* Owens, 423.

A grant of letters of administration d. b. n. c. t. a. to another in place of a deceased executor, who is not a sole executor, does not affect the right of a surviving executor to fulfill his office. Id.

A surviving executor who has full authority to receive money due to a decedent's estate may enter formal satisfaction of record. Id.

A payment in conformity with an absolute decree of the Orphans' Court making an award protects the executor and also the distributee, although no refunding bond be given by the latter. Ferguson *v.* Yard, 429.

A reasonable amount expended in the purchase of a tombstone for the grave of the decedent is a proper credit in an executor's account. Webb's Appeal, 571.

An executor should not be surcharged with the amount of a judgment due the estate paid to his attorney, who was also the attorney of decedent, unless the executor has been grossly negligent in failing to obtain the amount from the attorney. Id.

EXEMPTION. Parties attending on or returning from a magistrate's court are exempt from service of summons. (C. P.) Carstairs *v.* Knapp, 292.

Where, by agreement, testimony is taken for use in a case pending in another State and, to be present at the taking of the testimony, a party to such case comes within this jurisdiction, while such attendance may not exempt him from service of process here at the suit of a third person, as he is not here by process or in attendance upon a case here pending, yet he is exempt from service at the suit of the party to the case in which the testimony is to be used, as the agreement between the parties is a waiver of process and the parties thereto stand as though the evidence were taken in pursuance of process. (C. P.) Partridge *v.* Powell, 576.

Unmarried daughters, without means of support, living with and dependent upon their father, are "children" within the letter and spirit of the Act of April 14, 1851, and, therefore, entitled to the exemption provided for in that Act. (O. C.) Young's Estate, 316.

The word "children" in the Act of April 15, 1851, does not necessarily mean minor children only. Id.

Where a decree has fixed a widow's right to her exemption in cash, such decree cannot be attacked collaterally in a subsequent proceeding. (O. C.) Carr's Estate, 448.

EXEMPTION FROM TAXATION. Exemption of church property from taxation does not exempt from municipal assessment for improvements. See TAX-

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EXEMPTION FROM TAXATION—*Continued.*
ATION. Appeal of M. E. Church of Sewickley, 554.
See TAXATION. Commonwealth *v.* Philadelphia & Erie R. R. Co., 217. WIDOW. Grieve's Estate, 495.

EXPECTANCY. At law, a valid transfer cannot be made of an expectancy; in equity, however, if the consideration for such a transfer be a fair and honest one the assignment will be treated as an agreement to transfer when the assignor's title accrues and it will be held to take effect as an assignment when the expectant interest vests in the assignor. Kuhn's Estate, 155.

EXPERT. In cases in which the use of land, taken by virtue of the right of eminent domain, has been restricted to a specific purpose, witnesses who are best informed in regard to the use of property for such a purpose are the persons usually best qualified to testify as to value, without regard to whether they are experts as to land values or acquainted with the neighboring property. Boteler *v.* Phila. & Reading Terminal R. R. Co., 261.

EXTINGUISHMENT. Extinguishment is the extinction of a charge or equity by its passing into the hands of the owner of the land charged and it takes place when the same hand that is to receive is to pay. Henderson, Hull & Co., Limited, *v.* Stryker, 151.

FAMILY COMPACT. See PUBLIC POLICY. Enders *v.* Enders, 118.

FOOT FRONT RULE. See MUNICIPAL ASSESSMENTS. City of McKeesport *v.* Busch, 564; McKeesport *v.* Soles, 570.

FOREIGN INSURANCE COMPANIES. Foreign insurance companies licensed to transact business in this State have always been considered and are, in fact, essentially a distinct class of corporations, justifying and requiring legislation appropriate to the class itself. Kennedy *v.* Agricultural Insurance Company, 457.

The Act of April 4, 1873, as amended by the Act of June 20, 1883, P. L. 134, was designed to place such companies within easy and convenient reach of process, and the terms of the Act are very comprehensive. "Any and every writ" in the Act clearly comprehends an attachment execution, and service upon the State agent anywhere within the State is a good service upon the company. Id.

FORFEITURE. Forfeiture of shares of a stockholder, for failure to comply with a duly levied call for assessment in compliance with the terms of articles of association, will not be relieved against in equity, hence the terms of the articles must be strictly complied with and all provisions in regard to notice absolutely observed. Morris *v.* The Metalline Land Co., 187.

When articles of association provide for notice by publication in certain newspapers and also for notice by mail, failure to comply with the provisions in regard to publication in a particular newspaper avoids the forfeiture, even if it be shown that actual notice of the assessment called was given to the stockholder affected. Id.

The cases in which a shareholder has been held, in equity, to have acquiesced in the forfeiture of his shares are cases in which either the excuse for non-compliance was insufficient, or the delinquent stockholder held aloof while others were furnishing means to carry on the business or there was clear evidence of intentional abandonment of the stock, after full notice of forfeiture proceedings. Id.

When time is not stipulated as essential, and a forfeiture for any matter fully compensable in damages is provided as a penalty whose object is to enforce performance of another and principal obligation, equity will relieve against its enforcement, and will not permit it to be used for a different and inequitable purpose. Lynch *v.* Versailles Fuel Gas Co., 558.

FORFEITURE—*Continued.*

A lessor who intends to enforce forfeiture in case rent is not paid punctually is bound to ascertain on the very day it is due whether it has been paid or not and give prompt notice of forfeiture. Id.

FORGERY. See EVIDENCE. Lamberton *v.* Dunham, 489.

FRAUD. When the evidence shows that a collection of pictures has been published in book form and has acquired a reputation valuable for the purposes of sale, an imitation of the said collection in style, form and size, which so closely resembles the first collection as to naturally deceive the ordinary picture book buyer is, although called by a different title, such a fraud upon the rights of the publisher of the first collection as to entitle him to relief by an injunction and account. (C. P.) Shepp *v.* Jones, 29.

Where the agent of the lessor occupies a position of trust and confidence towards the lessee a stipulation for a secret profit to himself is sufficient fraud to vitiate the contract. (O. C.) Heckman's Estate, 199.

Where a trust relation exists and it is alleged in a petition that there was a fraudulent concealment of facts and that a confirmation of trustees' account was obtained by agreement, to which petitioner was not a party, the mere lapse of ten years since the confirmation of said account does not show such laches as will bar petitioner's right to a review, when it appears that he acted promptly after a knowledge of the facts. Ellison's Estate, 231.

Where means of knowledge respecting matters, alleged to have been falsely represented, are equally open to purchaser and vendor, the former is charged with knowledge of all that by the use of such means he could have ascertained, but this rule is not applicable when a knowledge of the matter referred to was very difficult to obtain, and it appears that the vendor expressly planned to mislead the purchaser. Brotherton *v.* Reynolds, 330.

The children and heirs at law of C. agreed to withdraw his will from probate, no letters having been granted, and assented to the appointment of an administrator, who sold the real estate on an order of the Orphans' Court for payment of debts. After the sale, the will was proved and the trustees under the will brought ejectment against the purchaser at the Orphans' Court sale; *held*, that if made in fraud of rights of another, not a party to the agreement, the Orphans' Court sale was void as to him, and that evidence tending to establish such fraud should have been admitted. Sager *v.* Mead, 333.

GRADE CROSSINGS. See RAILWAYS. Citizens' P. R. R. Co., *v.* East Harrisburg P. R. R. Co., 440.

HABEAS CORPUS. Until the final disposition of a case and an order in pursuance thereof it cannot be the subject of review by the Supreme Court: hence an order in habeas corpus proceedings for the possession of a child which contains the provision that the writ itself shall stand over as a pending writ, is not a subject for an appeal. Commonwealth *ex rel.* Blatt *v.* Parker, 471.

HIGHWAY. Proceedings to open are necessary, before a plotted street becomes an actual highway; the mere plotting vests in the public no present right of user. The report of the commissioners under the Act of Assembly of April 3, 1867, is notice of an intention to appropriate land covered by the plotted streets for use as highways whenever that shall become necessary; but it does not presently disturb the owner's possession or confer the right of user on the public. Commonwealth *v.* Kline, 90.

Ordinarily, one corporation has no standing to raise the question of the right of another corporation to use the streets of a city. The State alone may invoke the

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HIGHWAY—*Continued.*
chancellor's aid where the powers granted by it are not properly exercised, or the city may have a standing in Court when its rights have been invaded. (C. P.) Peoples' Passenger Railway *v.* Union Passenger Railway Company, 311.

The natural and reasonable construction of the Act of May 14, 1889, P. L. 211, is, that the streets or highways mentioned therein include the bridges connecting with and constituting portions of them. Pitts. & West End P. R. W. Co. *v.* Point Bridge Co., 393.

Responsibility of supervisors for condition of bridges in view of change in use of roads, see BRIDGE. Coulter *v.* Township of Pine, 399.

In determining amount of damages suffered by a property owner by the grading of a street, the fact that the newly established height had previously been assigned by the municipal authorities for a street, intersecting the first at the edge of the property in question, and that a proceeding to open the intersecting street at that height was previously begun, is not admissible as a guide to the jury in the determination of damages. Markle *v.* Phila., 346.

In estimating damages under such an issue the obligation of the municipal authorities or the absence of such obligation, under special circumstances of a street, to furnish ordinary highway improvements is not a consideration for the jury. Id.

R., owning land, laid out a street over it for public use and on more than one occasion applied to the borough authorities to put and keep the street in order, and public money was spent in so doing. The road ran along the northern edge of a cemetery, of which it originally formed a part, but no lots had ever been sold within its limits nor did its taking as a street interfere with any of the lots sold nor access to them by the regular laid out paths. Subsequently the cemetery company, into whose possession the cemetery had passed after the dedication of the road by R., purchased another lot on the northern line of the road which they made part of their cemetery and closed the road: *held*, (*a*) that R.'s dedication of the road did not interfere with the rights of the parties to whom he had sold lots; (*b*) that the opening of the road by the borough council was not a violation of the Act of April 18, 1849, forbidding the opening of a street through a burial ground or cemetery. Dubois Cemetery Co. *v.* Griffin, 530.

HUSBAND AND WIFE. The husband is primarily liable for necessaries for his family, although they are contracted for by the wife on the credit of her own separate estate. Roll *v.* Davison, 562.

Judgment and recovery against husband for necessaries, when not conclusive against the liability of wife. Id.

While the power of the husband over the separate estate of his wife has been taken away, his liability for her support, and that of his children, remains, and he is liable for necessaries furnished them with or without his knowledge. Moore *v.* Copley, 563.

A wife is not liable for family supplies unless she expressly undertakes to become so. The undertaking is never presumed, and must be shown affirmatively. A charge to the wife by the creditor is no evidence of her consent to be so charged. Id.

Where a husband has deserted his wife and the conjugal separation does not arise from any fault of hers, the family relation still exists and his domicile is hers, so as to entitle her to claim a widow's exemption. Grieve's Estate, 495.

See MARRIED WOMEN.

ILLITERACY. Illiteracy raises no presumption that words are used incorrectly; at most, it lets in the conjecture that they may be. Ihrie's Estate, 60.

INSURANCE. The refusal of an insurance company to pay a loss on a specified ground, estops it from asserting on the trial another ground of defence of which it had full knowledge, where the assured has incurred expense and brought action in the belief that the only objection was that communicated to him. McCormick *v.* Royal Insurance Co., 23.

A common carrier cannot require a shipper to insure the goods against fire so as to relieve the carrier from the consequence of its negligence. Willcock *v.* Penna. R. R. Co., 545.

Insurance, Fire. The business of insurance against loss by fire is a proper subject for the police power of the State. Commonwealth *v.* Vrooman, 97.

The Act of February 4, 1870, P. L. 14, prohibiting any person from issuing a policy or making a contract of indemnity against loss by fire without authority expressly conferred by charter, is a valid exercise of the police power and is constitutional. Id.

The Act of April 16, 1891, P. L. 22, providing for a uniform policy of fire insurance, is unconstitutional as a delegation of legislative power. O'Neil *v.* American Fire Insurance Company, 513.

The assignment or subrogation clause of the standard policy of fire insurance relieves the insurer, who has paid his policy, from the burden of showing his equity to be subrogated to the rights of the insured against the person primarily responsible for the loss and converts it to a legal right, which must prevail unless a counteracting equity is shown by the other party. Stoughton *v.* Manufacturers' Natural Gas Co., 519.

Ordinarily, as between the insurers, claiming subrogation, and the insured, the amount of recovery against the person whose tort caused the loss represents the entire loss suffered by the insured. Id.

Where a policy contains what is known as a space clause and, after the subject of the policy has been destroyed by fire, the insurer's adjuster visits the premises and, after examination, tells the assured that there will be no objection to payment on the score of the space clause and, afterwards, a correspondence takes place between the assurer and assured in which the former, with full knowledge of the facts, bases its refusal to pay solely on a denial that the assured owned the property destroyed, such conduct constitutes a waiver of the right to take advantage of the space clause and the insurer will be estopped from setting it up after action brought. McCormick *v.* Royal Insurance Co., 23.

Estoppel of company to deny approval of additional insurance. See ESTOPPEL. Stauffer *v.* Penn Mutual Fire Association, 298.

Insurance, Life. Money paid on a policy of life insurance is not the pecuniary value of the life but of the premiums paid, hence the amount recoverable under the policy is not to be deducted from damages allowed for injuries resulting in death. Coulter *v.* Township of Pine, 399.

A certificate of membership in a beneficial association is not an insurance policy within the meaning of the Act of May 11, 1881, and it is not requisite that the by-laws be contained in or attached to the certificate. Lithgow *v.* Supreme Tent of the Knights of the Maccabees of the World, 493.

A life insurance company, chartered in another State and having branch offices in Philadelphia, issued a life insurance policy to one B. by the terms of which it was to be null and void if the dues or assessments were not paid at maturity and no modification of this contract or waiver of forfeiture was allowed "except by an agreement in writing signed by the president or secretary of the association whose authority for this purpose cannot be delegated." The by-laws of the association provided "any

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INSURANCE—*Continued.*
member failing to pay his semi-annual payments and pro rata assessments at the death of a member, within thirty days after notification or according to the terms stated in the notice shall forfeit his membership" and "others shall be forfeited in like manner as those that fail to pay their actual dues with opportunities for reinstatement on similar conditions." There was nothing in the policy or application therefor or in the by-laws prescribing conditions of reinstatement, but the assessment notices sent to B., signed by the secretary, stated that after forfeiture, no payment could be received or reinstatement made, except upon the condition that the insured was alive and in good health. In or about 1889-'90, B. received some five notices of assessment which he did not, pay at the proper time, but did subsequently in December 1890. After this he received other assessment notices sent by the secretary, after the lapse of his policy by the delay in paying the five assessments containing the notice given above. He then sent in to the company, through its Philadelphia agent, an application for reinstatement with the requisite proof that he was in good health and in every other respect in a good insurable condition, which application was refused. He then brought suit to compel his reinstatement. The company defended on the ground that the money paid by B. had been received by the agent only on the condition that the company should reinstate him and that upon refusal so to do, a return of the money had been promptly tendered him: *held*, (1) That the action of the company in sending to B. notice of assessment, after his policy had lapsed, was a recognition of him as a member. (2.) That as these notices were signed by the secretary they were a waiver of the forfeiture. (3.) That the company was estopped by its action from refusing to recognize B. as a member and that B. was entitled to reinstatement. Commonwealth *ex rel.* Williams *v.* Provident Building Association, 147.

Insurance, Live Stock. A by-law of a live stock mutual insurance company, provided "the insurance of this company shall be confined to a distance not exceeding twelve miles from the borough of Hatboro." The policies did not describe the insured live stock as located at any particular place or provide that they should remain within the twelve mile limit. In an action upon a policy for the death of a horse, which the owner had permanently removed with him beyond the limit: *held*, that the law did not favor forfeitures and the by-law in question fairly admitted of a construction which prevented forfeiture. Reck *v.* Hatboro Mutual Live Stock and Protective Insurance Company, 180.

INSURANCE BROKER. A person doing business as agent for an association of individual underwriters, each of whom binds himself severally and not jointly, is not liable to the penalty of the Act of May 1, 1876, sec. 47, P. L. 53, for although the word "company" is used in that section, it must be held to mean corporations only, the plain reading of the entire Act showing that its intention throughout is confined to incorporated companies. Commonwealth *v.* Reinoehl, 20.

INTEREST. Whether interest should be allowed upon arrears of an annuity charged upon land is a question to be decided by a jury in view of all the facts of the case. Rohn *v.* Odenwelder, 181.

INTERSTATE COMMERCE. The Act of April 15, 1891, P. L. 17, forbidding peddling without a license, providing that nothing therein shall prevent any citizen of this Commonwealth from peddling the products of his or her farm or garden and empowering cities of the first-class to fix by ordinance the amount of the fee to be paid for a license is unconstitutional, as a discrimination against citizens of other States and as a restraint upon interstate commerce. (Q. S.) Commonwealth *v.* Simons 511.

JOINT STOCK ASSOCIATION. So far as shareholders are concerned, the articles of association of a joint stock company constitute the law governing the rights of the members or stockholders and the business of the association must be conducted in accordance with the provisions of such articles. Morris *v.* The Metallic Land Co., 187.

In order to make a forfeiture of the shares of a stockholder for failure to comply with the call for an assessment, duly levied by the managers, the terms of an article permitting a forfeiture must be strictly complied with and all provisions in regard to notice absolutely observed. Id.

JUDGE. The President Judge is not required to take an oath in addition to his official one, before entering on the duty of filling the jury wheel. Klemmer *v.* Mount Penn Gravity R. R. Co., 142.

JUDGMENT. Proper form of judgment against garnishee in attachment execution. See ATTACHMENT EXECUTION. Longwell *v.* Oil City Electric Co., 370.

A judgment cannot be stricken off, except for want of jurisdiction or other fatal irregularity apparent on its face, and an appeal from a refusal to strike off a judgment brings up the record alone. City of Philadelphia *v.* Jenkins, 276.

Where a married woman, against whom has been entered a judgment upon a promissory note with warrant to confess judgment attached, denies the execution of the note and alleges a debt to her on the part of the payee of the note the judgment should be opened and an opportunity afforded her to defend. Steiner *v.* Scholl, 227.

Where a judgment binding certain land is satisfied of record and afterwards the satisfaction is stricken off, the terre tenant has the right to appeal from the order striking off the satisfaction. Whitesell *v.* Peck, 540.

The Act of June 1, 1887, does not alter the provision of the Act of February 24, 1834, sec. 25, P. L. 77, that the lien of a judgment in force at the death of the judgment debtor is continued unimpaired for five years from the time of said death. Seabright's Estate. Stuart's Appeal, 55.

Priority of lien of. See LIEN. Fullerton's Appeal, 434.

Assignment of judgment, in form but in reality a power of attorney with pledge of the judgment as security. See POWER OF ATTORNEY. Vanderpool *v.* Vanderpool, 157.

In the revival of a judgment the recital of the names of equitable plaintiffs is mere surplusage. Assigned Estate of Ernst, 158.

When a plaintiff parts with his interest in a judgment by assignment revival can be had in his name, only, though for the benefit or use of the equitable plaintiffs. Id.

When portions of a judgment are assigned to different persons, any one of them has the right to use the name of the legal plaintiff to revive it and when the writ is issued, it is for the benefit of all. Id.

An attorney at law has no authority to satisfy his client's judgment, unless the money represented thereby be actually paid to him: if he go beyond this and accept securities instead of money, the client, when the fact comes to his notice, has his election to ratify or repudiate the unauthorized act of his attorney. Whitesell *v.* Peck, 540.

JUDGMENT FOR AMOUNT ADMITTED. The object of the Act of May 31, 1893, is to permit the plaintiff to have judgment for that "part of the claim" about which there is no contention, and the manner in which the claim is divided is immaterial. "Part of the claim" may be one of two items or just as well half of each of two items. (C. P.) Calkins *v* Keely, 315.

See RES ADJUDICATA.

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JURISDICTION. It is a question for the higher Court to decide whether an act done or to be done by a subordinate officer or court is ministerial or judicial. Commonwealth *v.* Thomas, 255.

The one-half of a bridge built over a creek, the middle of which is the county line between the two counties, is subject to the jurisdiction of the Court of the county within whose boundaries it lies and the officers and agents of the other county may be enjoined by said Court from tearing up rails from that portion of the bridge. Delaware County and Phila. Electric Railway Company *v.* Philadelphia, 348.

This question of jurisdiction is not affected by the fact that one-half of the expense of erecting the bridge was defrayed by the county whose officers it is sought to enjoin. Id.

The officers of a county and their agents are properly subject to the jurisdiction of the Courts of any other county, within which they attempt to commit an act of trespass, and the rule that the municipality can only be sued in the Courts of the county where it is situated has no application under such circumstances. Id.

The Orphans' Court has jurisdiction to enjoin the sale of mortgaged trust property, although the Court of Common Pleas may have refused to open the judgment upon the bond accompanying the mortgage. (O. C.) Trust Estate of John Lawrence, 406.

An executor and trustee must account to the Orphans' Court of the county of his appointment; that Court has full jurisdiction and cannot be ousted by a court of equity of another county. Henderson, Hull & Co., Limited, *v.* Stryker, 151.

Where land is taken for a road by a city, which has notice of the appointment of viewers, their report and the plaintiff's appeal, and pleads without objection to the issue framed on the appeal, the city cannot raise the question of jurisdiction by a point presented upon the trial. Larkin *v.* City of Scranton, 42.

The conclusive character of a judgment or decree depends not only on the theoretical jurisdiction of the court pronouncing it but upon actual jurisdiction over the persons whose rights are the subject of investigation. Unless a court has the parties before it by appearance or service of process it cannot bind them by its adjudication. White's Estate, 105.

Upon questions of discipline, as well as of faith, the decisions of ecclesiastical courts are ordinarily final and will be respected and enforced by courts of law. Krecker *v.* Shirey, 165.

JURY. The list containing the names, occupation and residence of every person placed in the jury wheel should be formally filed in the Prothonotary's office and there remain, but if properly made out and placed in said office, although it be afterwards taken to the sheriff's office and for most of the time kept there, there is no such gross irregularity as calls for the quashing of the array, but if the list were never made out there would be sufficient ground to quash. Klemmer *v.* Mount Penn Gravity R. R. Co., 142.

Jury commissioners who, before proceeding to select names for the jury wheel, prepare printed lists of proper persons, made up largely from the information of other persons, do not violate their duty, but if they fill the wheel from lists prepared by others, there is a gross violation of their duty which cannot be cured by waiver and necessitates the quashing of the array. Id.

An oath of jury commissioners that they will faithfully fill the jury wheel "pursuant to the provisions of the Act of Assembly of April 10, 1887, entitled an Act, etc.," is not a proper oath, yet, when the sheriff and jury commissioners have, on entering upon office, taken the oath prescribed for county officers by the Constitution, the de-

JURY—*Continued.*

parture from the correct form will not move the Supreme Court to reverse a judgment because the jury which has given the verdict was selected by commissioners, who had taken the oath above set out, when the appellant did not move to quash the array until several months after he had learned that the proper form of oath had not been observed. Id.

The President Judge is not required to take an oath in addition to his official one before entering on the duty of filling the jury wheel. Id.

That the jury wheel when filled has been kept by one of the commissioners at his house, there being no pretence that it has been tampered with, is no ground for quashing an array of jurors. Id.

JUSTICE OF THE PEACE. When reference to arbitration may be made in an action before. See ARBITRATION. Climenson *v.* Climenson, 471.

LACHES. When laches may have the effect in equity of depriving the plaintiff of certain relief sought, but yet not bar him from other relief. See EQUITY PRACTICE. Westhaeffer *v.* Lebanon and Annville Street Ry. Co., 33.

Under a will, eight children, including B. and C., were entitled to equal proportions of the mineral rights of the testator. In 1879, property of the testator was sold, nominally for the payment of debts, but in reality to put title in one name, and was purchased by D. one of the children, who executed a deed of trust agreeing to hold said land "in trust for the benefit of all the heirs of my father" . . . . said heirs were "to pay an equal pro rata share in the said purchase money in the said tracts of land." D. subsequently leased the coal in 1883 and collected large royalties on the same. In 1884, B. and C. filed a bill to have D. declared a trustee for them, as to two-eighths of the coal and as to the account: *held*, that B. and C. were not guilty of laches in not paying to D. their share of the purchase money, paid by him, as it did not appear that D. ever demanded it and it further appeared that there was a fund in the hands of D. more than sufficient to reimburse him, and that B. and C. were entitled to two-eighths of the minerals and an account. Christy *v.* Christy, 78.

When articles of association require publication in certain newspapers and provide for forfeiture of stock in case of failure by a stockholder to pay assessment after thirty days, in default of such publication there is no time at which the shareholder is in default for failure to pay, hence any forfeiture as for such a default declared by the company is invalid and the stockholder may bring suit to set aside the alleged forfeiture of his stock, even after a very long period without being barred of his right by laches. Morris *v.* The Metalline Land Co., 187.

Where the trust relation still exists and it is alleged in a petition that facts were fraudulently concealed and that the confirmation of the trustee's account was obtained by an agreement, to which petitioner was not a party, the mere lapse of ten years after the confirmation of said account does not show such laches as will bar petitioner's right to a review, when it appears that she acted promptly after a knowledge of the facts. Ellison's Estate, 231.

LANDLORD AND TENANT. A lessee, having notice that a lessor is an agent for others, is bound by a notice given him by the lessor's principal of the revocation of the agency. This is not altered by the fact that the agent is one of several owners of the demised premises, and if, after notice, the lessee pay rent to the agent he will be still liable to the other owners of the premises for their shares of the rent. Barrett *v.* Bemelmans, 76.

The right of alienation is an incident of an estate for

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LANDLORD AND TENANT—*Continued.*
years, in the absence of a restriction in the lease creating it; the lessee may therefore assign the term without the consent or joinder of the lessor and, in such case, the lessee continues liable upon the covenants of the lease, but as between himself and the assignee the latter is the principal debtor. (O. C.) Heckman's Estate, 199.

A lessor who deals with the assignee of a lease and accepts rent from him as tenant does not discharge the lessee from liability. Id.

An assignment brings the assignee into immediate privity with the lessor, differing in this respect from a sub-lease. Id.

K. was the tenant of a leasehold by a lease, which provided that in the event of the property being taken by a railroad the lease should be terminated without prejudice to the rights of either party in any suit for damages sustained by the appropriation of the premises: *held*, such a provision was not a bar to an action by a sub-tenant for the destruction of his leasehold. Boteler *v.* Phila. & Reading Terminal R. R. Co., 261.

A landlord is not entitled to recover a dividend out of an assigned insolvent estate upon a claim for rent, accrued after the assignment and after the occupancy of the premises by the assignee had ceased. Assigned Estate of Weinmann, 321.

The mere acceptance of the trust by an assignee for benefit of creditors is not an acceptance of a lease of premises held by the assignor, so as to make the assignee liable for subsequently accruing rent. Id.

When a landlord seeks to enforce a claim based on an alleged election of an assignee to hold a lease, it is incumbent upon him to prove, by clear and satisfactory evidence, an express agreement by the assignee so to hold it, or conduct on his part which necessarily implies that he had elected so to do. Id.

In an action, upon a lease, to recover rental for premises, (in this case a water right) held or used by the defendant, it is competent for the defendant to show, notwithstanding the lease signed by the lessor only, that he did not occupy the premises under the lease or pay rent there under but occupied by virtue of another and oral contract. Johnson *v.* Smith, 462.

A husband executed to a natural gas company a lease for oil purposes of certain land, owned by himself and wife as tenants in common. When the first instalment of rent fell due, the lessee objected to paying it, for the reason that the t tle to part of the land was in the wife and the lease had been signed by the husband only. The husband then undertook to obtain his wife's signature to the lease, which paper the president of the defendant company declined to deliver, saying that he would send it by messenger. This was not done, but, instead, the company wrote to the plaintiff offering to surrender the lease, if he would execute to it a written release and discharge of all rights to rent or royalty. This he refused to do and the company retained the lease for more than a year afterwards and until after the commencement of action when it unconditionally surrendered it. There was no fraud on the part of the plaintiff or his wife and no interference or attempted interference by the wife with the defendant's control of the land: *held*, that the lessee had had that sort of possession under its contract to which it was entitled and had no defence, in law or equity, against a demand for rent and royalty payable at the expiration of the first six months. Kunkle *v.* People's Natural Gas Co., 465.

Where, in a lease for the development of oil territory, a fixed rent is provided for delay in putting down wells, and, no date for payment being expressed, it is left to fall due by operation of law at the close of each year, time is not of the essence of the contract to pay rent to the extent of ousting equitable relief in case payment be not made on the last day of the year. Lynch *v.* Versailles Fuel Gas Co., 558.

A lessor, who intends to enforce a forfeiture in case rent be not paid punctually, must ascertain the fact of non-payment on the day the rent is due and give prompt notice of the forfeiture. While a delay of seven days will not ordinarily estop the lessor, yet when in that time the lessee expends money on the leased premises, with the knowledge of the lessor, the latter will be restrained from exercising the right of forfeiture. Id.

LEASE. See LANDLORD AND TENANT.

LEGACY. The rule that a legacy to a creditor will be deemed to have been given in satisfaction of the debt, does not apply, unless the legacy is equal to or greater than the debt and is not contingent or uncertain. (O. C.) Kendrick's Estate, 46.

LEGISLATION. When the constitution of a church provides for the fixing of a place of meeting from time to time by a certain body, the act of fixing the place of meeting is a matter of administration and not of legislation and the power to perform said act may be delegated. Kreeker *v.* Shirey, 165.

LIEN. The Act of May 12, 1891, providing that money due for wages of a certain character shall be a lien on property sold by execution, or otherwise, on account of the death or insolvency of the employer, does not give a specific lien on the property in the hands of the owner or his vendee, but refers to a sale effected by legal process where a fund is raised for distribution, and the employer may, therefore, transfer all his property by bill of sale to one of his creditors, although the effect of such transfer be to cut out the wage claims. Wilkinson *v.* Patton, 17.

As between other lien creditors and the Commonwealth the latter must be postponed unless a certificate of lien has been filed by the auditor-general in pursuance of the Act of 1827, but the Commonwealth's lien has priority over the claims of general creditors claiming under an assignment. (C. P.) *In re* Assigned Estate of Goodwin Gas Stove and Meter Co., 234.

B. died in 1876. An action was brought in 1886 against his executrix, upon which judgment was obtained: *held*, that under sec. 24 of Act of February 24, 1834, plaintiff had lost all lien as against the real estate of B., the claim not being founded upon a mortgage or secured by judgment. Ferguson *v.* Yard, 429.

F., a judgment creditor of one R. McC., as for his part of a transaction, satisfied of record his judgments; the transaction failing of completion, the satisfaction was, on rule taken, stricken off. C. McC. entered judgment against the same defendant, pending the disposition of the rule to strike off satisfaction. Execution was had against R. McC.'s realty upon a judgment, junior to F.'s but senior to McC.'s, and, in distributing the fund, the sheriff applied it first to the satisfaction of F.'s judgments, the fund not being sufficient to cover F.'s judgments and certain judgments entered before F.'s judgments were satisfied, but junior thereto: *held*, that as F.'s judgments were entitled to precedence over all the judgments except C.'s, C. had no equity against any judgment except that of F. and C.'s only claim would be in case he was prevented from sharing in the fund by reason of the appropriation of F.'s judgment. Fullerton's Appeal, 434.

See JUDGMENT, MECHANICS LIENS, MUNICIPAL CLAIMS.

LIFE TENANT. An improvement upon the real estate of a life tenant, not in the nature of repairs, is chargeable upon the fee. (O. C.) Bradley's Estate, 340.

Work done to property, pursuant to municipal order, is not chargeable to a life tenant, who acts merely as a compulsory agent to save the property from a lien. Id.

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LIGHT AND AIR. When a grantor conveys a portion of his premises, immediately adjoining premises already owned by the grantee, the consideration recited being, *inter alia*, the grant of an easement for "light and air" for the grantor's remaining property and the grantee for himself and his assigns agrees, by deed, not to build upon said conveyed premises to a height greater than sixteen feet and executes a covenant, running with the land, assuring to the grantor the before mentioned easement of light and air, a wall afterwards erected by the grantor on the line between his land and the piece of land granted is not to be regarded as an ordinary party wall and the grantor will not be restrained by injunction from leaving windows or openings therein at a height above said sixteen feet. Weigman *v.* Jones, 185.

LIMITED PARTNERSHIP. At the time of the renewal of a limited partnership, the special capital must be unimpaired or the special partner is liable as a general partner. (C. P.) Fourth Street National Bank *v.* Haines, 353.

Special partners are liable as general partners, if they have contributed goods and merchandise in lieu of cash, unless the contributions are first appraised as directed by the Act of March 30, 1865, P. L. 46, and their nature and value fully set forth in the certificate of formation. (C. P.) Siegel Bros. *v.* Wood, 355.

An original certificate for formation of a limited partnership contained the following: "The amount contributed by said special partners is $200,000, one-half thereof being in goods and merchandise." No description or valuation of the goods was given: *held*, the special partners were liable as general partners under the Act of 1865. Id.

An averment in a statement that the capital of a limited partnership was impaired at the time of a continuance must be specifically denied in the affidavit of defence. Id.

A false statement in a certificate of renewal of a limited partnership does not give cause of action in assumpsit. (C. P.) Reitzel *v.* Haines & Co., 359.

Under the Act of 1836, a falsehood in a statement of original information of a limited partnership is penalized by holding the special partner liable as a general partner; but there is no imposition of this penalty for a false statement in a certificate of renewal. The eleventh section of the Act imposes the penalty only where the "manner" of renewal was "otherwise than that required for original formation." Id. FINLETTER, P. J., dissents.

LIMITATION OF ACTIONS. Where a will directs the payment of certain debts specified in the will, the statute of limitations begins to run when the will goes into effect. (O. C.) Pillion's Estate, 68.

Where an attorney in fact collects money due to his principal and gives to his principal his note for the amount, the fiduciary relation is at an end and the statute of limitations begins to run as in any ordinary case of debtor and creditor. Stevens's Estate. Wiestling's Appeal, 249.

An acknowledgment to remove the bar of statute of limitations must identify the debt, specify the amount thereof or furnish a basis from which it may certainly be ascertained and be equivalent to an unqualified promise to pay. Patterson *v.* Neuer, 527.

Several insufficient acknowledgments will not constitute a sufficient one. Id.

LIQUIDATED DAMAGES. Whether a clause in an agreement, whereby one selling a practice binds himself in a penal sum for the faithful performance of his part of the agreement, is to be treated as a penalty or as liquidated damages must be determined by the facts of each case; the controlling elements being the intent of the parties and the circumstances of the case. The relation which the sum bears to the extent of the injury provided against will also be considered. Wilkinson *v.* Colley, 177.

LIQUIDATED DAMAGES—*Continued.*

LIQUOR LAW. Where an application for a license to sell liquor, either wholesale or retail, is made in due form and supported by the petition of citizens in good standing and no remonstrance is filed, it is an arbitrary exercise of the discretionary power of the Quarter Sessions to refuse to grant the license, for no reason other than that the Court has no personal knowledge of the facts alleged in the petition, and such arbitrary action is contrary to law. Kelminski's License, 309.

The Quarter Sessions may allow an applicant for a liquor license to substitute a sufficient, in lieu of a defective, bond before granting a license. *In re* License to Branch, 310

LOST WILL. See WILL. Estate of Lot Gardner, 417.

MAGISTRATE. No appeal lies from an order of the Common Pleas reinstating an appeal from an alderman, which had on motion been stricken off; such order is interlocutory only, and simply determines that the case is properly in the Common Pleas. Cupples Wooden Ware Co. *v.* Howe, 374.

MAGISTRATE'S COURT. Parties attending on or returning from a magistrate's court are exempt from service of summons. (C. P.) Carstairs *v.* Knapp, 292.

MANDAMUS. The right of the Court to compel by mandamus the register of wills to perform a ministerial or clerical act necessary to the proper adjudication of a question to be tried in court is undoubted. Commonwealth *v.* Thomas, 155.

Mandamus will not lie where full and ample remedy may be had either by appeal, writ of error or otherwise, reviewing the judgment, decree or order of the subordinate Court. Id.

MARRIAGE. A will speaks from its date of execution where it creates a separate use trust, if the beneficial legatee be either married or in direct contemplation of marriage. (O. C.) Pillion's Estate, 68.

MARRIED WOMEN. Where a married woman, against whom has been entered a judgment upon a promissory note with warrant to confess judgment attached, denies the execution of the note and alleges a debt to her on the part of the payee of the note, the judgment should be opened and an opportunity afforded her to defend. Steiner *v.* Scholl, 227.

A woman's will is revoked by her subsequent marriage, absolutely for all testamentary purposes. Craft's Estate, 413.

While an ante-nuptial agreement between a woman and a man whom she is about to marry may, in equity, be given effect to sustain the provisions of a will made before marriage, as to him, such agreement has no effect whatever upon the question of revocation by marriage with regard to the rights of third parties. Id.

To render the acknowledgment of a deed by a married woman sufficient, she must be separately examined by the officer taking the acknowledgment, must have full knowledge of the contents of the deed and voluntarily consent to the execution of it, and these facts must appear by the certificate of the officer. Spencer *v* Reese, 449.

The defective acknowledgment of a married woman cannot be cured, but if the certificate thereof only is defective, an acknowledgment having been made in fact, the certificate may be amended in accordance with the Act of May 15, 1878, P. L. 149, etc. Id.

MASTER. The finding of a master of questions of fact, approved by the Court below, will not be set aside in the Supreme Court except for clear error. Mere con-

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MASTER—*Continued.*
flict of testimony is not sufficient. Brotherton *v.* Reynolds, 330.

Where there is a disagreement between the Court and the master not as to the facts established but only as to their legal effect, the Court is quite as competent as the master to pass upon such effect and there is no presumption in favor of the master's finding. Dubois Cemetery Company *v.* Griffin, 537.

MEASURE OF DAMAGES. Where land is taken for public use, the measure of damages is the difference between the market value before and after the improvement and the jury may not consider the cost of replacing buildings, injured by the taking, as an independent item of damage. Larkin *v.* City of Scranton, 42.

The damages allowed by the Act of May 24, 1887, when an attachment under the Act of March 17, 1869, has been quashed, dissolved or ended, cover all legal costs, fees and damages by reason of the attachment, the latter including all damages for pecuniary loss, ordinarily and naturally resulting from the seizure of the goods, such as loss of sales, interruption of business, and expenses necessarily incurred, but not indirect or consequential loss or punitive damages for the malicious use of civil process. Commonwealth *v.* Magnolia Villa Land and Improvement Co., 87.

Where land is taken by a railroad company for the construction of its road and none of the property is left to the owner, the market value of the land taken is the true value of the damages recoverable. Boteler *v.* Phila. and Reading Term. R. R. Co., 261.

Measure of damages as against garnishee in attachment execution. See ATTACHMENT EXECUTION. Longwell *v.* Oil City Electric Co., 370.

Money paid on a policy of life insurance is not the pecuniary value of the life but of the premiums paid, hence the amount recoverable under the policy is not to be deducted from damages allowed for injuries resulting in death. Coulter *v.* Township of Pine, 399.

The measure of damages in an action upon an attachment bond is the costs, fees and damages, which are the actual and usual result of the seizure of goods. Berwald *v.* Ray, 458.

In determining the amount of damages, suffered by a property owner by the grading of a street, the fact that the newly established height had previously been assigned by the municipal authorities for a street, intersecting the first at the edge of the property in question, and that a proceeding to open the intersecting street at that height was previously begun, is not admissible as a guide to the jury in the determination of damages. Markle *v.* Philadelphia, 346.

MECHANICS' LIENS. Where the record and the appearances and the representations of the party in possession unite in presenting the case of an owner of a lot ordering materials for and erecting a house upon it, a material man who furnishes materials relying upon such apparent ownership is entitled to a lien for his claim. McCollum *v.* Riale, 389.

MINISTERIAL ACT. See JURISDICTION. Commonwealth *v.* Thomas, 255.

MORTGAGE. A sale by a mortgagor of a moiety of mortgaged premises and the receipt of the purchase money for the same by him casts the burden of the mortgage debt on the remaining part, when that is sufficient to pay the incumbrance. Turner *v.* Sharpneck, 366.

Where a mortgagee, with a knowledge of the fact that a portion of the mortgaged premises has been bought and paid for by a third person, subsequently releases from the lien of the mortgage the remaining part, which was of sufficient value to have satisfied the debt, such release will operate as a discharge of the lien of the mortgage

MORTGAGE—*Continued.*
as against the land bought by the third person. Id.

Knowledge in fact of the position of a purchaser of land bound by the mortgage is enough, however acquired, to affect the mortgagee who releases land covered by the same mortgage and retained by the mortgagor. Id.

The terre tenants of mortgaged premises are proper parties to an appeal from a decree refusing to set aside a lev. fac. Packer *v.* Owens, 423.

A mortgage is a sealed instrument which imports a consideration and the burden of proof lies on the mortgagor who alleges an illegal consideration or the failure of a lawful one, to establish either to the jury by competent evidence. Saalfield *v.* Manrow, 463.

Municipal claims for improvements made under the unconstitutional Act of June 14, 1887, P. L. 386, if made within the time specified by the curative Act of May 16, 1891, P. L. 78, may be set off against a purchase money mortgage dated since the passage of the curative Act. Lafferty *v.* Milligan, 551.

MUNICIPAL CLAIMS. The doctrine of assessment for benefits to pay for public improvements can only be defended upon the ground that the benefits are local and essential to the very property assessed, and then the assessment can only be made once. *In re* 54th Street, 400.

Owners of property, not abutting directly upon the line of an improvement, can not be subjected to an assessment even when the property is situated on the same street. Id.

The foot front rule is not applicable to rural neighborhoods. McKeesport *v.* Soles, 570.

Whether property, assessed for public improvements, is urban or rural is generally for the jury. Id.

The ground upon which a church building is erected is not exempt from municipal assessments for improvements to the property. Appeal of M. E. Church of Sewickley, 554.

Where an Act authorizing assessment enjoins the foot front rule, objections to its application growing out of inequalities of the surface which seem to make some cases harder than others are not fundamental, so as to make the rule inapplicable on that account. City of McKeesport *v.* Busch, 564.

The Act of May 16, 1891, P. L. 69, does not repeal the provisions of the Act of April 3, 1867, P. L. 732, (improvement of streets in McKeesport), but provides more specifically for the practice in cases where any final assessments have been made. Id.

The Act of June 10, 1881, authorizing service of a sci. fa. sur municipal claim on non-resident registered owners of real estate in Philadelphia by posting and publication is constitutional. City of Philadelphia *v.* Jenkins, 276.

Where the book entries of the claimant of a municipal lien describes the property, for which work is done and material furnished pursuant to order, it is of no consequence whether or not the name of the owner of the property be correctly set out. (O. C.) Bradley's Estate, 340.

Municipal claims for improvements made under the unconstitutional Act of June 14, 1887, P. L. 386, if made within the time specified by the curative Act of May 16, 1891, P. L. 78, are proper set-offs by the owner of the ground, in an action upon a purchase money mortgage dated since the Act of May 16, 1891. Lafferty *v.* Milligan, 551.

MUNICIPALITY. The Acts of May 13 and May 23, 1889, P. L. 196 and 277, are intended to remedy the intolerable confusion which was the effect of the unconstitutionality of the Act of May 24, 1887, P. L. 204, and as the true intent of the Act of May 13, is not in the least

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MUNICIPALITY—*Continued.*
doubt, it will not do to stick in the letter of its terms. It specifies ordinances and resolutions, but it also declares the city councils under the Act of 1887, to have been legally constituted, and its clear purpose is to validate municipal action based on the Act of 1887. Melick *v.* City of Williamsport, 39.

A municipality is not required to seek for defects in its sidewalks, the measure of its duty is to observe such defects as a reasonable supervision discloses. Lohr *v.* Borough of Philipsburg, 548.

NATIONAL BANKS. In an action by a national bank upon a promissory note, usury cannot be set up as a defence by the maker of the note or by his surety; the only remedy given by the Act of Congress is by a penal action to be brought for the recovery of double the amount of the illegal interest charged. Second National Bank of Clarion *v.* Morgan, 484.

National bank stock is subject to levy under a writ of fi. fa *In re* Voluntary Assignment of Braden, 497.

NEGLIGENCE. Where goods are sold to be delivered to purchasers, whose place of business is on the upper floor of a factory, the delivery is not complete until the goods are fastened to the lift for the purpose of being hoisted to the upper floor, and if the same be negligently fastened to the lift the purchasers are not responsible for the consequences. Fuhrmeister *v.* Wilson, 223.

Plaintiff's husband having been killed by the breaking down of a township bridge from the weight of his traction engine, it is proper to instruct the jury that the case turned upon the question whether or not traction engines had become usual and ordinary mode of travel when the bridge was reconstructed by the supervisors of the township and, under such instructions, a verdict of the jury for plaintiff is sustainable. Coulter *v.* Township of Pine, 399.

A municipality is not negligent simply because it does not search for defects in its sidewalk, but only when it does not repair those which a reasonable supervision ought to have disclosed or of which it has actual notice. Lohr *v.* Borough of Philipsburg, 548.

As a rule it is negligence for a passenger to alight from a moving train. This rule, has, however, exceptions. Victor *v.* Penn. R. R. Co., 473.

When a passenger leaves a train by direction of the company's servants or is placed in peril through their neglect or is in the act of alighting and cannot retrace his steps, the question of negligence is to be determined by the jury, although his attempt be made to alight while the train be in motion. Id.

Where an announcement is made by those in charge of a train that the next station is S. and, before the train stops, a passenger rises and, after he has risen, the train stops, before reaching the station, whereupon the passenger attempts to alight and in alighting is hurt, he is guilty of negligence, and as those in charge of the car had not announced that the station had been reached and had no reason to suppose the passenger would attempt to leave the train, before it had been stopped at the proper place, they were not guilty of negligence. Id.

A passenger's consent to all the company's reasonable regulations for entering, occupying or leaving their cars is implied, and the company is not liable for an injury occasioned by the failure of the passenger to observe them, although the negligence of the company's servants may have concurred in causing the injury. Deery *v.* Camden and Atlantic R. R. Co., 475.

Nothing but an overruling necessity will excuse a departure from such regulations; the fact that the car was crowded and egress less convenient is no justification for the action of a passenger in getting off by the side or bag-

NEGLIGENCE—*Continued.*
gage door of a combination car, although the conductor stood at this side door and told the passenger to "step lively" and extended his hands to assist her. Id.

A common carrier is not permitted to stipulate for a release from liability for its own negligence or to require the shipper to so insure himself against loss as to relieve the carrier from the consequences of its negligence. Willcock *v.* Penna. R. R. Co., 545.

A city ordinance, regulating the speed of trains, is admissible in evidence and should be considered by the jury in connection with other evidence in the case as bearing upon negligence. Lederman *v.* Pennsylvania Railroad Company, 502.

Whether a parent was or was not negligent in allowing a child to be upon the street is for the jury. Id.

NOTICE. Notice of the existence of an easement may be given by the appearance of the property in or over which it is claimed. Sharpe *v.* Scheible, 10.

Those interested in or affected by a judicial proceeding should have proper and timely notice thereof and, if the kind of notice given, etc., is not prescribed by statute, it is the duty of the court in which the proceeding is inaugurated, to direct, either by standing rule or special order, the kind of notice, etc., that should be given. *In re* Borough of Columbia, 41.

Notice of the meeting of commissioners to consider a division of a borough into wards is not sufficiently given by posting small hand bills in ten or twelve hotels, saloons, etc., of the borough, which contains some 12,000 inhabitants and in which daily and weekly newspapers were published. Id.

A lessee, having notice that his lessor is an agent for others, is bound by a notice given him by the lessor's principal of the revocation of the agency. This is not altered by the fact that the agent is one of several owners of the demised premises and if, after notice, the lessee pay rent to the agent he will be still liable to the other owners of the premises for their shares of the rent. Barrett *v.* Bemelmans, 76.

Forfeiture of shares of a stockholder for failure to comply with a duly levied call for assessment, in compliance with the terms of articles of association, will not be relieved against in equity, hence the terms of the articles of association must be strictly complied with and all provisions in regard to notice absolutely observed. Morris *v.* The Metalline Land Co., 187.

When articles provide for notice by publication in certain newspapers and also for notice by mail, failure to comply with the provisions in regard to publication in a particular newspaper avoids the forfeiture, even if it be shown that actual notice of the assessment called was given to the stockholder affected. Id.

Where a lease is made to an individual to secure property for a company, about to be chartered, or in a like case, the knowledge of the lessor's agent that the lease is so taken is the knowledge of the lessor himself and he cannot avail himself of the provisions of the lease to enforce a personal liability. (O. C.) Heckman's Estate, 199.

Where means of knowledge respecting matters, alleged to have been falsely represented, are equally open to purchaser and vendor, the former is charged with knowledge of all that by the use of such means he could have ascertained, but this rule is not applicable when a knowledge of the matter referred to was very difficult to obtain and it appears that the vendor expressly planned to mislead the purchaser. Brotherton *v.* Reynolds, 330.

A mortgage was executed, upon a trust property, to a corporation for $5,000 and upon it over $10,000 was loaned to the trustees individually, all but $2,000 of this being paid. As security for the payment of this individ-

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NOTICE—*Continued.*
ual debt another corporation took an assignment of the trust mortgage with other securities and paid the debt to the first corporation: *held*, that the second corporation was affected with notice and put upon inquiry and that the trust mortgage must be presumed to have been paid to the first corporation, since in course of its dealing with the trustee more than $5,000 had been paid. (O. C.) Trust Estate of John Lawrence, 406.

Knowledge in fact of the position of a purchaser of land bound by a mortgage is enough, however acquired, to affect the mortgagee, who releases land covered by the same mortgage and retained by the mortgagor. Turner *v.* Sharpneck, 366.

An allegation of want of actual notice of the settlement of the account or of a decree of distribution in the Orphans' Court is unavailing, where it appears that notice has been given by publication, as required by the Act of Assembly, and a decree founded upon such notice is not *ex parte* or made null by the omission to exact a refunding bond from the distributees. Ferguson *v.* Yard, 429.

A municipality is not held to have had constructive notice of the defective condition of its sidewalk, unless it was so obvious that it ought to have been apparent to the officers of the municipality in the exercise of a reasonable supervision. Lohr *v.* Borough of Philipsburg, 548.

NOVATION. When a matured note is surrendered upon the receipt of a new one the transaction is in the nature of a novation. (C. P.) Fourth St. Nat. Bank *v.* Haines, 353.

OIL LEASE. See LANDLORD AND TENANT. Kunkle *v.* Peoples' Natural Gas Co., 465.

See EQUITY. Lynch *v.* Versailles Fuel Gas Co., 558.

ORPHANS' COURT. The jurisdiction of the Orphans' Court is statutory, and where a matter outside of its general jurisdiction, is brought within it by special circumstances, the conclusiveness of its decree is limited to the purposes for which it takes jurisdiction. Fidelity Trust Co. *v.* Gazzam, 64.

The Orphans' Court has power to prevent, by injunction, either a repetition of acts prejudicial to property within the control of the Court or the commission of threatened acts and conduct to the injury and damage of such property, but such power will not be lightly exercised. (O. C.) Lafferty's Estate, 132.

An executor and trustee must account to the Orphans' Court of the County of his appointment; that court has full jurisdiction and cannot be ousted by a court of equity of another county. Henderson, Hull & Co., Limited *v.* Stryker, 151.

Where the amount of indebtedness to a third party by a distributee under a will is necessary to determine the amount to be paid to said distributee, the Orphans' Court has jurisdiction to determine the amount of said indebtedness. Roberts' Estate, 250.

The Orphans' Court has jurisdiction to enjoin the sale of mortgaged trust property, although the Court of Common Pleas may have refused to open the judgment upon the bond accompanying the mortgage. (O. C.) Trust Estate of John Lawrence, 406.

A payment in conformity with an absolute decree of the Orphans' Court making an award protects the executor and also the distributee, although no refunding bond be given by the latter. Ferguson *v.* Yard, 429.

The jurisdiction of the Orphans' Court is exclusive to ascertain the amount of a decedent's property and to make distribution among those entitled, and its decrees are conclusive until reversed on appeal or opened by it. Id.

Orphans' Court has jurisdiction to determine indebtedness of distributees where necessary to determine shares under will. See WILL. Roberts' Estate, 250.

ORPHANS' COURT SALES. A purchaser at an Orphans' Court sale is not bound to take a doubtful title and every title is doubtful which exposes the party to litigation. (O. C.) Howe's Estate, 16.

A voluntary statement, by an auctioneer at an Orphans' Court sale, that a ground rent upon the property being sold is redeemable may be regarded as a condition of sale. Id.

The children and heirs at law of C. agreed to withdraw his will from probate, no letters having been granted, and assented to the appointment of an administrator, who sold the real estate on an order of the Orphans' Court for payment of debts. After the sale, the will was proved and trustees under the will brought ejectment against the purchaser at the Orphans' Court sale: *held*, that if made in fraud of rights of another, not a party to the agreement, the Orphans' Court sale was void as to him and that evidence tending to establish such fraud should have been admitted. Sager *v.* Mead, 333.

PARENT AND CHILD. The legal right of a parent to the custody, care and companionship of his children is not to be interfered with, except for the most substantial reasons affecting their welfare. The hasty disposition of such a case, unless it is very clear, is likely to result in great injustice to the parent and ultimate injury to the child. Com'th *ex rel.* Parker *v.* Blatt, 469.

Whether a parent was or was not negligent in allowing a child to be upon the street is for the jury. Lederman *v.* Pennsylvania Railroad Company, 502.

PARKS. Where land is taken by the City of Philadelphia for a park, the proceedings follow the same course as is required in proceedings for the assessment of damages in opening streets, at the time the park proceedings are taken. *In re* Vernon Park, 49.

The Act of June 13, 1874, P. L. 283, and the Act of May 26, 1891, P. L. 116, apply to park cases. Id.

PARTNERSHIP. When a partner, who is acting as prosecutor of one who has embezzled money of the firm, agrees to settle the prosecution and receives money therefor, the presumption is that the money is received on behalf of the firm and he cannot be heard to allege that the money was a bribe to himself to betray the rights of his firm. Merchants and Manufacturers' Bank *v.* W. A. Baeder Glue Co., 69.

Where articles of partnership provide that, on dissolution, certain personalty shall become the property of the party of the first part and that the interest of the party of the second part shall be ascertained by taking the gross receipts of a certain department of the partnership business for the twelve months prior to dissolution, the property specified does not, on dissolution, become partnership assets for the purpose of settlement and the case is not changed by the fact that more than twelve months before dissolution, the partners sell the department whose receipts are to determine the interest of the party of the second part. Wilson *v.* Black, 435.

See LIMITED PARTNERSHIP, PARTNERSHIP ASSOCIATION LIMITED.

PARTNERSHIP ASSOCIATION LIMITED. When articles of a partnership association limited have been executed, but not recorded, before the commencement of negotiations, carried on in the name of the association, which culminate in a contract with a third party after they have been recorded, the members of the association do not become liable as individuals or general partners for goods delivered to the association under the said contract, although no notice of the recording of the articles was given to the vendors other than that inferred from the record itself. Hinds *v.* Scranton Match Co., Limited, 350.

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PARTY WALL. Where a grantor conveys a portion of his premises, immediately adjoining premises already owned by the grantee, the consideration recited being, *inter alia*, the grant of an easement for "light and air" for the grantor's remaining property and the grantee for himself and his assigns agrees by deed not to build upon the said conveyed premises to a height greater than sixteen feet, and executes a covenant, running with the land, assuring the grantor the before mentioned easement of light and air, a wall afterwards erected by the grantor on the line between his land and the piece of land granted is not to be regarded as an ordinary party wall and the grantor will not be restrained by injunction from leaving windows or openings therein at a height above said sixteen feet. Weigman *v.* Jones, 185.

PARTY TO ACTION. Exemption from service. See EXEMPTION. (C. P.) Partridge *v.* Powell, 576.

PAYMENT. A mortgage was executed upon a trust property to a corporation for $5000, and upon it over $10,000 was loaned to the trustees individually, all but $2,000 of this being paid. As security for the payment of this individual debt another corporation took an assignment of the trust mortgage with other securities and paid the debt to the first corporation: *held*, that the second corporation was affected with notice and put upon inquiry and that the trust mortgage must be presumed to have been paid to the first corporation, since in course of its dealings with the trustee more than $5,000 had been paid. (O. C.) Trust Estate of John Lawrence, 406.

PEDDLING. See CONSTITUTIONAL LAW. (Q. S.) Commonwealth *v.* Simons, 511.

PENALTY. See LIQUIDATED DAMAGES. Wilkinson *v.* Colley, 177.

PERPETUITIES. A limitation over in a will "in case either of my said grandchildren shall die . . . . without leaving any children or the issue of any deceased child living at their death . . . . if leaving such child or issue, all of them shall die under the age of twenty-one years without issue" does not violate the rule against perpetuities. (O. C.) Winebrener's Estate, 67.

PHILADELPHIA. The Act of May 8, 1876, P. L. 131, and its supplement of May 3, 1878, P. L. 41, having reference to the taking of bridges by counties apply to the City of Philadelphia. *In re* City Avenue and Germantown Bridge, 409.

PHYSICIAN. A injunction will lie to restrain a defendant from practicing as a physician within a limit of eight miles, when he has agreed in writing with another physician for a consideration to abstain from practicing within such limit for ten years. Wilkinson *v.* Colley, 177.

PILOTAGE. A master of a vessel sailing from Philadelphia may employ a Delaware licensed pilot as well as one from Pennsylvania and a compliance with the law of Delaware will protect him against the consequences of a refusal or neglect to take a Philadelphia pilot. (Q. S.) Commonwealth *v.* Fitzpatrick, 258.

The laws of Delaware and Pennsylvania command the employment of a pilot, but until navigation has actually begun there is no liability on the part of a master.

Semble, no payment before this time should be regarded as a fulfillment of the penalty of the law unless the offer of the pilot's services, and the refusal of the master be continuously and in good faith persisted in until the beginning of the voyage. Id.

A pilot who gives a receipt for the amount of lawful pilotage, when he has received less than the amount recited in the receipt and when he has not taken charge of the vessel as pilot is criminally liable under the Act of March 31, 1860, sec. 169. Id.

PLEADING. Under the plea of not guilty, filed in an action of trespass, under the Act of 1887, for damages for personal injuries, a release given by the plaintiff is admissible in evidence. Johnson *v.* Phila. & Reading R. R. Co., 375.

Where a statement alleges a contract by the defendant to carry goods to a certain terminus and that the defendant, in violation of the agreement, so negligently carried the same that the goods were damaged to a certain amount, an affidavit which denies negligence and states the cause of accident which resulted in the injury to the goods, is sufficient. Ross *v.* P. W. & B. R. R. Co., 510.

Under the Act of 1887, where a statement sets out the place of record of any instrument of writing the Court can consider the instrument itself as set out. (C. P.) Siegel Bros. *v.* Wood, 355.

An averment in a statement that the capital of a limited partnership was impaired at the time of a renewal must be specifically denied in the affidavit of defence or taken as true. Id.

POINT RESERVED. An issue was tried to determine whether an alleged testatrix was of sound mind and whether she had been subjected to undue influence. The jury was instructed, if it found for defendants, to state in full whether it found the testatrix was not of sound mind and memory or that she was acting under undue influence. The verdict was for defendants and that testatrix was not of sound mind. As there was nothing upon the record to show that the jury considered the question of undue influence, the point reserved whether there was any evidence upon which defendants were entitled to recover did not embrace the issue and judgment could not be entered upon it. Butts *v.* Armor, 137.

See PRACTICE. Butts *v.* Armor, 137; Moore *v.* Copley, 563.

POLICE POWER. The business of insurance against loss by fire is a proper subject for the police power of the State. Commonwealth *v.* Vrooman, 97.

And see CONSTITUTIONAL LAW. (Q. S.) Com'th *v.* Simons, 511.

POWER. The exercise of the power of appointment of a beneficiary of a certificate of membership in a beneficial society is in the nature of a testamentary disposition. (O. C.) Kendrick's Estate, 46.

The rule of law that a power to sell land includes a power to mortgage does not apply in the interpretation of a mere letter of attorney with a naked authority to sell, uncoupled with any interest in the land or the fund. Campbell *v.* Foster Home Association, 293.

The testator, having authorized a sale of all of his real estate as soon as practicable, directed a sale of all the unimproved parts "as soon as may be" and from this last direction he excepted those parts which his executors might think would improve in the near future and those which he was of opinion would improve, properties in Pittsburgh and Chicago. These, though unimproved, were not to be sold under the specific direction as to that class but to be retained by the executors with the productive real estate and sold when practicable: *held*, the power of sale, as to all, remained in the executors and there was in the will no evidence of an intention that their judgment as to the time of sale should be controlled, except by the direction which the testator gave. Pennsylvania Co. *v.* Leggate, 522.

POWER OF ATTORNEY. An assignment to A. of a judgment "to collect and account to B. therefor after deducting his fees, expenses and the fees and expenses" of B., is merely a power of attorney to collect, with a pledge of the judgment as security for fees and expenses. Vanderpool *v.* Vanderpool, 157.

Such a power may be revoked at any time, subject to

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POWER OF ATTORNEY—*Continued.*
the equity of the attorney to be reimbursed his fees and expenses, and the burden is upon such attorney to show that he incurred fees and expenses in good faith. Id.

A power of attorney, to mortgage without more, does not include a power to sell. Campbell *v.* Foster Home Association, 293.

A power of attorney to mortgage establishes simply the relation of principal and agent between the parties to it. Id.

The authority of a power of attorney is never extended beyond that which is given in its terms, or which is necessary and proper for carrying the authority so given into full effect. Id.

A letter of attorney authorizing an agent to sell property "for such sum or price and on such terms as to him shall seem meet," and to receive all sums of money due on account of the sale and "to compound and agree on the same," does not authorize the attorney to take payment in bonds. "Terms," in such connection, means the time and amounts of payment, and if any payments are deferred it may embrace stipulations as to how such payments are to be secured. "Price," in the same connection, does not differ in its meaning from "sums." Paul *v.* Grimm, 451.

PRACTICE. Service upon the State agent of a foreign insurance company anywhere within the State is good service upon the company; this applies to an attachment execution. Kennedy *v.* Agricultural Insurance Company, 457.

A return of service upon a corporation by giving "a true and attested copy of the within writ to D., general manager of said company, and making known to him the contents thereof," is defective, because it does not set out that D. was the principal officer of the corporation, or set out facts that would show that a service on a manager would be good. (C. P.) Dale *v.* Blue Mountain Mfg. Co., 509.

The Court will set aside the sheriff's return to a summons, if defective Id.

The only cases in Pennsylvania, except in suits by the Commonwealth, in which a summons can be served upon a manager or a director of a corporation, even where the property of the corporation is wholly or in part in the county, are where the president, treasurer, secretary or chief clerk do not reside or cannot be found in the county and the sheriff's return must so show. Id.

Where no appearance is entered for the defendant and there is a defective return of service, judgment against him, for want of an affidavit of defence, is void and will be stricken off. Id.

Where parties to a suit in another State agree that testimony shall be taken here before a notary public, and the party comes into this State, upon notification of time and place, to be present at the taking of the testimony, he is exempt from service here at the suit of the other party; as between them the agreement supplies the lack of legal process. (C. P.) Pattridge *v.* Powell, 576.

Parties attending on or returning from a magistrate's Court are exempt from the service of summons. (C. P.) Carstairs *v.* Knapp, 292.

An action for money had and received, even before the Procedure Act of 1887, could have been maintained for money which the defendant ought to have received and, since the Act, the statutory assumpsit may be maintained to recover, from an agent, the price of land, the payment for which he has, without authority, accepted in articles or things other than money. Paul *v* Grimm, 451.

When the statement in assumpsit sufficiently sets out a cause of action, the defendant must controvert or deny one or more of the material averments, or judgment may be entered for want of an affidavit, or of a sufficient affi-

PRACTICE—*Continued.*
davit of defence. (C. P.) Fourth Street National Bank *v.* Haines, 353.

The amount of damages sustained through alleged negligence of a defendant is in issue without any defence being made specially thereto, except where the negligence is admitted and the value of the property or amount of loss is disputed. Ross *v.* P. W. & B. R. R. Co., 510.

The facts that through delay on the part of the plaintiff in the fulfilment of his part of a contract the defendant suffered loss and that plaintiff promised to make such loss good cannot be given in evidence, in an action on the contract, under the plea of set-off, non-assumpsit or payment, unless notice has been given, as required by rule of Court, of the intention to introduce such facts as a defence. Lovegrove *v.* Christman, 327.

Where an affidavit alleges that the plaintiff has brought suit to recover commission on a sale of merchandise, under an agreement of the defendants that he should have a commission at a certain rate on the amount of the sales, that the amount is unknown to him, that the defendants have refused to inform him as to said amount, and that the books containing the entry of said amount were in the exclusive power and control of defendants, although part of one of the books are in plaintiff's handwriting, the Court will on application permit the plaintiff to inspect the said books. (C. P.) Boyce *v.* Super, 339.

If a statement in an action for damages for personal injuries allege a specific act of negligence as the cause, and issue be joined upon this allegation, the inquiry at the trial should be confined to this issue. Fuhrmeister *v.* Wilson, 223.

The filing of a suggestion of the death of a defendant and the names of his legal heirs does not make the latter parties or give them any standing in Court, without some order of substitution or a writ of scire facias to bring them in. City of Philadelphia *v.* Jenkins, 276.

A special verdict must contain all the facts upon which the judgment of the Court is to rest, and the Court, in entering judgment, is confined to the facts embodied in the verdict and may not aid the same by intendment or by extrinsic facts which may appear in the evidence. McCormick *v.* Royal Insurance Co., 23.

Where a verdict is taken subject to points reserved, the points should appear upon the record either by special verdict or distinct reservation, stating the question of law reserved. The failure to state the points on the record is reversible error. Moore *v.* Copley, 563.

It is erroneous practice and ground for reversal to submit questions, as to which there is conflicting testimony, to the jury, reserving the point "whether there is any evidence upon which the defendants are entitled to recover," and subsequently to enter judgment *non obstante veredicto.* Butts *v.* Armor, 137.

An appeal, with security, taken in due time is a supersedeas of a decree under the Act of June 19, 1871, P. L. 1361, approving a plan by which one railroad may cross the tracks of another, and, pending such appeal, the Supreme Court may enforce the supersedeas by an order restraining the appellee, whose plan has been approved, from proceeding with the construction of the crossing. Citizens Passenger Ry. Co. *v.* East Harrisburg Passenger Ry. Co., 12.

Proceedings after judgment by default against garnishee in attachment execution, see ATTACHMENT EXECUTION. Longwell *v.* Oil City Electric Co., 370.

No appeal lies from an order of the Common Pleas reinstating an appeal from an alderman, which appeal had on motion been stricken off; such order is interlocutory only, and simply determines that the case is properly in the Common Pleas. Cupples Wooden Ware Co. *v.* Howe, 374.

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PRACTICE—*Continued.*

The question of the qualification of petitioners for the vacation of a road should be raised in the lower Court by specific exception, and, unless that be done, the Supreme Court cannot pass upon it when the record comes up on a certiorari. *In re* Vacation of Swanson Street, 306.

The requirement of the Act of May 8, 1854, that petitions for vacation shall set forth, concerning the street which it is sought to vacate, whether the same has been laid out by public or private owners, is met by an allegation that the street "is opened and used as a public street." Id.

In a proceeding under the Act of June 14, 1836, for the removal of an assignee, it is improper for the Court to appoint a master. It is the duty of the judge to decide upon the examiner's finding of the facts without the intervention of a master. *In re* Assigned Estate of Powel & Co., 237.

In the revival of a judgment, the recital of the names of equitable plaintiffs is mere surplusage. Assigned Estate of Ernst, 158.

PRACTICE. Orphans' Court. When an account shows a balance due from the estate to the executor, the practice is to merely audit and settle the account and ascertain its correctness. Claims against the estate must wait until there is a fund for distribution. (O. C.) Snyder's Estate, 204.

Where the Supreme Court has decided that the survivor of the makers of a double will (which was not a joint will, or in the nature of a contract) had power to revoke her part by a subsequent separate will, such decision does not establish the validity of the second will, which was then before the Court as evidence of the revocation, but the latter must be proved in the regular way and is subject to the same objections as it would have been if the double will had never been executed. Estate of Mary Cawley, 254.

Where a will has disappeared before probate and is alleged to have been concealed or destroyed by persons other than the testator, an issue whether or not it had been revoked is of right, unless the evidence of the fact be so doubtful and unsatisfactory that a verdict in favor of the will would not be permitted to stand. Estate of Lot Gardner, 417.

PRACTICE. Supreme Court. The appellate Court will not interfere where rules for judgment for want of sufficient affidavit of defence have been discharged by the lower Courts in doubtful and uncertain cases, but only in such as are very clear and free from doubt. Ensign & Cash *v.* Kindred, 236.

Admissions of counsel are no part of the record and cannot be considered by the Supreme Court. *In re* Vacation of Swanson Street, 306.

One who has withdrawn all exceptions filed in the lower Court has no standing to be heard in the Supreme Court. Id.

Neither testimony nor the opinion of the Court can be considered upon certiorari to the Quarter Sessions, as they form no part of the record. *In re* License to Branch, 310.

The finding of a master on questions of fact, approved by the Court below, will not be set aside in the Supreme Court except for clear error. Mere conflict of testimony is not sufficient. Brotherton *v.* Reynolds, 330.

Where there is no disagreement between the Court and the master as to the facts established but only as to their legal effect, the Court is quite as competent as the master to pass upon such effect, and there is no presumption in favor of the master's finding. Dubois Cemetery Co. *v.* Griffin, 537.

The Supreme Court does not interfere with the interpretation by the lower Courts of their own rules, except

PRACTICE—*Continued.*

in cases of plain mistake which has inflicted substantial injury on the party complaining. Johnson *v.* Phila. & Reading R. R. Co., 375.

Method of considering and assigning cases upon appeal stated, per WILLIAMS, J. Schwartz *v.* Keystone Oil Co., 387.

The terre tenants of mortgaged premises are proper parties to an appeal from a decree refusing to set aside a lev. fac. Packer *v.* Owens, 423.

PRINCIPAL AND AGENT. One who proposes to borrow money on land impliedly warrants that he has a marketable title thereto and, in the absence of instructions to the contrary, his employment of a broker to obtain a loan is sufficient authority to the latter to make representations and negotiations on that basis and such authority is not negatived by leaving unanswered questions put by the broker upon a blank for the purpose of obtaining information. Middleton *v.* Thompson, 1.

The mere mention of the name of counsel in an acceptance of a loan, the application for which is made upon a blank, which states that full brief of title and searches, with opinion of counsel will be required, by an agent employed to obtain a loan, will not prevent the contract from being a binding one upon the principal, as whether the agent had authority to submit the question of title to the particular counsel will depend upon the character of the objections raised by him. Id.

See ATTORNEY AT LAW. Whitesell & Sons *v.* Peck, 540

PRINCIPAL AND SURETY. After the assignment of an estate for years, as between the assignor and assignee the latter is the principal debtor upon the covenants of the lease. (O. C.) Heckman Estate, 199.

PRIVILEGE. Of party to action from service of process. See EXEMPTION. (C. P.) Partridge *v.* Powell, 576.

PROBATE. Effect of. See WILL. Craft's Estate, 413.

PROMISSORY NOTE. The holder of a negotiable note, bona fide for value without notice, can recover notwithstanding he took under circumstances which ought to excite suspicion of a prudent man. Second Nat. Bank of Clarion *v.* Morgan, 484.

To constitute a defence against the holder of a note for value it must be shown that the note was taken *mala fide* and the burden of proving bad faith rests on the defendant. Id.

In an action by a National bank upon a promissory note, usury cannot be set up as a defence by the maker of the note or by his surety. Id.

PUBLIC POLICY. A contract to be void as against public policy must be inconsistent with sound policy and good morals as to the consideration or thing to be done. Enders *v.* Enders, 118.

While a contract by a parent by which she bargains away the control of her child to a stranger, and so attempts to relieve herself of all parental responsibility, is void as against public policy, yet a contract of the nature of a family compact by which a mother in needy circumstances agrees that her child may be brought up by and live with his grandfather, who is of good character and ample estate and who further agrees that the mother shall visit her child when she desires and have him at her house when convenient, is not against public policy, and the mother may recover the stipulated consideration upon which she surrendered the possession of her child. Id.

An agreement by an employee of a railroad company to have a portion of his wages applied for the purpose of securing benefits in a relief association and that, in consideration of contributions by the railroad company to the fund of the association, acceptance of benefits from

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PUBLIC POLICY—*Continued.*
the said fund shall operate as a release of all claims against the company, does not violate public policy. Such agreement is to be distinguishable from those which exempt a carrier from liability for negligence, in that the employee retains whatever right of action he may have, until after knowledge of all facts and an opportunity to make a choice between the sure benefits of the association and the chance of litigation. Johnson *v.* Phila. & Reading R. R. Co., 375.

Public policy will not permit a common carrier to require the shipper to insure for the benefit of the carrier. See COMMON CARRIER. Willcock *v.* Penna. R. R. Co., 545.

QUESTION OF LAW AND FACT. When there is no doubt as to the language of an instrument in writing, or as to the circumstances under which it is executed, its interpretation is for the Court and not for the jury. Tozer *v.* Jackson, 264.

Where a release is set up in the course of a trial and, while the physical fact of its execution is admitted, the releasor gives evidence that his mental condition at the time was such that he was unable to know what he was doing, the question of the existence of a release, *i. e.*, the assent of the releasor's mind thereto, is for the jury under all the evidence. Gibson *v.* W. N. Y. & P. R. R. Company, 381.

When the use of steam engines for threshing, etc., becomes so general that their transportation amounts to an ordinary use of the roads, it may be necessary in law to strengthen the bridges so as to withstand the increased strain. The generality of such use would ordinarily be a question for the jury. Coulter *v.* Township of Pine, 399.

When a passenger leaves a train by direction of the company's servants or is placed in peril through their neglect or is in the act of alighting and cannot retrace his steps, the question of negligence is to be determined by the jury, although his attempt be made to alight while the train is in motion. Victor *v.* P. R. R. Co., 473.

Whether property, assessed for municipal improvements, is urban or rural, is generally for the jury. McKeesport *v.* Soles, 570.

RAILROADS. When the charter of a railroad company limits its power to take land for right of way to a strip four rods in width, "except in the neighborhood of deep cuttings or high embankments or places selected for sidings, turnouts, depots, engine or water stations," no greater width than four rods can be taken, unless it affirmatively appear that one or more of the exceptional circumstances specified in the charter exist. Robinson *v.* Penna. R. R. Co., 61.

The mere fact that an engineer, who located the line of a railway testifies that there was a cut thirteen feet on a farm through which the right of way was surveyed, does not justify the taking of an additional width for the whole length of the line. The burden of proof is upon the railroad company both as to the extent and location of such cuts or embankments, and if extra width is claimed for stations, sidings, etc., the necessity for the same and their location must be positively shown. Id.

While the discretion as to the location of stations, sidings, etc., belongs to the company, it must be exercised in good faith and the necessity, extent and location of the extra appropriation for such purposes must be definitely shown. Id.

Where evidence shows that a right of way 147 feet in width was taken by a railroad company and the same was located by a central line, a verdict for a plaintiff in ejectment "for the land named in the writ (being the said 147 feet in width for a distance of almost a mile) in excess of

RAILROADS—*Continued.*
sixty-six feet" is not void for uncertainty; the practical effect of this finding is that the appropriation by the railroad company was properly exercised as to thirty-three feet on each side of such line, and the verdict will be so amended. Id.

Both a diagonal and a transverse crossing are expressly allowed by the 18th section of the Act of 1889, and there is nothing therein contained which prohibits such a reasonable elongation of the connecting track as is essential to reach the opposite point of the crossing. Citizens' P. R. R. Company *v.* East Harrisburg P. R. R. Co., 440.

RAILROAD RELIEF ASSOCIATION. An agreement by an employee of a railroad company to have a portion of his wages applied for the purpose of securing benefits in a relief association and that, in consideration of contributions by the railroad company to the fund of the association, acceptance of benefits from the said fund shall operate as a release of all claims against the company, does not violate public policy. Such agreement is distinguishable from those which exempt a carrier from liability for negligence, in that the employee retains whatever right of action he may have, until after knowledge of all facts and an opportunity to make a choice between the sure benefits of the association and the chance of litigation. Johnson *v.* Phila. & Reading R. R. Co., 375.

RATIFICATION. In an action in trespass to recover damages for personal injuries received, the defence was a release, for a valuable consideration, executed by plaintiff the day after receiving the injuries, and shortly after undergoing an operation during which he was anæsthetized. The plaintiff alleged that he had no recollection of executing the release, but omitted to return the consideration of it, after having returned to his proper condition and after having knowledge that it was claimed by the defendant that a settlement had been made: *held*, this was a ratification of the execution of the release, and the plaintiff could not recover. (STERRETT, C. J., dissented.) Gibson *v.* W. N. Y. & P. R. R. Co., 381.

Where an attorney has, without authority, accepted securities in payment of a judgment and entered satisfaction thereof, the client must make his election, to repudiate or ratify the act, promptly upon acquiring knowledge of the fact, and inaction after such knowledge, or an attempt to realize upon the securities taken, will amount to a ratification of the attorney's act. Whitesell & Sons *v.* Peck, 540.

RECORD. In an action based upon a foreign judgment, where it appears from a copy of the record, annexed to the plaintiff's claim, that the certificate of the clerk of the Court giving the judgment was made, not by the clerk but by his deputy, the record is insufficient as a basis of an action. Ensign & Cash *v.* Kindred, 236.

In an action in ejectment, where a paper, duly proved as a will, has been given in evidence, the record of the Orphans' Court in proceedings to set aside the will, the probate and the record of the Common Pleas wherein an issue *devisavit vel non* was tried, from which it appears there was no certificate to the Common Pleas or any return made to the Orphans' Court or any final decree vacating the probate or sustaining the appeal from the register, are not admissible in evidence. Tozer *v.* Jackson, 264.

A paper having been admitted to probate as a certified and true copy of a will, claimed to have been proved in France, and having been recorded and letters issued upon it, parties interested cannot, after an interval of fifteen years, invoke aid of the Act of June 17, 1839, P. L. 678, and have the record corrected by a true copy of the original will. Coleman's Estate, 273.

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RECORD—*Continued.*

Admissions of counsel are no part of the record and cannot be considered by the Supreme Court. *In re* Vacation of Swanson Street, 306.

Neither testimony nor the opinion of the Court can be, considered upon a certiorari to the Quarter Sessions, as they form no part of the record. *In re* License to Branch, 310.

REFUNDING BOND. A payment in conformity with an absolute decree of the Orphans' Court, making an award, protects the executor and also the distributee, although no refunding bond be given by the latter. Ferguson *v.* Yard, 429.

An allegation of want of actual notice of the settlement of an account or of a decree of distribution in the Orphans' Court is unavailing, where it appears that notice has been given by publication, as required by the Act of Assembly, and a decree founded upon such notice is not *ex parte* or made null by the omission to exact a refunding bond from the distributees. Id.

REGISTER OF WILLS. The right of the Court to compel, by mandamus, the register of wills to perform a ministerial or clerical act, necessary to the proper adjudication of a question to be tried in Court, is undoubted. Commonwealth *v.* Thomas, 255.

Mandamus will not lie where full and ample remedy may be had either by appeal, writ of error or otherwise reviewing the judgment, decree or order of the subordinate Court. Id.

The Judges of the Common Pleas have supervisory power over certain work of the register of wills, by virtue of the Act of June 17, 1839, P. L. 678, but such supervision does not extend to his judicial acts from which an appeal lies to the Orphans' Court. In his judicial acts is included the admission of a will to probate. Coleman's Appeal, 273.

REGISTRY. A vendee of the sheriff, under a lev. fa. sur municipal lien for taxes, will take no title, if the deed to the actual owners, at the time the taxes were assessed, had been left at the surveyor's office for registration under the provisions of the Act of March 29, 1867, although the registration was inaccurately performed, unless the actual owners have been served with the sci. fa. sur claim as in the case of a suit by summons. Fryer *v.* Magill, 221.

RELEASE. Where a mortgagee, with a knowledge of the fact that a portion of the mortgaged premises has been bought and paid for by a third person, subsequently releases from the lien of the mortgage the remaining part, which was of sufficient value to have satisfied the debt, such release will operate as a discharge of the lien of the mortgage against the land bought by the third person. Turner *v.* Sharpneck, 366.

Effect of stipulation for a release in application for membership in a railway relief association, see PUBLIC POLICY. Johnson *v.* Phila. & Reading R. R. Co., 375.

Where a release is set up in the course of a trial and, while the physical fact of its execution is admitted, the releasor gives evidence that his mental condition at the time was such that he was unable to know what he was doing, the question of the existence of a release, *i. e.*, the assent of the releasor's mind thereto, is for the jury under all the evidence. Gibson *v.* W. N. Y. & P. R. R. Co., 381.

RELIGIOUS ORDER. Members of, not disqualified as public school teachers or debarred from wearing the religious dress while teaching. See SCHOOL LAW. Hysong *v.* School District of Gallitzin Borough, 278.

RES ADJUDICATA. The confirmation of a first account of an executor and his discharge by the Orphans' Court are no ground for a plea to the jurisdiction

RES ADJUDICATA—*Continued.*

of the Common Pleas upon a bill in equity, filed by the administrator d. b. n. c. t a. of testator, to set aside a power of attorney given by the testator to the executor and to compel said executor to account for money, alleged to have been fraudulently appropriated to his own use while acting as attorney in fact for the decedent during his lifetime. Fidelity Trust Co. *v.* Gazzam, 64.

A testator left the bulk of his estate to his four children and a legacy, coupled with a condition, to an infant grandchild. The executors stated an account; the four children asked its reference to an auditor, who, on being appointed, not only passed upon the account, but held that the legacy to the grandchild had been forfeited. The grandchild was not represented and had no notice of the proceedings. The report was confirmed without objection: *held*, the grandchild was in no way concluded by the confirmation. White's Estate, 105.

When an assignee is discharged or removed and there is no decree that he shall pay over, it must be conclusively taken in any collateral proceedings that the Court which discharged or removed him found no funds in his hands. Hirst *v.* Freeman, 235.

Where the Supreme Court has decided that the survivor of the makers of a double will (which was not a joint will nor in the nature of a contract) had power to revoke her part by a subsequent separate will, such decision does not establish the validity of the second will, which was then before the Court as evidence of the revocation, but the latter must be probated in the regular way and is subject to the same objections as it would have been if the double will had never been executed. Estate of Mary Cawley, 254.

Where a decree has fixed the widow's right to her exemption in cash, such decree cannot be attacked collaterally in a subsequent proceeding. (O. C.) Carr's Estate, 448.

Action against the husband alone for necessaries is generally conclusive against the liability of the wife, as an admission of record that the goods were not sold on her credit, but where action is brought and judgment recovered against both, which on certiorari is affirmed as to the husband and reversed as to the wife, there being no judgment in her favor on the merits of the case, the judgment against the husband is not a bar to a subsequent action to recover for the same necessaries against the wife alone. Roll *v.* Davison, 562.

RESCISSION. Of Contract. See BAILMENT. Seanor *v.* McLaughlin. 455.

RESTRAINT OF TRADE. An agreement by a physician, for a valid consideration, to abstain from practicing within a limit of eight miles for the space of ten years is not invalid as in restraint of trade. Wilkinson *v.* Colley, 177.

REVIEW. A petitioner is not entitled to a review of an account confirmed by the Orphans' Court, as a matter of right, unless error of law appear on the face of the record or new matter arise after the decree, but a review may be granted, as a matter of grace, for new proof, discovered after the decree, unless distribution under the decree has been made. The after discovered proof must be of such a nature that it could not possibly have been used at the time the decree was made. Kennedy's Estate, 544.

REVIVAL OF JUDGMENT. See JUDGMENT. Assigned Estate of Ernst, 158.

REVOCATION. Where the Supreme Court has decided that the survivor of the makers of a double will (which was not a joint will nor in the nature of a contract) had power to revoke her part by a subsequent will, such decision does not establish the validity of the second will, which was then before the Court as evidence of the

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REVOCATION—*Continued.*
revocation, but the latter must be probated in the regular way and is subject to the same objections as it would have been if the double will had never been executed. Estate of Mary Cawley, 254.

See WILL. Craft's Estate, 413, and Estate of Lot Gardner, 417.

ROAD LAW. Where a street has been placed upon the city's plan and passes through property of a land owner, who, subsequently, conveys the land on both sides, referring to it as a boundary, such conveyance constitutes a contract that the said street shall be kept open subject to the right of way of the grantees and hence when the land covered by the street is actually taken by the city, for the purpose of the street, the owner can recover as damages only the value of the land as affected by the right of way of the grantees and the question of such value is for the jury. Gamble *v.* City of Philadelphia, 4.

Where land is taken for a road by a city, which has notice of the appointment of the viewers, their report and the plaintiff's appeal, and pleads without objection to the issue framed on the appeal, the city cannot raise the question of jurisdiction by a point presented upon the trial. Larkin *v.* City of Scranton, 42.

The Acts of June 13, 1874, and May 26, 1894, are both affirmative Acts. Under the former an appeal is given from "the ascertainment of the damages" or "the filing a report thereof in Court." Such appeal must be taken within thirty days and not afterwards. The Act of 1891 gives no appeal from the award, but from the decree of confirmation by the Court of Quarter Sessions. The two Acts work in entire harmony. *In re* Vernon Park, 49.

Proceedings to open are necessary before a plotted street becomes an actual highway; the mere plotting vests in the public no present right of user. Commonwealth *v.* Kline, 90.

The report of the commissioners, under the Act of Assembly of April 3, 1867, is notice of an intention to appropriate land covered by the plotted streets for use as highways, whenever that shall become necessary, but it does not presently disturb the owner's possession or confer a right of user on the public. Id.

Under the Act of May 8, 1854, P. L. 645, providing that the Court of Quarter Sessions shall have authority to vacate any private or public highway, whether laid out by public or private owners, whenever, by reason of forming town plots or otherwise, they shall have become useless to the public and those having lands bounding thereon, the Court may vacate the whole or any part of such public or private road. *In re* Vacation of Swanson Street, 306.

The question of the qualification of petitioners for the vacation of a road should be raised in the lower Court by specific exception and, unless that be done, the Supreme Court cannot pass upon it when the record comes up on a certiorari. Id.

The requirement of the Act of May 8, 1854, that petitions for vacation shall set forth, concerning the street which it is sought to vacate, whether the same has been laid out by public or private owners is met by an allegation that the street "is opened and used as a public street." Id.

RULES OF COURT. The Supreme Court does not interfere with the interpretation by the lower Courts of their own rules, except in cases of plain mistake which has inflicted substantial injury on the party complaining. Johnson *v.* Phila. & Reading R. R. Co., 375.

SALARIES. The Act of 1872 providing for compensation of certain county officers of Allegheny County

SALARIES—*Continued.*
by salaries and fees is supplied by the general Act of March 31, 1876, and its supplement of June 13, 1883, providing for the compensation of the same officers in counties, within whose description Allegheny County falls, by salaries alone, the manifest intent of the latter legislation being to abolish compensation by fees and not merely to fix the amount of salaries to be paid by certain officers. McCleary *v.* County of Allegheny, 193.

SALE. A voluntary statement by an auctioneer at an Orphans' Court sale that a ground rent upon the property being sold is redeemable may be regarded as a condition of sale. (O. C.) Howe's Estate, 16.

Power of agent to make sale, see AGENT. Paul *v.* Grimm, 451.

SCHOOL LAW. The discretion of a board of school directors in selecting teachers is absolute, within the bounds of law, and when it appears that the board has appointed a teacher of good moral character, who has presented a certificate of qualification as to scholarship and aptness to teach, there is an end of judicial inquiry into the action of the board in making the appointment. Hysong *v.* School District of Gallitzin Borough, 278.

A member of a religious order is not, by the fact of such membership, disqualified to hold the position of teacher in the public schools. Id.

The fact that the member of a religious order, who has earned a salary, as a public school teacher, pays the amount into the treasury of the order to which she belongs, in obedience to a requirement of the order, does not render the payment of the salary a diversion of school funds to sectarian purposes: when the salary is earned the recipient has a right to do what she pleases with it. Id.

The use by a teacher, while engaged in her work as such, of the religious garb or habit to which she belongs is not unlawful and is not sectarian teaching, although the use of the dress imparts to the pupils knowledge of the church to which the wearer belongs. WILLIAMS, J., dissented. Id.

A teacher's certificate is not illegal because made out in the religious name of the holder and not in the secular name. Id.

Illegal taxation by school district, how remedied, see EQUITY. Arthur *v.* School District of Polk Borough, 289.

Inmates of an institution, chartered for the care and education of poor children, do not by their residence in the said institution acquire such a residence in the district, within whose bounds it is situated, as will entitle them to be educated without charge in the common schools of the district. Commonwealth *v.* Balmer, 336.

This rule applies to a home for soldiers' children, having a charter in which no provision is made for the education of the inmates but which has received State appropriations for the said purpose. Id.

The Act of April 18, 1893, P. L. 236, does not entitle a child, resident in a soldiers' home, to free admission to the schools of the district containing the home. The Act was intended to insure school privileges to the children of soldiers who were obliged to seek employment and homes outside the district of their parents' residence, but it does not include the children of any class for whose education in the charitable institution of which they are inmates, the State has made adequate provision. Id.

SET OFF. Where money of a county is deposited by its treasurer in his own account in bank, but is known by the banker to be county funds, and the banker has become possessed of county warrants, his claim upon said warrants is subject to be set-off by the amount of the deposit of county funds in his hands, and the warrants will be regarded as paid if the money on deposit exceed the

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SET-OFF—*Continued.*
amount of the warrants; this rule will apply as against the banker's assignee for benefit of creditors. County of Crawford *v.* Merchants National Bank, 133.

The fact that the treasurer was accustomed to give, from time to time, at convenient intervals, his check for the amount of warrants held by the banker does not alter the rule and prevent the deposit of money from constituting payment, in the case of a failure by the banker at a time when the money on deposit exceeds the amount of the warrant and no check has been given for said amount. STERRETT, P. J., and MITCHELL, J., dissented. Id.

Municipal claims for improvements made under the unconstitutional Act of June 14, 1887, P. L. 386, if within the curative Act of 1891, may be set-off against a purchase money mortgage dated since the passage of the latter Act. Lafferty *v.* Milligan, 551.

SETTLEMENT. See COMPROMISE. Township of French Creek *v* Moore, 500.

SHERIFF'S SALE. A vendee of the sheriff, under a lev. fa. sur municipal lien for taxes, will take no title, if the deed to the actual owners at the time the taxes were assessed had been left at the surveyor's office for registration, under the provisions of the Act of March 29, 1867, although the registration was inaccurately performed, unless the actual owners have been served with the sci. fa. sur claim "as in the case of a suit by summons." Fryer *v.* Magill, 221.

SHERIFF'S RETURN. See PRACTICE. (C. P.) Dale *v.* Blue Mountain Manufacturing Co., 509.

SOLDIERS' CHILDREN. See SCHOOL LAW. Commonwealth *v.* Balmer, 336.

STOCK. National bank stock is subject to levy under a writ of fi. fa. *In re* Voluntary Assignment of Braden, 497.

Issue of stock in payment of plant, patents, contracts, etc. See CORPORATIONS. American Tube & Iron Co. *v.* Baden Gas Co., 530.

STREET PASSENGER RAILWAYS. The Act of November 22, 1873, authorizing the Union Passenger Railway Company to extend its roads to certain streets named, "and on such other street or streets south of Christian street, west of 20th street, north of Columbia avenue and east of Third street, as the Councils of the City of Philadelphia may from time to time permit or authorize" gives the said company the right, subject to consent of Councils, to lay and operate tracks on any street or streets south of Christian street, north of Columbia avenue, west of 20th street and east of Third street. Commonwealth *v.* Union Passenger Railway Co., 83.

SUB-LEASE. See LANDLORD AND TENANT. (O. C.) Heckman's Estate, 199.

SUBROGATION. Subrogation is an equitable principle and will not be allowed to overcome a higher equity. Seabright's Estate, Stuart's Appeal, 55.

Where an executor in good faith, and with reasonable ground to believe the estate in his care solvent, pays off judgments, he has an equitable right of subrogation, so far as personal estate is concerned, provided it can be allowed without injury to others. Seabright's Estate, Coyle's Appeal, 58.

The rights of creditors having liens on a decedent's realty are fixed by a sale of the same, and thereafter no new right of lien or claim can be acquired by subrogation or otherwise. Id.

Subrogation will not be allowed in favor of a mere volunteer who, without any duty moral or otherwise, pays the debt of another. Campbell *v.* Foster Home Association, 293.

The payment of a prior lien by one about to lend money upon mortgage, for the purpose of making the

SUBROGATION—*Continued.*
mortgage a first mortgage, is not a payment made under any compulsion, or for the protection of any rights or interests previously acquired, and such payment does not give any right of subrogation to the debt discharged. Id.

The assignment or subrogation clause of the standard policy of fire insurance relieves the insurer, who has paid his policy, from the burden of showing his equity to be subrogated to the rights of the insured against the person primarily responsible for the loss and converts it to a legal right, which must prevail unless a counteracting equity is shown by the other party. Stoughton *v.* Manufacturers' Natural Gas Co. 519.

Ordinarily, as between the insurer claiming subrogation and the insured, the amount of the recovery against the person whose tort caused the loss represents the entire loss suffered by the insured. Id.

SURETY. In a proceeding on a bond, executed by virtue of the Act of 1887, the liability of an attaching creditor and his surety cannot be extended beyond the terms of that Act. Commonwealth *v.* Magnolia Villa Land and Improvement Co., 87.

TAXATION. Shares of stock, on which State tax has been paid by the corporation issuing them, are not liable to be again taxed in the hands of the holder, whether an individual or another corporation. Commonwealth *v.* Lehigh Coal & Nav. Co., 124.

Taxation upon a stockholder as such has been abolished by the Act of January 3, 1868, P. L. 1318. Id.

While it is true that the Legislature has power to impose double taxation, an intention to exercise this power will not be presumed but must be affirmatively shown. Id.

Since the Act of June 8, 1891, P. L. 229, all corporations are taxable upon the actual value in cash of their capital stock, and, in determining the amount upon which a corporation is to be taxed, the amount and rate per cent. of dividends made and the amount carried to surplus and sinking fund during the tax year do not furnish an absolute indication or measure of the actual value in cash of the capital stock, but are to be considered with all other relevant facts in determining what is the actual value in cash. Commonwealth *v.* Edgerton Coal Co., Limited, 205.

To arrive at the actual value of stock for the purpose of taxation, possibilities and probabilities as well as things certain are properly to be considered. Id.

The Legislature has power to classify corporations for the purpose of taxation, may sever a small class from a larger one and subject one class to taxation while it leaves another exempt, without violating Article IX. section 1, of the Constitution of Pennsylvania, or Article XIV. section 1, of the Amendments to the Constitution of the United States. Commonwealth *v.* Sharon Coal Co., Limited, 213.

As properties in the same class must be taxed without discrimination in the rate of tax imposed, the rule for ascertaining the value of the property must be the same in all cases. Id.

The title of the Act of June 8, 1891, P. L. 229, is sufficient to cover those sections of the Act which provide a new method of assessing the value of stock for the purpose of taxation and repeal the former method. Id.

A binding contract for exemption from taxation may be made between a corporation and the Commonwealth by an Act supplemental to the charter. It is not necessary for its validity that it be contained in the charter itself. Commonwealth *v.* Phila. & Erie R. R. Co., 217.

In a settlement with the Commonwealth for taxes on the capital, based on the net earnings of a company, it is

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TAXATION—*Continued.*
proper to deduct from the gross receipts the amount paid to another company for use of equipment. Id.

Where a supplement to its charter, exempting certain stock from taxation, has been adopted by a company, the general repealing clause in a later Act will not repeal the supplement. Id.

A. owned a tract of land divided by a line separating Polk Borough from French Creek township; the former assessed for school taxes land in the latter and the owner asked for an injunction to restrain the assessment; *held*, 1. The assessment was unlawful. 2. The proper remedy was by injunction at the suit of the land owner. 3. That as the township's power of taxation was not affected by the illegal act of the borough, it could not claim an account from the latter. Arthur *v.* School District of Polk Borough, 289.

So much of the indebtedness of a corporation as is held in their own right by Pennsylvania corporations or by non-residents of this Commonwealth is not taxable. Commonwealth *v.* Wilkesbarre & Scranton Ry. Co., 443.

The Act of June 8, 1891, P. L. 229, section 4, is not unconstitutional because of defect in its title, or for any other cause. Id.

The Act of June 30, 1885, P. L. 194, is not repealed by the Act of June 8, 1891, section 4, and, under this section, it is the duty of the treasurer of a corporation to assess and retain and pay over to the State the taxes imposed by the first section of the Act of June 8, 1891, or so much of this indebtedness as is held and owned by residents of Pennsylvania, and the corporation is liable for his failure to do so. Id.

The ground upon which a church building is erected is not exempt from municipal assessments for improvements benefiting the property; such assessments do not fall within the definition of a tax, viz: a contribution to the general fund for the support of a government. Appeal of the M. E. Church of Sewickley, 554.

TENANCY BY ENTIRETIES. Words which in a conveyance to unmarried persons constitute joint tenancy will create a tenancy by entireties in a conveyance to husband and wife. (O. C.) Young's Estate, 164.

An assignment of a mortgage to husband and wife "in equal moieties or half parts as tenants in common, that is to say one full equal moiety or half part unto the said D., his heirs, executors, administrators and assigns and the remaining one full equal moiety or half part unto the said C. [D.'s wife] her heirs," etc., creates a tenancy by entireties, the words following tenants in common being mere surplusage. Id.

TERRE TENANT. Where a judgment binding certain land is satisfied of record and, afterwards, the satisfaction is stricken off, the terre tenant has the right to appeal from the order striking off the satisfaction. Whitsell & Sons *v.* Peck, 540.

TESTAMENTARY CAPACITY. There is no standard of drunkenness save downright imbecility and positive evidence is required to overcome the presumption of testamentary ability. (O. C.) Dimond's Estate, 31.

TIMBER. What is a reasonable time for the exercise of a right to cut timber, after notice, depends upon circumstances, such as the quantity of timber, its character and the facilities for manufacturing and marketing it. Patterson *v.* Graham *et al.*, 437.

See TRESPASS. Irvin *v.* Patchen, 341.

TITLE OF CORPORATION. See CHARTER. (Ex. Dept.) *In re* York Wall Paper Co., 574.

TOMBSTONE. See EXECUTOR. Webb's Appeal, 571.

TREES. An injunction will issue to restrain the destruction of a tree growing, in a rural or suburban locality, on the line between two adjoining properties, at the instance of one of the owners. (C. P.) Comfort *v.* Everhardt, 364.

TRESPASS. Where an interval of eleven years elapses between ceasing to cut and remove timber and a return to prosecute the work, it must be concluded that the grantee has relinquished his rights under the contract allowing him to cut the timber and he becomes a trespasser when he enters for the purpose of removing the timber. Patterson *v.* Graham *et al.*, 437.

Where an attachment execution is issued and, under proceedings had upon it, goods of a third person are sold by the sheriff, as the goods of the debtor, the sheriff is liable in trespass to the owners of the goods. Berrill *v.* Ray, 458.

As against a trespasser, title to wild lands carries with it possession. Irvin *v.* Patchen, 341.

In a parol conveyance of land, K. reserved a right to cut certain species of timber therefrom. This land was subsequently transferred by articles of agreement to sundry persons, subject to the said reservation. The last one in the title received a deed in fee simple from K.'s grantor, in whom the paper title still remained. K. subsequently transferred his right to cut timber to P. whose representatives cut the timber: *held*, that if the timber cut by them was that which was standing at the time the reservation was made, there was no trespass. Id.

TRUSTS AND TRUSTEE. A will speaks from its date of execution where it creates a separate use trust, if the beneficial legatee be either married or in immediate contemplation of marriage. (O. C.) Pillion's Estate, 68.

Where an attorney in fact collects money due to his principal and gives to the principal his own note for the amount, the fiduciary relation is at an end and the statute of limitations begins to run as in any ordinary case of debtor and creditor. Stevens's Estate, Wiestling's Appeal, 249.

A mortgage was executed upon a trust property to a corporation for $5,000 and, upon it, over $10,000 was loaned to the trustees individually, all but $2,000 of this being paid. As security for the payment of this individual debt, another corporation took an assignment of the trust mortgage with other securities and paid the debt to the first corporation: *held*, that the second corporation was affected with notice and put upon inquiry and that the trust mortgage must be presumed to have been paid to the first corporation, since in course of its dealing with the trustees more than $5,000 had been paid. (O. C.) Trust Estate of John Lawrence, 406.

Trustees who use trust funds in their private business must account to their *cestui que* trust for the profits made by such use. Ellison's Estate, 231.

Where the trust relation still exists and it is alleged in a petition that facts were fraudulently concealed and that the confirmation of the trustee's account was obtained by an agreement, to which petitioner was not a party, the mere lapse of ten years after the confirmation of said account does not show such laches as will bar petitioner's right to a review, when it appears that she acted promptly after a knowledge of the facts. Id.

The commissions paid to an administrator or other trustee are intended as compensation for the responsibility involved in the acceptance of the trust and for services rendered in the administration of it. Eby's Appeal, 160.

There is no warrant in law for charging the estate for services rendered or time and money expended in procuring the bond which the trustee is required to give. Id.

A person charged with the duty of administering an estate cannot speculate, either directly or indirectly, in

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TRUSTS AND TRUSTEE—*Continued.*
claims against the same, and if he buy them for less than their face value he can recover no more than the amount actually paid. Woods *v.* Irvine, 324.

The omission of the word "trustees" after their signatures is immaterial when the deed recites them as such. (O. C.) Trust Estate of John Lawrence, 406.

UNDUE INFLUENCE. Where the charge of undue influence centres in the relations which existed between testator and those accused of exerting the influence, any testimony which throws light upon these relations is a vital factor in the case. (O. C.) Erwin's Estate, 477.

USURY. In an action, by a National bank, upon a promissory note, usury cannot be set up as a defence by the maker of the note or by his surety; the only remedy given by the Act of Congress is by a penal action to be brought for the recovery of double the amount of the illegal interest charged. Second National Bank of Clarion *v.* Morgan, 484.

VENDOR AND VENDEE. Where a vendee takes possession of land, but fails for an indefinite time to pay the purchase money, the vendor may resume possession, if he can do so peaceably, and the vendee cannot then recover in ejectment, as against his vendor or any subsequent purchaser, except on tendering the purchase money in full. Dwyer *v.* Wright, 7.

A married woman orally agreed with H. to sell him certain real estate. The following day, her husband, acting for her, placed the same property in the hands of a broker for sale. The broker, that day, obtained a purchaser and the terms of the sale were approved in writing by the owner. She and her husband consummated the oral bargain with H. The second purchaser filed a bill against H. and his wife, in whose name the property was taken, for specific performance and general relief: *held*, the first purchaser acquired the title, specific execution could not be decreed against the vendor for it was out of her power, and the plaintiff's remedy was an action for damages sustained in consequence of the vendor's refusal to perform the contract with him. Maguire *v.* Powell, 228.

VERDICT. SPECIAL VERDICT. See PRACTICE. McCormick *v.* Royal Ins. Co., 23.

Where evidence shows that a right of way 147 feet in width was taken by a railroad company and the same was located by a central line, a verdict for a plaintiff in ejectment "for the land named in the writ (being the said 147 feet in width for a distance of almost a mile) in excess of sixty-six feet" is not void for uncertainty; the practical effect of this finding is that the appropriation by the railroad company was properly exercised as to thirty-three feet on each side of such line, and the verdict will be so amended. Robinson *v.* Pennsylvania Railroad Company, 61.

VESTED OR CONTINGENT INTEREST. Where a bequest is made for life and over to "all testator's grandchildren," the grandchildren in being take a vested interest subject to its being opened to let in after born grandchildren. Under such will the child of a grandchild will take although its parent die in the testator's lifetime. (O. C.) Bradley's Estate, 427.

VOLUNTEER. A volunteer is not entitled to subrogation. See SUBROGATION. Campbell *v.* Foster Home Association, 293.

C., owning real estate, executed a power of attorney to R. to sell the same. R. mortgaged the premises to F. for $7,500 and, at the settlement, F. paid off a prior mortgage and certain taxes and charges, the balance being handed to R., who never paid to C. any money and did not inform her of what had taken place. Subsequently, C. filed a bill to have the mortgage declared void and cancelled. In the answer, F. claimed that if the mortgage were cancelled he should be subrogated to the amount of the debt against the property discharged by him; *held*, F. was a mere volunteer and had no right of subrogation. Id.

WAGES. The Act of May 12, 1891, providing that money due for wages of a certain character shall be a lien on property sold by execution or otherwise on account of the death or insolvency of the employer, does not give a specific lien on the property in the hands of the owner or his vendee, but refers to a sale effected by legal process where a fund is raised for distribution, and the employer may, therefore, transfer all his property by bill of sale to one of his creditors, although the effect of such transfer be to cut out the wage claims. Wilkinson *v.* Patton, 17.

WAIVER. Where land is taken for a road by a city, which has notice of the appointment of viewers, their report and the plaintiff's appeal, and pleads without objection to the issue framed on the appeal, the city cannot raise the question of jurisdiction by a point presented upon the trial. Larkin *v.* City of Scranton, 42.

While a defendant may waive his right to an account of his goods from one with whom he has deposited them, yet he cannot by such waiver, if collusively made, affect the right of his attaching creditor to require an account. Merchants and Manufacturers' Bank *v.* W. A. Baeder Glue Co., 69.

The right to take advantage of the fact that a jury has been selected by commissioners, who have taken an oath to fulfil their duties not in the regular form, is waived by a neglect to move to quash the array for several months after notice that the proper form of oath had not been observed, provided the commissioners had on entering on office taken the proper oath of county officials. Klemmer *v.* Mount Penn Gravity R. R. Co., 142.

WARRANTY. One who proposes to borrow money on land impliedly warrants that he has a marketable title thereto and, in the absence of instructions to the contrary, his employment of a broker to obtain a loan is sufficient authority to the latter to make representation and negotiations on that basis and such authority is not negatived by leaving unanswered questions put by the broker upon a blank for the purpose of obtaining information. Middleton *v.* Thompson, 1.

WATER COURSE. The right of the upper land owner to discharge water upon the lower lands of his neighbor is in general a right of flowage, only in the natural ways and natural quantities. Pfeiffer *v.* Brown, 481.

The only case in which a land owner has the right to discharge, upon his neighbors' land, water in artificially increased quantities, or from a point of concentration, is where such discharge is the natural, proper and non-negligent use of his own land and where the damage suffered by the neighbor cannot be prevented by the owner of the lands, from which the discharge takes place, by reasonable care and expenditure. Id.

The right of one land owner to injure the land of another is founded on necessity and exists only where he himself would otherwise be deprived of the beneficial use of his own land. Id.

WAY. A right of way appurtenant to land is appurtenant to every part of it and, if the owner divide it into several lots, the grantee of each lot has an equal right over the servient land. (C. P.) Ehret *v.* Gunn, 291.

Right of way granted by apparent reservation of building privilege in deed. See DEED. Meigs *v.* Lewis, 317.

A clause, in a deed for land, "said party of the first part

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WAY—*Continued.*
reserves the right of road or lane from said F. road along said west line and M.'s east line 18 feet wide to said party of the first part's fields or orchards" is a reservation of a right of way and not an exception of a strip of land from the grant. Moffitt *v.* Lytle, 459.

One who owns a right of way over land has no right to erect a fence along the same on said land. Id.

Where a right of way exists, the owner of the servient tenement may plow up the ground, provided that by so doing he do not interfere with the right of way; whether he has so interfered is a question for the jury. Id.

WIDOW. Where a husband has deserted his wife and the conjugal separation does not arise from any fault of hers, the family relation still exists and his domicile is hers so as to entitle her to claim a widow's exemption. Grieve's Estate, 495.

While a wife living in a foreign country, who has never formed part of her husband's family here, is not generally entitled to the exemption, this rule is not applicable where the separation has been brought about by the husband's causeless and wilful desertion of his wife. Id.

WILL. A paper, in whatever form it be, which shows, by its words or the circumstances attending it, an intention to make a disposition of the writer's property to take effect only after his death is a will. Tozer *v.* Jackson, 264.

A paper, duly proved as a will, cannot, before the probate thereof is set aside, be treated, in a collateral proceeding, as a deed. Id.

Where a will is executed with all the forms of law, it will not be invalidated by subsequent additions thereto by the testator which are not signed by him, the rule is the reverse where the whole instrument is prepared at one and the same time and is intended to be so executed. (O. C.) Baird's Estate, 15.

To defeat a will upon the ground of the testamentary incapacity of the testator, it must be shown that the incapacity existed at the time of the execution of the will, and the capacity of the testator before or after that time is merely ground for inference as to his capacity at the time of execution. (O. C.) Dimond's Estate, 31.

As a general rule an executor is not bound to defend his testator's will and, if he undertake to do so, it must be as the agent and in the interest of those benefited by his action. Titlow's Estate, 252.

A deed to one and her children in fee made by one who by his will directs the deed to be delivered to the person named, creates a life estate to the person named with remainder to his children. Hague *v.* Hague, 44.

A will speaks from its date of execution where it creates a separate use trust, if the beneficial legatee be either married or in direct contemplation of marriage. (O. C.) Pillion's Estate, 68.

Where a will, which is shown to have been executed by the testator, cannot be found and it is sought to obtain probate thereof by the production of a copy, the burden is upon the proponents to overcome the presumption of revocation and not only the testator's character, condition, acts and declarations, but the conduct and interests of those around him, from and after the date of the will, are legitimate subjects of inquiry. Estate of Lot Gardner, 417.

A woman's will is revoked by her subsequent marriage absolutely for all testamentary purposes. Craft's Estate, 413.

The invalidity of a will, revoked by a subsequent marriage of the testatrix, is not cured by an admissson to probate. Id.

While an ante-nuptial agreement between a woman and a man, whom she is about to marry, may in equity be given effect to sustain the provisions of a will, made before marriage, as to him, such agreement has no effect whatever upon the question of revocation by marriage in regard to the rights of third parties. Id.

On a question of distribution, the validity of testamentary provisions depending on facts *dehors* the record may be inquired into, notwithstanding probate. Id.

Where the Supreme Court has decided that the survivor of the makers of a double will (which was not a joint will or in the nature of a contract) had power to revoke her part by a subsequent separate will, such decision does not establish the validity of the second will, which was then before the Court as evidence of revocation, but the latter must be proved in the regular way and is subject to the same objections as it would have been if the double will had never been executed. Estate of Mary Cawley, 254.

In construing wills, it is the testator's actual intent that must govern and, where that is clear, all technical rules of construction must give way. Cameron *v.* Coy, 525.

The testator having authorized a sale of all his real estate as soon as practicable, directed a sale of all the unimproved parts "as soon as may be" and from this last direction he excepted those parts which his executors might think would improve in the near future, and those which he was of opinion would improve, properties in Pittsburgh and Chicago. These, though unimproved, were not to be sold under the specific direction as to that class, but to be retained by the executors with the productive real estate and sold when practicable: *held*, the power of sale, as to all, remained in the executors and there was in the will no evidence of an intention that their judgment as to the time of sale should be controlled, except by the direction which the testator gave. Pennsylvania Co. *v.* Leggate, 522.

Where a testator, who has considerable real estate but large liabilities, directs his executors to hold his real estate for five years, giving them a power to sell or incumber meanwhile for the payment of debts, his intention to devote the lands to payment of debts is manifest and the rents and profits of the lands should be awarded to the creditors and not to the widow and next of kin. Seabright's Estate, Seabright's Appeal. 52.

Wills, like contracts, are to be construed according to the actual intent of the maker, as ascertained from his words, and illiteracy of the testator raises no presumption that words are used incorrectly; at most, it lets in the conjecture that they may be. Ihrie's Estate, 60.

The word "between" properly refers to two and not more, hence when a testatrix provides that the residue of her estate shall be divided "between my husband's grandchildren and the children of A." the fund should be awarded one-half to each class named. Id.

Where the whole tenor of a will shows the intention of the testator to treat all his children alike, that intention will not be defeated by the use of inartificial words in certain clauses of the will. Christy *v.* Christy, 78.

A. owned lands with coal underlying them. By his will he devised to B. and C., two of his eight children, the portions of his land on which they were living at the time of his death. The devise to B. was of the farm on which she resided, "which is to be her share of my estate, and should the coal be opened on said land or sold in a body she to have an equal share with the other heirs." The devise to C. was of land occupied by him and immediately following the devise the following words were used, "the mineral right is reserved. He is to pay out of his share of the mineral right his note and store account." To each of his other six children the testator gave by separate items "an equal share of my whole estate" de-

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ducting particular advancements made: *held*, 1. The intention of the testator was to divide his whole estate, both surface and mineral, equally among his eight children. 2. The devise to B. was for her full share of the surface, but she was further entitled to a full one-eighth share of the mineral estate in whatever manner it might be turned into money. 3. The devise to C. was in full for his share of the surface, but by implication he gave him an equal share of the mineral by directing what should be charged against him. Id.

F., by her will, made in 1883, directed her trustees to pay $2,000 to each of her two granddaughters, M. R. and C. M., when they should reach the age of twenty-one years respectively. C. M. subsequently died. In 1878, E. N., another granddaughter was born, and the testatrix, in 1883, made a codicil to her will as follows: "I wish my granddaughter, E. N., to have two thousand dollars from my estate (the eldest daughter of I. F. N.), I have left the same amount to M. R. I demand that this wish is carried out:" *held*, that the bequest to E. N. was not substituted for the one to her deceased sister, but was a vested legacy. Fry's Estate, 81.

A. left to B. a sum in trust to pay over the income or so much of it "as my executors might deem sufficient to maintain and educate my son W. . . . until he shall arrive at the age of twenty-five years" and, after that time, to pay the income directly to W. for life, with a limitation over to his children: *held*, W. could not recover any unexpended income, which accrued before he reached the age of twenty-five years, but the same passed to the residuary legatees in A.'s will. White's Estate, 105.

The testator by will left to his nephew a life estate in certain property and, upon certain conditions precedent to be performed by the nephew, the fee, and added in case the life estate should expire before the legatee had entitled himself to the fee "then I dispose of whatever shall remain as balance if the aggregate sum shall amount to $50,000 without which no other disposal thereof can be made, I give it to my trustees to erect and establish and endow a house of refuge." The nephew died before fulfilling the condition and at that time the estate did not amount to $50,000; *held*, the effect of the parenthetical requirement that the estate should amount to $50,000 was not to make the bequest for the charity contingent upon the estate's amounting to $50,000 on the death of the life tenant, but merely to prevent an erection of a house of refuge until the estate equalled said sum. Stevens' Estate, Appeal of Thaddeus J. B. Stevens *et al.*, 246.

The will of a resident of Maryland ordered her farm in Pennsylvania to be sold and one-half of the proceeds to be "secured in the farm while my dear husband lives or if it is taken out it must be secured in some other real estate so as to keep the principal to be equally divided, after my husband's death, among all my children. My husband is to have the interest only while he lives. The other half I want to be equally divided among my children or, if any of them is dead, their share is to be equally divided among their heirs. If any one of them owes us anything take it out of their share before giving it to them and divide equally among them all." The husband died prior to the testatrix. On a distribution of the proceeds of the sale of the farm by the Pennsylvania executor of the decedent: *held*, 1, it was the intention of the will that each child's indebtedness to either his father or mother should be deducted, and the father's death prior to that of his wife did not alter this construction; 2, that the Orphans' Court had jurisdiction to determine the amount of indebtedness of the sons to their father, as that was necessary for a proper distribution of the fund under the will. Roberts's Estate, 250.

G. devised land to his son for life, remainder in fee to his grandson, providing, however, that after the death of his son, his (the son's) widow should "be maintained out of the products" of the land during her widowhood: *held*, this did not give the widow the right of possession of the land but created a charge during her widowhood. Walker *v.* Gibson, 369.

A direction in a will, "this land I want disposed of as follows: the valuation of it when sold is to go to my brother," etc., is insufficient to work a conversion. Irvin *v.* Patchen, 341.

Where there is a testamentary gift to one person and to the children of another person, who stand in the same relation to the testator, the donees take *per capita*. Scott's Estate, 403.

A contrary intent will be inferred where under the intestate laws, which are always resorted to in cases of doubtful interpretation, a distribution would be made *per stirpes*, *e. g.* where the claimants are in different degrees of consanguinity, but where the gift is to persons or classes of persons who stand in the same relation to the testator the analogy furnished by the intestate laws indicates a division *per capita*. Id.

A will provided as follows: "Should my beloved niece J. die without issue then in that case I will and devise the remainder of my estate after her decease without issue as aforesaid to be divided among my nephews and nieces, to wit: the legal heirs of Mrs. L., of my deceased brother S. and the lawful heirs of my beloved brother W. and R. each to take share and share alike": *held*, the division of the estate among the nephews and nieces should be *per capita* and not *per stirpes*. The words "share and share alike" might refer to a division among classes but this cannot be said of "each to take" which plainly indicates a division *per capita*. Id.

Where two clauses under a will are absolutely repugnant the latter must prevail even to total exclusion of the first, but exclusion for repugnance is a principle of construction to be invoked only as a last resort after all efforts to reconcile and give harmonious meaning to both have failed. Hart *v.* Stoyer, 415.

S., by will, made provision for the support of his wife and devised to her "the dwelling house in which we are now living and all there is therein to have and to hold the same until her death when it shall go to my two daughters M. and F., with the exception of the organ which shall go to my son C." He then divided his farm between his sons P. and G. charging the portions in their hands with specified sums in favor of his other children. With the portion of the farm given to P. he devised "the adjoining dwelling house in which my son G. is now living," the balance of the farm devised to G. contained the dwelling house given to the wife. After the death of the widow, M. one of the daughters of S. brought ejectment against G. to recover her interest in the dwelling house devised to the wife for life: *held*, (1), the bequest to the daughters was only of the contents of the house; (2), the house was devised to G. after the life estate of the widow. Id.

A. devised to his son, Hugh, ninety acres of land, and to his daughter, Martha, the rest of his farm, and, in a later part of the will, declared that "if either H. or M. should die leaving no issue, then their estates should descend in equal shares alike to the two married sisters, and H. and M. or survivors, that is the three survivors of the four shall have equal shares alike of said estate or estates." H. died, before any of his sisters, leaving a widow but no children, and his executor sold the ninety acres devised to him under an order of court to pay debts. During H.'s lifetime M. had released to him all her interest in the above land and, after the sale, the other sisters accepted part of the purchase money. In a case

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WILL—*Continued.*
stated to determine whether the purchaser at the Orphans' Court sale took a valid title: *held*, (*a*) that it was not necessary to determine whether at the death of H. his estate was defeated by the coming into existence of the devise over to the three surviving sisters, as M.'s interest, if any, was released to H. by her deed and the other sisters were equitably estopped from contesting purchaser's title by acceptance of part of purchase money; (*b*) therefore, the purchaser took a good title in fee. Cameron *v.* Coy, 525.

Where a will has disappeared before probate thereof, and it is alleged to have been concealed or destroyed by persons, other than the testator, an issue whether or not it had been revoked is of right, unless the evidence of the facts be so doubtful and unsatisfactory that a verdict in favor of the will would not be permitted to stand. Estate of Lot Gardner, 417.

A residuary bequest of "all bonds, mortgages, judgments, single bills or other evidences of debt in the counties of U. and N," is not a specific bequest of a particular mortgage on land in such counties. Packer *v.* Owens, 423.

Where a bequest is made for life and over to "all testator's grandchildren," the grandchildren in being take a vested interest, subject to its being opened to let in afterborn grandchildren. Under such a will the child of a grandchild will take, although its parent die in the testator's lifetime. (O. C.) Bradley's Estate, 427.

A clear gift will not be cut down or altered by any

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subsequent words unless they show an equally clear intent. (O. C.) Lare's Estate, 447.

A devise for life, or during widowhood, of all the rents, issues and incomes "of testator's estate, real and personal," the devisee paying thereout all the rents and taxes chargeable or charged thereon and expenses of keeping the said real estate in good order and repair, is equivalent to a gift of the property itself during the period named. Id.

Where after such provision the will provides, "In case it should become desirable or necessary to change any investments that I have made, or that I may hereafter make, or that of any ground rent which I now hold, or I may hereafter acquire, be released or extinguished, I do hereby give and grant unto my said executors and executrix and the survivor of them power and authority to make such change of such investment, or release or extinguish such ground rent, and for that purpose to make, execute and acknowledge such deeds or deed or instrument or instruments of writing as may be necessary or requisite in the premises, . . . and re-invest the money arising therefrom for the same object and purpose as aforesaid, to be secured upon good real estate security or securities;" the executor has no right to collect rents during the continuance of the widow's estate. Id.

If the Orphans' Court find that there is proof of alleged undue influence, sufficient to sustain a verdict, against the will, an issue must be awarded. (O. C.) Erwin's Estate, 477.

END OF VOLUME XXXV.

Ex. J. M.

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